

COMMISSION vs ITALY

Introduction ¹

The Italian Government imposed a tax on the export of art treasures from Italy, claiming that such a tax would be less restrictive than an export ban. The Commission brought an action in the ECJ under Art. 226 (ex 169).

Held: (ECJ) The measure was illegal under Art. 25 (ex 12) (prohibition on customs duties and measures equivalent to customs duties). It could not therefore be justified under Art. 30 (ex 36). [1968] E.C.R. 423.

Key Principle: Restrictions on imports and exports may be justified on grounds of the protection of national treasures possessing artistic, historic or archaeological value.

Commentary: In the absence of definitive case law, some guidance may be found in Regulation 3911/92 (implemented by Regulation 752/93) which seeks to impose uniform standards at borders on the export of protected cultural goods within a licensing scheme for art treasures. Directive 93/7 gives Member States the right to define their national treasures unlawfully removed abroad.

Judgment of the Court of 10 December 1968. Commission of the European Communities v Italian Republic.

Case 7-68.

Keywords:

- 1 . OBLIGATIONS OF MEMBER STATES - FAILURE TO FULFIL - ACTION BY THE COMMISSION BEFORE THE COURT OF JUSTICE - BRINGING THE ACTION - TIMING - DISCRETION OF THE COMMISSION (EEC TREATY, ARTICLE 169)
- 2 . FREE MOVEMENT OF GOODS - GOODS - CONCEPT - ARTICLE POSSESSING ARTISTIC OR HISTORIC VALUE (EEC TREATY, ARTICLE 9)
- 3 . FREE MOVEMENT OF GOODS - ARTICLES POSSESSING ARTISTIC OR HISTORIC VALUE - CHARGES ON EXPORTS - CHARGE HAVING AN EFFECT EQUIVALENT TO A CUSTOMS DUTY (EEC TREATY, ARTICLE 16)
- 4 . FREE MOVEMENT OF GOODS - CUSTOMS DUTIES AND QUANTITATIVE RESTRICTIONS - NATURE OF EACH - DIFFERENCE - PROHIBITIONS AND RESTRICTIONS FOR THE PROTECTION OF NATIONAL TREASURES - SPECIAL NATURE - STRICT CONSTRUCTION (EEC TREATY, ARTICLES 16 AND 36)
- 5 . FREE MOVEMENT OF GOODS - PROHIBITIONS AND RESTRICTIONS FOR THE PROTECTION OF NATIONAL TREASURES - LIMITS TO BE OBSERVED BY MEMBER STATES REGARDING THE OBJECT AND NATURE OF THE MEANS ADOPTED - INCOMPATIBILITY WITH THE TREATY OF A CHARGE ON THE EXPORT OF ARTICLES OF ARTISTIC OR HISTORIC VALUE (EEC TREATY, ARTICLE 36)

Summary

1 . IT IS FOR THE COMMISSION, UNDER ARTICLE 169 OF THE TREATY, TO JUDGE AT WHAT TIME IT SHALL BRING AN ACTION BEFORE THE COURT; AND THE CONSIDERATIONS WHICH DETERMINE ITS CHOICE OF TIME CANNOT AFFECT THE ADMISSIBILITY OF THE ACTION, WHICH FOLLOWS ONLY OBJECTIVE RULES .

2 . BY GOODS, WITHIN THE MEANING OF ARTICLE 9 OF THE EEC TREATY, THERE MUST BE UNDERSTOOD PRODUCTS WHICH CAN BE VALUED IN MONEY AND WHICH ARE CAPABLE, AS SUCH, OF FORMING THE SUBJECT OF COMMERCIAL TRANSACTIONS .

¹ *Penelope Kent*, *Nutcases European Union Law*, 3rd edition, Sweet & Maxwell 2003, p 89f

LAW FOR ARTS AND MEDIA
COMMISSION vs ITALY

THE RULES OF THE COMMON MARKET APPLY TO ARTICLES POSSESSING ARTISTIC OR HISTORIC VALUE SUBJECT ONLY TO THE EXCEPTIONS EXPRESSLY PROVIDED BY THE TREATY .

