REPORT FOR THE HEARING
in Case C-312/91 *

I — Facts and Procedure

1. By a decision of 3 July 1991, in the course of criminal proceedings against Gaetano Lo Presti for offences under Article 2(4) of Decree-Law 746/83 and Articles 292 to 295(c) of Presidential Decree No 43/73, concerning the collection of VAT, the Procura della Repubblica (Public Prosecutor) of the Tribunale di Milano (District Court, Milan) ordered the seizure of nine aluminium ingots weighing 205 885 kg imported from Austria by Metalsa Srl, on the ground that Metalsa had not paid the VAT due on importation. In the context of those criminal proceedings, relating to a fraudulent importation from Austria, that seizure is linked to the confiscation to which the goods will be subject if that fraudulent importation is confirmed in the final decision.

By a decision of 13 July 1991, the Public Prosecutor refused a request by Metalsa for the return of the goods. On 19 July 1991, Metalsa lodged an appeal against that decision with the office of the Giudice per le Indagini Preliminari (Judge responsible for preliminary inquiries) of the Tribunale di Milano and requested that the goods be released, arguing that the penalty was disproportionate. Metalsa argued that, since the penalty could not be applied when the VAT offence occurred in relation to a transfer of goods within the country, the disproportion in question constituted a discriminatory internal fiscal measure or practice, prohibited by Article 18 of the Agreement between the EEC and Austria. Metalsa relies on the interpretation of Article 95 of the EEC Treaty given by the Court of Justice in Case 299/86 *Drexl* [1988] ECR 1213 and argues for its transposition to the Free Trade Agreement. The Public Prosecutor rejects this argument, considering that that ruling can have no relevance to imports from outside the Community.

2. The first paragraph of Article 18 of the Agreement concluded on 22 July 1972 between the EEC and the Republic of Austria (Regulation (EEC) No 2836/72 of the Council of 19 December 1972 (OJ, English Special Edition 1972 (31 December — JO L 300), p. 1) 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.'

3. The Judge responsible for preliminary inquiries, being of the opinion that the resolution of the interlocutory proceedings relating to the seizure of Metalsa's goods raised a delicate problem of interpretation of the Agreement concluded between the EEC and Austria, asked the Court, by an order of 18 November 1991, to make a preliminary

* Language of the case: Italian.

ruling under Article 177 of the EEC Treaty on the following question:

'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 (Case 299/86 *Drexl* [1988] ECR 1213) in relation to Article 95 of the EEC Treaty?'

4. The order for reference was received at the Court Registry on 3 December 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted:

— on 3 April 1992 by the Commission of the European Communities, represented by Marie-José Jonczy, Legal Adviser, acting as Agent, assisted by Alexandre Carnelutti, of the Paris Bar,

— on 8 April 1992 by Metalsa Srl, represented by Bruno Brugia, of the Milan Bar, and

— on 14 April 1992 by the Italian Government, represented by Marcello Conti, Avvocato dello Stato.

5. Upon 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, and to assign the case to the Fifth Chamber.

II — Summary of the written observations submitted to the Court

6. According to the *Commission*, the case raises two preliminary questions.

First, the Commission notes that the Judge responsible for preliminary inquiries is undeniably a court or tribunal with jurisdiction to make a reference to the Court for a preliminary ruling, as is clear from the case-law of the Court on the definition of a court or tribunal within the meaning of Article 177 (Case 61/65 *Vaassen* v *Beambtenfonds Mijnbedrijf* [1966] ECR 261), on the nature of the proceedings under national law (Case 82/71 *Pubblico Ministero Italiano* v *SAIL* [1972] ECR 119; and Case 238/84 *Röser* [1986] ECR 795) and in particular on the references for preliminary rulings from Italian Pretori (Case 14/86 *Pretore di Salò* v *Persons Unknown* [1987] ECR 2545; and Case 228/87 *Pretura unificata di Torino* v *X* [1988] ECR 5099). In this case, the judge responsible for the main proceedings has judicial status and statutory jurisdiction; his position is permanent within the judiciary; his investigations are conducted *inter partes* and the relevant Community and national laws are applied. It is immaterial that the investigation

may lead to the case being closed without going to trial and that, at certain stages in the proceedings, the Judge acts as Public Prosecutor.

Secondly, the Commission states that the first paragraph of Article 18 of the Agreement of 22 July 1972 between the EEC and Austria confers rights on individuals which the national courts must safeguard. It points out that in Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641 the Court confirmed the direct effect of an article of the free trade agreement between the EEC and Portugal, the text of which was identical to the first paragraph of Article 18, the interpretation of which is sought.

7. The *Commission* and the *Italian Government* claim that the first paragraph of Article 18 of the agreement of 22 July 1972 between the EEC and Austria cannot be interpreted in the same way as Article 95 of the EEC Treaty was interpreted in *Drexl*. That ruling cannot be transposed to a free trade agreement. That being the case, the fact that Italy penalizes the non-payment of VAT on the importation of goods from Austria by confiscation but not where the non-payment pertains to a domestic transaction cannot be regarded as a discriminatory fiscal measure or practice within the meaning of the first paragraph of Article 18 of the EEC-Austria agreement.

