OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 16 March 2000 *

1. These two references from the Hellenic Republic ask whether a Greek tax on the exportation of tobacco amounts to a charge having equivalent effect to a customs duty on exports prohibited by the EC Treaty, and, if so, whether reimbursement of the taxes improperly collected can be refused on the ground of unjust enrichment.

I — The legal and factual context

A — *Facts and reference*

2. Kapniki Michailidis AE, the plaintiff in the main proceedings (hereinafter 'Kapniki'), is a tobacco trader. In those proceedings, it is seeking the annulment, before the Diikitiko Protodikio Thessalonikis (Administrative Court of First Instance, Thessaloniki, 'the national court'), of two separate administrative decisions refusing its requests for the refund of two sums, amounting, respectively, to GRD 336 068 769 and GRD 30 113 030, and levied, between 1990 and 1994 (hereinafter 'the relevant period'), in accordance with Article 7 of the Law No 2348/1953 (hereinafter 'the 1953 Law'), as amended, in respect of exports from Greece of Greek-produced tobacco to other Member States and non-member countries. [1] Kapniki contends that the impugned tax constitutes a charge having equivalent effect to a customs duty since it is levied on exports by virtue of the fact that they cross a frontier.

3. The national court has referred the following two questions to the Court:

'1. Does a charge which is levied by a Member State on domestic goods exported to another Member State in proportion to their value constitute a charge having equivalent effect to customs duties on exports, having regard to the fact that that charge, which is invariably imposed on a particular category of domestic goods, in accordance with objective criteria and within the framework of a general system of taxation, is not imposed on domestic products which are distributed in the home market or on like goods which are imported into the

* Original language: English.

1 — FEK I (Official Journal of the Hellenic Republic), p. 75.

country from another Member State? Alternatively is the abovementioned proportional contribution payable by tobacco exporters — which is levied and credited as income of the IKA, a social security institution, for the benefit of the Tobacco Workers' Pensions Branch — by reason of its objective, that is to say boosting the financial resources of the particular insurance branch, not inconsistent with Community law, in that it constitutes in a broader sense a contribution in favour of an insurance body for the purpose of achieving the social security objectives in respect of the particular group of workers, who may be employed in undertakings like the plaintiff's, and are in any event entitled, even by means of the imposition of charges such as the one in this case, to social security, in accordance with the appropriate provisions of the constitution of the particular Member State?

2. If the first part of the first question is answered in the affirmative, is a Member State in principle obliged to refund to a trader financial charges on the value of exported goods which must be regarded as levied in breach of Community law, on the basis that it is established that the person who was required to pay the charges at issue in fact passed them on to other persons, namely the purchasers of the goods, and it does not follow, nor does the trader claim, that that charge caused an increase in the price of the products and a reduction in the volume of his sales with the result that he suffered subsequent loss?'

4. Although it is clear from the order for reference that the claims involved in the main proceedings concern exports both to Member States and to third countries, the national court has confined its questions to intra-Community trade. In the absence of further information or of any argument about the legal issues relating to the imposition of the tax on exports outside the Community, I propose only to consider the validity of the impugned tax in so far as it affects exports to other Member States.

B — *National law*

5. The tax impugned in this case ('the impugned tax') was established by the 1953 Law concerning the amendment, supplementation and repeal of provisions on the processing of tobacco leaves and concerning the amalgamation of the Tamio Asfaliseos Kapnergaton (Tobacco Workers' Insurance Fund; 'TAK') with the Idryma Koinonikon Asfaliseon ('IKA'), the general Greek social security institution. Article 6(1) of the 1953 Law provided:

'For the purpose:

(a) of continuing to pay pensions to persons already entitled to a pension from the TAK and to persons who acquire

such entitlement in accordance with the provisions of this Law as well as, on their death, to persons entitled through them in accordance with the above, and

(b) of paying compensation to any employees of the TAK not affiliated to the IKA and not entitled to a pension until this Law enters into force,

a special account with the National Bank of Greece and Athens called "Special account for the benefit of pensioners of the Tamio Asfaliseos Kapnergaton as amalgamated with the IKA" is hereby set up.'

Article 6(2), indent (c), provided that the special account would be funded, *inter alia*, by revenue from 'the proceeds of the contribution, in accordance with the following article, on the value of exported tobacco'.