3 . ANY CHARGE WHICH, BY ALTERING THE PRICE OF AN ARTICLE EXPORTED, HAS THE SAME RESTRICTIVE EFFECT ON THE FREE CIRCULATION OF THAT ARTICLE AS A CUSTOMS DUTY IS DEEMED TO BE A CHARGE HAVING AN EFFECT EQUIVALENT TO A CUSTOMS DUTY WITHIN THE MEANING OF ARTICLE 16 OF THE EEC TREATY . A TAX LEVIED ON THE EXPORTATION OF ARTICLES POSSESSING ARTISTIC OR HISTORIC VALUE FALLS WITHIN THE PROHIBITION CONTAINED IN ARTICLE 16 BY REASON OF THE FACT THAT EXPORT TRADE IN THE GOODS IN QUESTION IS HINDERED BY THE PECUNIARY BURDEN WHICH IT IMPOSES ON THE PRICE OF THE EXPORTED ARTICLES .

4 . THE PROHIBITIONS OR RESTRICTIONS ON IMPORTS AND EXPORTS REFERRED TO IN ARTICLE 36 OF THE EEC TREATY ARE BY NATURE CLEARLY DISTINGUISHED FROM CUSTOMS DUTIES AND ASSIMILATED CHARGES WHEREBY THE ECONOMIC CONDITIONS OF IMPORTATION OR EXPORTATION ARE AFFECTED WITHOUT RESTRICTING THE FREEDOM OF DECISION OF THOSE INVOLVED IN COMMERCIAL TRANSACTIONS . BECAUSE SUCH MEASURES CONSTITUTE AN EXCEPTION TO THE FUNDAMENTAL PRINCIPLE OF THE ELIMINATION OF ALL OBSTACLES TO THE FREE MOVEMENT OF GOODS BETWEEN MEMBER STATES, THEY MUST BE STRICTLY CONSTRUED .

5 . THE PROHIBITIONS AND RESTRICTIONS REFERRED TO IN ARTICLE 36 OF THE EEC TREATY CANNOT JUSTIFY THE RETENTION OF MEASURES, SUCH AS CUSTOMS DUTIES OR CHARGES HAVING EQUIVALENT EFFECT, WHICH FALL OUTSIDE THE SCOPE OF THE PROHIBITIONS REFERRED TO IN THE CHAPTER RELATING TO THE ELIMINATION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES .

IN ORDER TO AVAIL THEMSELVES OF ARTICLE 36, MEMBER STATES MUST OBSERVE THE LIMITATIONS IMPOSED BY THAT PROVISION BOTH AS REGARDS THE OBJECTIVE TO BE OBTAINED AND AS REGARDS THE NATURE OF THE MEANS USED TO ATTAIN IT . THE LEVY OF A TAX ON THE EXPORTATION OF GOODS POSSESSING ARTISTIC OR HISTORIC VALUE IS INCOMPATIBLE WITH THE PROVISIONS OF THE TREATY .

Parties

IN CASE 7/68

COMMISSION OF THE EUROPEAN COMMUNITIES, REPRESENTED BY ITS LEGAL ADVISER,
ARMANDO TOLEDANO, ACTING AS AGENT, WITH AN ADDRESS FOR SERVICE IN
LUXEMBOURG AT THE OFFICES OF ITS LEGAL ADVISER, EMILE REUTER, 4 BOULEVARD

ROYAL,
APPLICANT,
AND

ITALIAN REPUBLIC, REPRESENTED BY ADOLFO MARESCA, MINISTER PLENIPOTENTIARY,
ACTING AS AGENT, ASSISTED BY PIETRO PERONACI, DEPUTY STATE ADVOCATE-
GENERAL, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE ITALIAN