In *Drexl*, the Court accepted that the non-payment of VAT on importation forms a different category of offence from the non-payment of VAT in respect of a domestic transaction and that, consequently, Member States were entitled not to apply the same system of penalties for the two categories of offence. Nevertheless, the Court stated that the difference between the two systems of penalties must not be disproportionate and that such a disproportion exists where penalties of imprisonment and confiscation of the goods are provided for in the case of an offence on importation, whereas comparable penalties are not provided for, or are not generally imposed, in the case of offences concerning the payment of value added tax on domestic transactions.

That interpretation cannot, however, be transposed to similarly worded articles of free trade agreements. The Court interprets free trade agreements concluded by the Community in a manner which takes account of the purpose of a provision and of the legislative framework in which it appears. In particular, the Court has stated that any possible similarity between the wording of a provision of the EEC Treaty and of a provision of a free trade agreement was not a sufficient reason to transpose an interpretation arrived at in respect of the EEC Treaty to that agreement (Case 270/80 *Polydor* v *Harlequin Record Shops* [1982] ECR 329). Similarly, the Court has held that it is not possible to apply the conclusions arrived at in interpreting Article 95 of the EEC Treaty to Article 21 of the EEC-Portugal Free Trade Agreement, a provision prohibiting tax discrimination and worded in the same way as Article 18 of the EEC-Austria agreement (*Kupferberg*, cited above).

The Commission claims that it follows from those rulings that the EEC Treaty must be interpreted in the light of the objectives and activities of the Community as defined in articles 2 and 3 of the Treaty. A provision of a free trade agreement, however, must be interpreted only by reference to its terms and to its objective within the agreement in which it appears, and such an interpretation is inevitably narrower and more limited than that of an equivalent or identical provision of the EEC Treaty. The Court has only exceptionally accepted an identical interpretation, in the context of the association agreement between Greece and the Community (Case 17/81 *Pabst & Richarz* v *Hauptzollamt Oldenburg* [1982] ECR 1331), which was designed to prepare for accession. The case-law of the Court on the interpretation of the EEC Treaty in the light of its own objectives has, moreover, recently been confirmed in Opinion 1/91 [1991] ECR I-6079. In that opinion the Court emphasizes the specific objectives of the EEC Treaty to achieve economic integration as well as the common objective of all Community treaties to contribute to the development of the European Union; the Court also points out that the EEC Treaty forms the constitutional charter of a Community based on the rule of law.

The free trade agreement between Austria and the EEC has a different — and much more limited — objective than that of the EEC Treaty, as complemented by the Single European Act of 1986. This radical difference in objectives and goals between the body of rules governing intra-Community relations and those which regulate trade with Austria must necessarily be reflected in the interpretation of provisions contained in those two bodies of rules. Consequently, the conclusions in *Drexl*, which were arrived at by a systematic and teleological interpretation of the EEC Treaty, may not in any circumstance be transposed to the EEC-Austria agreement.

In those circumstances, the scope of the first paragraph of article 18 of the EEC-Austria agreement cannot extend to the system of penalties applied to the infringement of national fiscal laws regulating VAT. The scope of the provision must, admittedly, extend to all measures and practices which have an effect on the calculation of the tax and on the conditions and methods of collection. However, the restriction of the powers of Member States to impose penalties applies only between members of a Community which has as its objective the creation of a common market and a Union. The broad interpretation of the prohibition of tax discrimination applies within the Community, and cannot be transposed to a simple free trade area.

The Italian Government further claims that, in interpreting and applying the prohibition of fiscal discrimination contained in free trade agreements, it is the economic effect of the discrimination between the products of the Contracting Parties which is decisive and not simply the difference between the tax rules applicable. In this case, none of the prerequisites for real discrimination exist,

because the case relates to the application of entirely different fiscal provisions, applying on the one hand only to imports and on the other hand only to domestic transactions. VAT on importation is a tax which is completely different to VAT on domestic transactions and the rules governing it are also very different. There is no similarity between the basic rules governing domestic VAT and those governing VAT on importation. A mechanical comparison of the corresponding penalties would be pointless. It cannot be the case therefore that a more severe penalization of VAT offences on importation could amount to discrimination between national and imported products in the sense in which discrimination is referred to in the EEC-Austria agreement.

8. According to *Metalsa*, the purpose and the spirit of the EEC-Austria Free Trade Agreement of 22 July 1972 are such that the principle established in the *Drexl* judgment applies to this case; the Italian Court of Cassation has accepted that principle, to the effect that, where goods originating in a Member State of the Community are concerned, the non-payment of VAT on importation does not amount to a criminal offence unless the offence on importation is not penalized more severely, to a disproportionate extent, than a VAT offence concerning domestic sales of goods.

Article 18 of the agreement provides, literally, that the Contracting Parties are to refrain from 'any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination' between the Parties' products. First, it is clear that this provision is comparable to Article 95 of the EEC Treaty, which would seem to mean that the same criteria of interpretation should be applied. Secondly, it is difficult to avoid classing an element as important and as serious as a criminal penalty amongst the prohibited discriminatory practices.

In this case, the Court is concerned with penalties which result from a 'measure or practice of an internal fiscal nature' which, to the extent that it results in a difference between the penalties provided for in cases of VAT offences on domestic transactions and those provided for in cases of offences on importation, gives rise to clear discrimination between the non-payment of VAT on the importation of goods coming from within the Community and the same offence on the importation into a Community country of goods originating in Austria.

Metalsa emphasizes the observation of the referring judge with regard to the complications of having two different systems of movement of goods, one for relations between Italy and Austria and another for relations between Austria and other countries of the EEC.

G. C. Rodríguez Iglesias
Judge-Rapporteur