6. Article 7(1), accordingly, established, initially for three years, a 'special contribution' that was to be 'imposed on the value of tobacco exported outside the borders of the country', whose rate was fixed 'at 5% from the 1952 harvest and ... at 3% from the 1953 and 1954 harvests ...'. Article 7(1), as amended, provides that the impugned tax is payable 'by the exporters immediately on export and collected by the State customs office through which the export takes place', that office being obliged to 'pay the contributions into the special account ...'. [2] However, its application was extended to post-1954 harvests, albeit at reduced rates, falling to its present 0.5% rate 'for the harvests from 1959 onwards'. [3] It is important to note that this tax is applied only to unprocessed tobacco.

7. At first sight and in the absence of explanation, the 1953 Law seems incompatible with the Treaty rules in force at the time of the facts giving rise to the main proceedings, namely those contained in Articles 9 and 12 of the EC Treaty (now, after amendment, Articles 23 EC and 25 EC) and Article 16 of the EC Treaty (repealed by the Treaty of Amsterdam). Article 9(1) of the EC Treaty (now, after amendment, Article 23(1) EC) provides that the Community is 'based upon a customs union', which, *inter alia*, shall involve 'the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect'. [4]

2 — See Article 2 of Legislative Decree 2519/1953; FEK I, p. 220.

3 — See Article 9 of Legislative Decree 4104/1960; FEK I, p. 147. Article 11(4) of that decree abolished the special account and transferred the rights and obligations in respect of that account to the Pensions Branch of the IKA.

4 — Pursuant to Articles 2 and 30 of the Act concerning the conditions of accession of the Hellenic Republic and the adjustments to the Treaties annexed to the Treaty of Accession, Greece was required to abolish customs duties and equivalent charges on exports between it and the other Member States and to respect Article 95 of the EC Treaty (now, after amendment, Article 90 EC) from the date of its accession on 1 January 1981; OJ 1979 L 291, p. 17.

II — Analysis

8. Written and oral observations have been submitted by Kapniki, the IKA, Greece and the Commission.

A — *The nature of the impugned tax*

9. The Hellenic Republic, supported by the IKA, submits that the impugned tax constitutes internal taxation that falls within the scope of Article 95 rather than Articles 9, 12 and 16 of the EC Treaty. [5] More particularly, it alleges that its purpose, despite being described in the 1953 Law as an 'export' tax, is merely to include tobacco destined for export within the scope of a single consumption tax that equally affects the Greek tobacco that remains on the domestic market. There is nothing, however, in the order for reference or in the wording of the first question that suggests that the national court considered that the impugned tax constituted a component of such a general system of taxation.

10. By its first question, the national court asks in substance whether, notwithstanding the fact that the impugned tax is imposed only on exports, it may escape classification as a charge having equivalent effect to a customs duty on exports because of the social objective underlying its imposition.

11. As the Court has consistently stated, in particular in the first *Diamantarbeiders* case, to which Kapniki and the Commission allude, it follows 'from the general and absolute nature of the prohibition of any customs duties applicable to goods moving between Member States that customs duties are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom'. [6] The extension of the prohibition of customs duties to charges having equivalent effect is intended to promote the efficacy of the former so as to ensure, 'in trade between Member States', that 'the imposition of any pecuniary charge on goods circulating within the Community by virtue of the fact that they cross a national frontier' is avoided. [7] The following broad definition of a charge having equivalent effect has therefore, since its formulation over 30 years ago, been consistently applied by the Court: [8]

'... any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense, constitutes a charge having equivalent

5 — Greece refers, in particular, to Case 158/82 *Commission* v *Denmark* [1983] ECR 3573, paragraph 24.

6 — Joined Cases 2/69 and 3/69 *Diamantarbeiders* v *Brachfeld* [1969] ECR 211, paragraph 13 (hereinafter '*Diamantarbeiders I*').

7 — Ibid.

8 — *Diamantarbeiders I*, loc. cit. See also, among many others, Case C-209/89 *Commission* v *Italy* [1991] ECR I-1575, paragraph 7.

effect to a customs duty ... , even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect or if the product on which it is imposed is not in competition with any domestic product.'