EMBASSY,
DEFENDANT,

Subject of the case

APPLICATION FOR A DECLARATION THAT THE ITALIAN REPUBLIC HAS FAILED TO FULFIL THE OBLIGATIONS IMPOSED ON IT BY ARTICLE 16 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY BY CONTINUING TO LEVY, AFTER 1 JANUARY 1962, THE PROGRESSIVE TAX PROVIDED FOR BY LAW NO 1089 OF 1 JANUARY 1939 ON EXPORTS TO OTHER MEMBER STATES OF THE COMMUNITY OF OBJECTS OF ARTISTIC, HISTORIC, ARCHAEOLOGICAL OR ETHNOGRAPHIC INTEREST;

Grounds

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THE COMMISSION HAS BROUGHT BEFORE THE COURT, UNDER ARTICLE 169 OF THE TREATY AN APPLICATION FOR A DECLARATION THAT THE ITALIAN REPUBLIC BY CONTINUING AFTER 1 JANUARY 1962 TO LEVY THE PROGRESSIVE TAX PROVIDED FOR IN ARTICLE 37 OF LAW NO 1089 OF 1 JUNE 1939 ON THE EXPORT TO OTHER MEMBER STATES OF THE COMMUNITY OF ARTICLES HAVING AN ARTISTIC, HISTORIC, ARCHAEOLOGICAL OR ETHNOGRAPHIC VALUE, HAS FAILED TO FULFIL THE OBLIGATIONS IMPOSED ON IT BY ARTICLE 16 OF THE TREATY ESTABLISHING THE EEC .

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A - ADMISSIBILITY

THE DEFENDANT, QUESTIONING THE ADMISSIBILITY OF THE APPLICATION, SUBMITS THAT THE COMMISSION, BY BRINGING THE MATTER BEFORE THE COURT AT A TIME WHEN THE ITALIAN PARLIAMENT, WHICH HAD BEFORE IT A DRAFT LAW FOR THE PURPOSE OF AMENDING THE PROVISION IN DISPUTE, WAS ON THE POINT OF BEING DISSOLVED, DISREGARDED THE OBLIGATION IMPOSED UPON THE COMMUNITY INSTITUTIONS UNDER ARTICLE 2 OF THE TREATY TO ' PROMOTE THROUGHOUT THE COMMUNITY A HARMONIOUS DEVELOPMENT OF ECONOMIC ACTIVITIES ' .

IT IS FOR THE COMMISSION, UNDER ARTICLE 169 OF THE TREATY, TO JUDGE AT WHAT TIME IT SHALL BRING AN ACTION BEFORE THE COURT; THE CONSIDERATIONS WHICH DETERMINE ITS CHOICE OF TIME CANNOT AFFECT THE ADMISSIBILITY OF THE ACTION, WHICH FOLLOWS ONLY OBJECTIVE RULES.

IN THE PRESENT CASE, THE ACTION OF THE COMMISSION WAS IN ANY CASE PRECEDED BY A PROLONGED EXCHANGE OF VIEWS WITH THE ITALIAN GOVERNMENT, BEGUN BEFORE THE EXPIRY OF THE SECOND STAGE OF THE TRANSITIONAL PERIOD, TO TRY TO PERSUADE THE COMPETENT AUTHORITIES IN THE REPUBLIC TO DO WHAT WAS NECESSARY TO AMEND THE PROVISIONS CRITICIZED BY THE COMMISSION .

THE ACTION IS THEREFORE ADMISSIBLE .

B - THE SUBSTANCE OF THE CASE

1 . THE SCOPE OF THE DISPUTED TAX

BY BASING ITS ACTION ON ARTICLE 16 OF THE TREATY, THE COMMISSION CONSIDERS THAT ARTICLES OF AN ARTISTIC, HISTORIC, ARCHAEOLOGICAL OR ETHNOGRAPHIC NATURE, WHICH ARE THE SUBJECT OF THE ITALIAN LAW OF 1 JUNE 1939, NO 1089, FALL UNDER THE PROVISIONS RELATING TO THE CUSTOMS UNION . THIS POINT OF VIEW IS DISPUTED BY THE DEFENDANT, WHICH CONSIDERS THAT THE ARTICLES IN QUESTION CANNOT BE ASSIMILATED TO ' CONSUMER GOODS OR ARTICLES OF GENERAL USE ' AND ARE NOT THEREFORE SUBJECT TO THE PROVISIONS OF THE TREATY WHICH APPLY TO ' ORDINARY MERCHANDISE ' ; FOR THAT REASON THEY ARE EXCLUDED FROM THE APPLICATION OF ARTICLE 16 OF THE TREATY .

