JUDGMENT OF THE COURT (Fifth Chamber)
1 July 1993 *

In Case C-312/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Giudice per le Indagini Preliminari of the Tribunale di Milano for a preliminary ruling in the interlocutory proceedings pending before that court concerning the seizure of goods belonging to

Metalsa Srl,

in criminal proceedings against Gaetano Lo Presti,

on the interpretation of the first paragraph of Article 18 of the Agreement between the European Economic Community and the Republic of Austria, signed in Brussels on 22 July 1972, concluded and approved in the name of the Community by Regulation (EEC) No 2836/72 of the Council of 19 December 1972 (OJ, English Special Edition 1972 (31 December — JO L 300), p. 3),

THE COURT (Fifth Chamber),

composed of: G. C. Rodríguez Iglesias, President of the Chamber, R. Joliet, J. C. Moitinho de Almeida, F. Grévisse and D. A. O. Edward, Judges,

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Metalsa Srl, by Bruno Brugia, of the Milan Bar,

* Language of the case: Italian.

— the Italian Government, by Marcello Conti, Avvocato dello Stato,

— the Commission of the European Communities, by Marie-José Jonczy, Legal Adviser, acting as Agent, assisted by Alexandre Carnelutti, of the Paris Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of the Commission at the hearing on 11 March 1993,

after hearing the Opinion of the Advocate General at the sitting on 22 April 1993,

gives the following

Judgment

1 By order of 8 November 1991, received at the Court on 2 December 1991, the Giudice per le Indagini Preliminari (Judge Responsible for preliminary enquiries) of the Tribunale di Milano (District Court, Milan) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the first paragraph of Article 18 of the Agreement between the European Economic Community and the Republic of Austria, signed in Brussels on 22 July 1972, concluded and adopted in the name of the Community by Council Regulation (EEC) No 2836/72 of 19 December 1972 (OJ, English Special Edition 1972 (31 December — JO L 300), p. 3).

2 That question was raised in connection with an action brought by Metalsa Srl against the Italian Public Prosecutor, who, by a decision of 3 July 1991 in the course of criminal proceedings against Gaetano Lo Presti, ordered the seizure of 205 885 kg of aluminium ingots, imported from Austria by Metalsa, on the ground

that the company had not paid the VAT due on importation. In the context of those criminal proceedings, relating to a fraudulent importation from Austria, the seizure is merely an interim measure, whereas the aluminium ingots must be confiscated if that fraudulent importation is confirmed in final decision.

3 When the Public Prosecutor refused, by decision of 13 July 1991, a request for the return of the goods, Metalsa lodged an objection to that decision on 19 July 1991 with the office of the Judge responsible for preliminary enquiries of the Tribunale di Milano and requested the release of the goods, arguing that the penalty was disproportionate as compared with that imposed in respect of a VAT offence arising out of a domestic transaction.

4 Metalsa claimed that the disproportion amounted to a discriminatory internal fiscal measure or practice prohibited by Article 18 of the free trade agreement between the EEC and Austria. Metalsa relied on the interpretation of Article 95 of the EEC Treaty laid down by the Court of Justice in Case 299/86 *Drexl* [1988] ECR 1213), which it claimed should be transposed to the interpretation of Article 18 of the agreement with Austria.

5 That is the context in which the national court referred the following question to the Court for a preliminary ruling:

'Are national rules punishing offences concerning value added tax on importation more severely than those concerning value added tax on domestic sales of goods compatible with Article 18 of the Agreement between the EEC and Austria when that difference is disproportionate to the dissimilarity between the two categories of offence, having regard to the answer given to a similar question in the judgment of 25 February 1988 (*Drexl*) in relation to Article 95 of the EEC Treaty?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts and legal issues in the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 The national court is seeking by its question to ascertain whether the first paragraph of Article 18 of the free trade agreement between the EEC and Austria should be interpreted in the same way as Article 95 of the EEC Treaty, with the effect that national rules which penalize VAT offences on importation more severely than VAT offences on domestic sales of goods are incompatible with that provision in so far as that difference in penalties is disproportionate to the dissimilarity between the two categories of offence.

8 The first paragraph of Article 18 provides:

'The Contracting Parties shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting Party.'

9 The wording of that provision differs from that of the first paragraph of Article 95 of the EEC Treaty but the object of both provisions is to prohibit all direct or indirect fiscal discrimination against products of the other Contracting Party, in the first case, and of Member States, in the other.

10 In certain cases the Court has considered it appropriate to extend the interpretation of a provision of the EEC Treaty to an identical or similar provision of an agreement concluded with a non Member State (see Case 17/81 *Pabst & Richarz* v *Hauptzollamt Oldenburg* [1982] ECR 1331 and Case 163/90 *Administration des Douanes* v *Legros and Others* [1992] ECR 4625), while in other cases the Court has considered such an extension neither possible nor appropriate (see Case

270/80 *Polydor* v *Harlequin Record Shops* [1982] ECR 329 and Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641).