The fact that the present case concerns exports is not significant since no distinction has been drawn depending on whether the relevant charge affects imports or exports. [9]

12. The mere fact that the purpose of the impugned tax is to finance social security benefits for tobacco workers is irrelevant. National social objectives, even if adopted pursuant to national constitutional provisions (as implied in the first question), may not be financed by Member States through the imposition of charges that are incompatible with Community law. Thus, although 'Community law does not detract from the powers of Member States to organise their social security systems', they 'must nevertheless comply with Community law when exercising those powers'. [10] Thus, conditions of national social security regulations may be incompatible with the rules on free movement of goods if they discriminate regarding the origin of the products supplied, [11] or refuse to reimburse an insured person in respect of purchases made in another Member State. [12]

13. I turn to consider the contention that the export tax contributes, nevertheless, a mere incidental aspect of a genuine and non-discriminatory system of internal taxation. Apart from reciting the legislation to which I have already alluded (paragraphs 5 and 6 above), the national court refers only to the fact that, according to Article 59(4) of Law No 2084/1992 (hereinafter 'the 1992 Law'), the revenue available to the IKA comprises various sources, which are said to include 'contributions' on exported tobacco, on consumed tobacco products and on 'tobacco land tax', without, however, specifying the precise taxation provisions other than the first. [13]

14. It is important to bear in mind, of course, that it is ultimately for the national court to interpret the relevant provisions of Greek law. The Court, in its answers to the questions posed, can give guidance as to how it should approach the contention that the impugned tax constitutes part of a general system of internal taxation.

9 — See Case 51/74 *Hulst* v *Produktschap voor Siergewassen* [1975] ECR 79, paragraphs 13 and 14, Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association* v *Ireland* [1981] ECR 735, paragraph 23 and Case C-111/89 *Bakker Hillegom* [1990] ECR I-1735, paragraphs 9 and 10.

10 — Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831 (hereinafter '*Decker*'), paragraphs 21 and 23.

11 — Case 238/82 *Duphar* v *Netherlands* [1984] ECR 523, paragraph 21.

12 — *Decker*, loc. cit., paragraph 46.

13 — FEK I, p. 165.

15. Greece asserts that there is a fine distinction between the pecuniary charges that fall to be considered as charges having equivalent effect to customs duties and those that may be considered to constitute internal taxation and that the latter should be considered in the light of Article 95 of the EC Treaty. I do not agree.

16. In *Diamantarbeiders I* the Court naturally recognised that 'the concept of a charge having equivalent effect does not include taxation which is imposed in the same way within a State on similar or comparable domestic products, or at least which falls, in the absence of such products, within the framework of general internal taxation, or which is intended to compensate for such internal taxation within the limits laid down by the Treaty'. [14] The rationale underlying the distinction is clear. As Advocate General Gand explained in his Opinion in that case, 'charges having equivalent effect and internal taxation constitute different fields and are not subject to the same system', since the former are 'unlawful solely by virtue of the fact that [they constitute] an obstacle to trade, whereas internal taxation is unlawful only if, and to the extent to which, it is imposed more heavily on imported products than on domestic products'. [15] Thus, Member States are free to determine the level of internal taxation but they may not exercise that competence so as to impose obstacles to trade. The distinction in principle between charges having equivalent effect and internal taxation is clear from the case-law.

17. In *Denkavit* v *France*, the Court had to consider whether a charge imposed on the importation of pig meat could escape classification as a charge having equivalent effect to a customs duty because it was intended to compensate for the imposition of a domestic levy on the slaughter of swine. [16] It held that '... in order to relate to a general system of internal dues, the charge to which an imported product is subject must impose the *same duty* on national products and identical imported products *at the same marketing stage* and that *the chargeable event* giving rise to the duty must also *be identical* in the case of both products'. [17] It was 'not sufficient that the objective of the charge imposed on imported products [wa]s to compensate for a charge imposed on similar domestic products — or which ha[d] been imposed on those products or a product from which they [we]re derived — at a production or marketing stage prior to that at which the imported products are taxed', since, '[t]o exempt a charge levied at the frontier from the classification of a charge having equivalent effect when it is not imposed on similar national products or is imposed on them at different marketing stages or, again, on the basis of a different chargeable event giving rise to duty, because that charge aims to compensate for a domestic fiscal charge applying to the same products ... would make the prohibition on charges having an effect equivalent to customs duties empty and meaningless'. [18] Thus, a charge such as the impugned tax in this case which is

14 — [1969] ECR 211.
15 — Ibid., p. 232.
16 — Case 132/78 [1979] ECR 1923.
17 — Ibid., paragraph 8 (emphasis added).
18 — Paragraph 8.

levied at a national frontier must be presumed to constitute a charge having equivalent effect, unless the supposedly comparable charge on domestic products is applied at the same rate, at the same marketing stage and as a result of the occurrence of the same chargeable event.