UNDER ARTICLE 9 OF THE TREATY THE COMMUNITY IS BASED ON A CUSTOMS UNION ' WHICH SHALL COVER ALL TRADE IN GOODS ' . BY GOODS, WITHIN THE MEANING OF THAT PROVISION, THERE MUST BE UNDERSTOOD PRODUCTS WHICH CAN BE VALUED IN MONEY AND WHICH ARE CAPABLE, AS SUCH, OF FORMING THE SUBJECT OF COMMERCIAL TRANSACTIONS .

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THE ARTICLES COVERED BY THE ITALIAN LAW, WHATEVER MAY BE THE CHARACTERISTICS WHICH DISTINGUISH THEM FROM OTHER TYPES OF MERCHANDISE, NEVERTHELESS RESEMBLE THE LATTER, INASMUCH AS THEY CAN BE VALUED IN MONEY AND SO BE THE SUBJECT OF COMMERCIAL TRANSACTIONS . THAT VIEW CORRESPONDS WITH THE SCHEME OF THE ITALIAN LAW ITSELF, WHICH FIXES THE TAX IN QUESTION IN PROPORTION TO THE VALUE OF THE ARTICLES CONCERNED .

IT FOLLOWS FROM THE ABOVE THAT THE RULES OF THE COMMON MARKET APPLY TO THESE GOODS SUBJECT ONLY TO THE EXCEPTIONS EXPRESSLY PROVIDED BY THE TREATY .

2 . THE CLASSIFICATION OF THE DISPUTED TAX HAVING REGARD TO ARTICLE 16 OF THE TREATY

IN THE OPINION OF THE COMMISSION THE TAX IN DISPUTE CONSTITUTES A TAX HAVING AN EFFECT EQUIVALENT TO A CUSTOMS DUTY ON EXPORTS AND THEREFORE THE TAX SHOULD HAVE BEEN ABOLISHED, UNDER ARTICLE 16 OF THE TREATY, NO LATER THAN THE END OF THE FIRST STAGE OF THE COMMON MARKET, THAT IS TO SAY, FROM 1 JANUARY 1962 . THE DEFENDANT ARGUES THAT THE DISPUTED TAX DOES NOT COME WITHIN THE CATEGORY, AS IT HAS ITS OWN PARTICULAR PURPOSE WHICH IS TO ENSURE THE PROTECTION AND SAFETY OF THE ARTISTIC, HISTORIC AND ARCHAEOLOGICAL HERITAGE WHICH EXISTS IN THE NATIONAL TERRITORY . CONSEQUENTLY, THE TAX DOES NOT IN ANY RESPECT HAVE A FISCAL NATURE, AND ITS CONTRIBUTION TO THE BUDGET IS INSIGNIFICANT .

ARTICLE 16 OF THE TREATY PROHIBITS THE COLLECTION IN DEALINGS BETWEEN MEMBER STATES OF ANY CUSTOMS DUTY ON EXPORTS AND OF ANY CHARGE HAVING AN EQUIVALENT EFFECT, THAT IS TO SAY, ANY CHARGE WHICH, BY ALTERING THE PRICE OF AN ARTICLE EXPORTED, HAS THE SAME RESTRICTIVE EFFECT ON THE FREE CIRCULATION OF THAT ARTICLE AS A CUSTOMS DUTY . THIS PROVISION MAKES NO DISTINCTION BASED ON THE PURPOSE OF THE DUTIES AND CHARGES THE ABOLITION OF WHICH IT REQUIRES .