11 It is clear from that case-law that the extension of the interpretation of a provision in the Treaty to a comparably, similarly or even identically worded provision of an agreement concluded by the Community with a non-member country depends, *inter alia*, on the aim pursued by each provision in its particular context and that a comparison between the objectives and context of the agreement and those of the Treaty is of considerable importance in that regard.

12 An international treaty must not be interpreted solely by reference to the terms in which it is worded but also in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the law of treaties stipulates in that respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (Opinion 1/91 [1991] ECR I-6079, paragraph 14).

13 Account must be taken of the foregoing in determining whether or not the first paragraph of Article 18 of the free trade agreement between the EEC and Austria should be interpreted in the same way as Article 95 of the Treaty.

14 In *Drexl*, the Court ruled that national legislation which penalizes offences concerning the payment of value added tax on importation more severely than those concerning the payment of value added tax on domestic sales of goods is incompatible with Article 95 of the Treaty, in so far as that difference is disproportionate to the dissimilarity between the two categories of offences.

15 The Court based that interpretation in particular on the view that such a disproportion could have the effect of jeopardizing the free movement of goods within the Community and would thus be incompatible with Article 95 of the Treaty, the interpretation of which must take account of the aims of the Treaty, as laid down in Articles 2 and 3, which include, first, the establishment of a common market involving the elimination of all obstacles to trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market (paragraphs 23 and 24).

16 Those objectives do not form part of the free trade agreement between the EEC and Austria. According to the preamble to that agreement, the legal basis of which was Article 113 of the Treaty, its aim is to consolidate and extend the economic relations existing between the Community and Austria and to ensure, with due regard for fair conditions of competition, the harmonious development of their commerce. To that end, the Contracting Parties decided to eliminate progressively the obstacles to substantially all their trade, in accordance with the provisions of the General Agreement on Tariffs and Trade (GATT) concerning the establishment of free trade areas.

17 In *Kupferberg*, the Court stated, with regard to Article 21 of the Agreement between the European Economic Community and the Portuguese Republic, signed in Brussels on 22 July 1972, concluded and approved, in the name of the Community, by Regulation (EEC) No 2844/72 of the Council of 19 December 1972 (OJ, English Special Edition 1972 (1 December — JO L 301), p. 166), that interpretations given to Article 95 of the Treaty could not be applied by way of simple analogy to the Agreement on free trade, and that, as a result, the first paragraph of Article 21 thereof must be interpreted according to its terms and in the light of the objective which it pursues in the system of free trade established by the Agreement (see paragraphs 30 and 31).

18 Those considerations also apply to the interpretation of the first paragraph of Article 18 of the Agreement between the EEC and Austria, the terms of which are identical to those of the first paragraph of Article 21 of the Agreement between the EEC and Portugal and which is included in an agreement which, as in the case of

that concluded with Portugal, has as its aim the creation of a system of free trade between the Contracting Parties.

19 Consequently, the interpretation of Article 95 of the Treaty laid down by the Court in *Drexl* cannot be extended to the first paragraph of Article 18 of the free trade agreement concluded between the Community and Austria.

20 That paragraph prohibits discrimination resulting from any measure or practice which has a direct or indirect effect on the calculation, applicability and methods of collection of taxes on products of the other Contracting Party but does not require that there be any comparison between the penalties imposed by Member States for tax offences occurring on importation of goods from Austria and those imposed for tax offences arising on domestic transactions or on imports from other Member States.

21 Accordingly, the reply to be given to the question referred by the national court is that the first paragraph of Article 18 of the Agreement between the European Economic Community and the Republic of Austria must be interpreted, unlike Article 95 of the EEC Treaty, as meaning that national rules which penalize offences concerning VAT on importation more severely than those concerning VAT on domestic sales of goods are not incompatible with that provision of the Agreement, even if that difference is disproportionate to the dissimilarity between the two categories of offence.

Costs

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

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Giudice per le Indagini Preliminari of the Tribunale di Milano, by order of 8 November 1991, hereby rules:

The first paragraph of Article 18 of the Agreement between the European Economic Community and the Republic of Austria, signed in Brussels on 22 July 1972, concluded and approved, in the name of the Community, by Regulation (EEC) No 2836/72 of the Council of 19 December 1972 must be interpreted, unlike Article 95 of the EEC Treaty, as meaning that national rules which penalize offences concerning VAT on importation more severely than those concerning VAT on domestic sales of goods are not incompatible with that provision of the agreement, even if that difference is disproportionate to the dissimilarity between the two categories of offence.

Rodríguez Iglesias Joliet

Moitinho de Almeida Grévisse Edward

Delivered in open court in Luxembourg on 1 July 1993.

J.-G. Giraud G. C. Rodríguez Iglesias

Registrar President of the Fifth Chamber