18. It is instructive to contrast *Denkavit* v *France* with the later case of *Commission* v *France*, where the Court rejected a Commission infringement action directed against the imposition of a levy on the use of 'reprographic' equipment and seeking a declaration that, in so far as it applied to imported equipment, it constituted a charge having equivalent effect to a customs duty.[19] The levy in question applied to 'eight different types of equipment', which comprised 'all types of reprographic equipment designed for reproduction of the written word', and was related to a levy on the publication of books imposed by the same national law.[20] Although the Court appeared to regard French domestic production of the taxed equipment as being insignificant, it was, none the less, satisfied that 'the particular features of the levy in issue [led] to its being accepted as forming part of a general system of internal dues'.[21] In *Co-Frutta* v *Amministrazione delle Finanze dello Stato*,[22] the Court held that subjecting bananas, upon importation, to a consumption tax did not, notwithstanding the fact that a small domestic production (in Sicily) appeared effectively to be untaxed,[23] constitute a charge having equivalent effect to a customs duty, because it was satisfied that it formed 'part of a general system of internal dues applying systematically to categories of products', the levy in question constituting one of 'the 19 taxes on consumption [that were] governed by common tax rules and [were] charged on categories of products irrespective of their origin in accordance with an objective criterion, namely the fact the product falls into a specific category of goods'.[24] The Court also referred specifically to the fact that the place of production of the taxed categories of goods '[did] not seem to have a bearing on the rate, the basis of assessment or the manner in which the tax is levied', as well as to the fact that the yield from the taxes 'is not earmarked for a specific purpose ... [but] constitutes tax revenue identical to other tax revenue ...'.[25]

19. The notion of what constitutes a 'general system of internal taxation' is not to be interpreted broadly. In *Commission* v *Denmark*, the Court rejected Denmark's defence that groundnuts and Brazil nuts constituted a specific group of products to which the impugned import charge was applied systematically on the basis of objective criteria (the particularly grave risk to health posed by possible contamination).[26] It held that 'such a limited number of products [could] not fall within the broad concept of "whole classes of ...

19 — Case 90/79 [1981] ECR 283.

20 — See the Opinion of Advocate General Warner, [1981] ECR 303, p. 315.

21 — Paragraph 16.

22 — Case 193/85 [1987] ECR 2085.

23 — See paragraphs 17 and 23 of the Opinion of Advocate General Lenz, who noted that Italy had not provided a satisfactory answer to a question regarding the taxation of domestic banana production.

24 — Paragraphs 11 and 12.

25 — Paragraph 12.

26 — Case 158/82, cited in footnote 5 above.

products" ... , a concept which implies a much larger number of products determined by general and objective criteria'. [27]

20. More recently, in *CRT France International*, the Court held that a flat-rate tax on the supply of radio transmitting-receiving sets, which operate on two-way channels, viz. CB sets, and imposed by a French Law effectively on imports only did not constitute internal taxation within the meaning of Article 95 of the EC Treaty but, instead, a charge having an effect equivalent to a customs duty. [28] This was because, although most other forms of radio-relay system devices were taxed in France, the method of taxing CB sets was different; unlike the other equipment, where the tax was borne by the users, the supply of CB sets was taxed. This case illustrates clearly the need for uniformity in the method of application of allegedly comparable charges.

21. Nevertheless, in its written observations, Greece submits that the impugned tax constitutes merely one component of a general and non-discriminatory system of tax designed to finance social security benefits for tobacco workers. The other components, it submits, comprise a (single) consumption tax levied at a rate of 16% on the selling price of tobacco and a tax affecting land used for the purpose of growing tobacco. Quoting from Article 6 of the 1953 Law, Greece asserts that the single consumption tax dates from Article 2(4)(b) of Law No 3460/28. [29] In the absence of any information in the order for reference regarding this supposed (single) consumption tax and since Article 59(4)(f) of the 1992 Law, which is cited by the national court, does refer to 'a contribution on tobacco land tax', the Court posed a number of questions to Greece for a written response.