IT IS NOT NECESSARY TO ANALYSE THE CONCEPT OF THE NATURE OF FISCAL SYSTEMS ON WHICH THE DEFENDANT BASES ITS ARGUMENT UPON THIS POINT, FOR THE PROVISIONS OF THE SECTION OF THE TREATY CONCERNING THE ELIMINATION OF CUSTOMS DUTIES BETWEEN THE MEMBER STATES EXCLUDE THE RETENTION OF CUSTOMS DUTIES AND CHARGES HAVING EQUIVALENT EFFECT WITHOUT DISTINGUISHING IN THAT RESPECT BETWEEN THOSE WHICH ARE AND THOSE WHICH ARE NOT OF A FISCAL NATURE .

THE DISPUTED TAX FALLS WITHIN ARTICLE 16 BY REASON OF THE FACT THAT EXPORT TRADE IN THE GOODS IN QUESTION IS HINDERED BY THE PECUNIARY BURDEN WHICH IT IMPOSES ON THE PRICE OF THE EXPORTED ARTICLES .

3 . THE CLASSIFICATION OF THE DISPUTED TAX HAVING REGARD TO ARTICLE 36 OF THE TREATY

THE DEFENDANT RELIES ON ARTICLE 36 OF THE TREATY AS AUTHORIZING EXPORT RESTRICTIONS WHICH, AS IN THIS CASE, ARE CLAIMED TO BE JUSTIFIED ON GROUNDS OF THE PROTECTION OF NATIONAL TREASURES POSSESSING ARTISTIC, HISTORIC OR ARCHAEOLOGICAL VALUE . BY REASON OF ITS OBJECT, SCOPE AND EFFECTS, THE TAX IN DISPUTE IS CLAIMED TO FALL LESS WITHIN THE PROVISIONS OF THE TREATY RELATING TO CHARGES HAVING AN EFFECT EQUIVALENT TO CUSTOMS DUTIES ON EXPORTS THAN WITHIN THE RESTRICTIVE MEASURES PERMITTED BY ARTICLE 36 .

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IN FACT, THE DIVERGENCE OF VIEW BETWEEN THE COMMISSION AND THE ITALIAN GOVERNMENT RELATES, IT IS ARGUED, NOT TO THE OBJECTIVE BUT TO THE CHOICE OF MEANS . AS FOR THE LATTER, THE ITALIAN AUTHORITIES GAVE THEIR PREFERENCE TO THE LEVY OF A CHARGE WHICH WOULD DISTURB THE FUNCTIONING OF THE COMMON MARKET LESS THAN THE APPLICATION OF PROHIBITIONS OR EXPORT RESTRICTIONS .

ARTICLE 36 OF THE TREATY PROVIDES THAT : ' THE PROVISIONS OF ARTICLES 30 AND 34 SHALL NOT PRECLUDE PROHIBITIONS OR RESTRICTIONS ON ... EXPORTS...JUSTIFIED ON GROUNDS OF...THE PROTECTION OF NATIONAL TREASURES POSSESSING ARTISTIC, HISTORIC OR ARCHAEOLOGICAL VALUE ' . THIS PROVISION, BOTH BY ITS POSITION AND BY AN EXPRESS REFERENCE TO ARTICLES 30 TO 34, FORMS PART OF THE CHAPTER RELATING TO THE ELIMINATION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES . THE SUBJECT OF THAT CHAPTER IS STATE INTERVENTION IN INTRA-COMMUNITY TRADE BY MEASURES IN THE NATURE OF PROHIBITIONS, TOTAL OR PARTIAL, ON IMPORT, EXPORT OR TRANSIT, ACCORDING TO CIRCUMSTANCES . IT IS TO SUCH MEASURES THAT ARTICLE 36 REFERS CLEARLY AND SOLELY, AS FOLLOWS FROM THE USE OF THE WORDS ' PROHIBITIONS OR RESTRICTIONS ' . THE PROHIBITIONS AND RESTRICTIONS IN QUESTION ARE BY NATURE CLEARLY DISTINGUISHED FROM CUSTOMS DUTIES AND ASSIMILATED CHARGES WHEREBY THE ECONOMIC CONDITIONS OF IMPORTATION OR EXPORTATION ARE AFFECTED WITHOUT RESTRICTING THE FREEDOM OF DECISION OF THOSE INVOLVED IN COMMERCIAL TRANSACTIONS .

THE PROVISIONS OF TITLE 1 OF PART TWO OF THE TREATY INTRODUCED THE FUNDAMENTAL PRINCIPLE OF THE ELIMINATION OF ALL OBSTACLES TO THE FREE MOVEMENTS OF GOODS BETWEEN MEMBER STATES BY THE ABOLITION OF, ON THE ONE HAND, CUSTOMS DUTIES AND CHARGES HAVING EQUIVALENT EFFECT AND, ON THE OTHER HAND, QUANTITATIVE RESTRICTIONS AND MEASURES HAVING EQUIVALENT EFFECT . EXCEPTIONS TO THIS FUNDAMENTAL RULE MUST BE STRICTLY CONSTRUED .

CONSEQUENTLY, IN VIEW OF THE DIFFERENCE BETWEEN THE MEASURES REFERRED TO IN ARTICLE 16 AND ARTICLE 36, IT IS NOT POSSIBLE TO APPLY THE EXCEPTION LAID DOWN IN THE LATTER PROVISION TO MEASURES WHICH FALL OUTSIDE THE SCOPE OF THE PROHIBITIONS REFERRED TO IN THE CHAPTER RELATING TO THE ELIMINATION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES .

FINALLY, THE FACT THAT THE PROVISIONS OF ARTICLE 36 WHICH HAVE BEEN MENTIONED DO NOT RELATE TO CUSTOMS DUTIES AND CHARGES HAVING EQUIVALENT EFFECT IS EXPLAINED BY THE FACT THAT SUCH MEASURES HAVE THE SOLE EFFECT OF RENDERING MORE ONEROUS THE EXPORTATION OF THE PRODUCTS IN QUESTION, WITHOUT ENSURING THE ATTAINMENT OF THE OBJECT REFERRED TO IN THAT ARTICLE, WHICH IS TO PROTECT THE ARTISTIC, HISTORIC OR ARCHAEOLOGICAL HERITAGE .

IN ORDER TO AVAIL THEMSELVES OF ARTICLE 36, MEMBER STATES MUST OBSERVE THE LIMITATIONS IMPOSED BY THAT PROVISION BOTH AS REGARDS THE OBJECTIVE TO BE ATTAINED AND AS REGARDS THE NATURE OF THE MEANS USED TO ATTAIN IT .

CONSEQUENTLY, THE LEVY OF THE DISPUTED TAX, WHICH FALLS OUTSIDE THE LIMITS OF ARTICLE 36, IS INCOMPATIBLE WITH THE PROVISIONS OF THE TREATY .

Decision on costs

UNDER ARTICLE 69(2) OF THE RULES OF PROCEDURE, THE UNSUCCESSFUL PARTY MUST BE ORDERED TO PAY THE COSTS . THE DEFENDANT HAS FAILED IN ITS SUBMISSIONS .

Operative part

THE COURT
HEREBY :

- 1 . DECLARES THAT THE APPLICATION IS ADMISSIBLE;
- 2 . DECLARES THAT THE ITALIAN REPUBLIC, BY CONTINUING TO LEVY AFTER 1 JANUARY 1962 THE PROGRESSIVE TAX LAID DOWN BY ARTICLE 37 OF THE LAW OF 1 JUNE 1939 NO 1089 ON THE EXPORT TO OTHER MEMBER STATES OF THE COMMUNITY OF ARTICLES OF AN ARTISTIC, HISTORIC, ARCHAEOLOGICAL OR ETHNOGRAPHIC INTEREST, HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER ARTICLE 16 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY;
- 3 . ORDERS THE DEFENDANT TO PAY THE COSTS .