22. Before evaluating the material provided in that response, I would make two preliminary observations. First, the impugned tax is a single tax imposed upon the export of raw tobacco. Secondly, it is important to keep in mind the distinction between a tax imposed on specific acts relating to a product and legal provisions relating to the allocation of the proceeds of taxation.

23. In its response, Greece furnished the Court with details regarding, in particular, the contributions mentioned at indents (e) and (f) of Article 59(4) of the 1992 Law, i.e. the 'contributions' on 'consumed tobacco products' and on 'tobacco land tax', but not with an official citation for or a complete text of Law No 3460/28.

27 — Ibid., paragraph 24. See also section 4 of the Opinion of Advocate General Mancini.

28 — Case C-109/98 [1999] ECR I-2237. The tax was payable on importation and it was common case that there was no French production of CB sets; see paragraph 19 of the Opinion of Advocate General Cosmas.

29 — In its written observations Greece mistakenly refers to Law No 3466/28.

24. At the end of the hearing, and even with the benefit of information from several governmental authorities of the Hellenic Republic, it remained unclear whether any tax on tobacco other than the impugned tax existed in Greece during the relevant period. A letter from the Ministry of Finance (Annex B to the response) says that, apart from the impugned tax, neither raw nor processed tobacco was subject, during the relevant period, to any taxation apart from the excise taxes and VAT on the consumption of processed tobacco.

25. Regrettably, the Court has also been supplied with other contradictory, or at least confusing, information. The greatest confusion surrounds the question of a former tax on land under cultivation and its later modification. Since the national court alone can determine the true position in Greek law regarding the existence of such a tax, I shall refer only briefly to the main elements of the information provided.

26. From Law No 3460/28, it appears that a tax was at some stage imposed on land under cultivation but that this took the form of a State contribution of 4% of the proceeds of a single tax of 16% on the selling price of tobacco (after deduction of 20% destined for municipal and communal authorities) and which was allocated to comprise part of the social security insurance funding for tobacco workers. The nature or precise basis of the imposition of this 'tax' has never been identified. Indeed, it does not seem to me to have functioned independently as a tax during the relevant period. It appears, from information supplied by Greece, that, by Article 1(10) and (12) of Law No 3921/58, the tax in question was integrated into a fixed-rate consumption tax on cigarettes and other tobacco products.

27. As concerns the '*contribution* on consumed tobacco products' (emphasis added) which is mentioned at Article 59(4)(e) of the 1992 Law, the information provided by the abovementioned IKA document states that it is regulated by three provisions. [30] It seems to be accepted that those provisions effectively provided for the allocation of a fixed sum (GRD 12 780 000) from the general consumption tax on the retail sale of tobacco. It would also appear that the former land tax has been subsumed into this 'contribution'. The latter, however, does not, itself, constitute a tax in the accepted legal sense but rather an allocation of tax proceeds.

28. If the foregoing represents an accurate account of the taxation of tobacco products in Greece, it is clear that, in the relevant period, there was no tax in force comparable to the impugned tax. The latter was imposed on exported tobacco. Since its

30 — Legislative Decrees 441/47 (FEK I, p. 170, inserting a new provision into Law No 5967/1933) and 4373/64, together with Decision No K.2376/65 of the Minister for Finance.

taxable event is the exportation of tobacco and not its retail sale, it is difficult to envisage how it may be compared with a (single) consumption tax on cigarettes and other tobacco products. Moreover, the contribution of 4% of 16% of the price of tobacco does not appear, as I have already noted, to represent a tax at all but, instead, a system of allocation of the proceeds of the general tax on cigarette consumption.

29. According to the document from the Greek Ministry of Finance, which is also annexed to the response (Annex B), the consumption of processed tobacco is subject to excise duties, charges which are levied, in addition to VAT, on the retail sale price pursuant to the Community legislation harmonising certain aspects of excise duties. [31] During the period 1990 to 1995, they were charged at rates which increased progressively from 44.53% to 57.5%. These are, of course, taxes. They are clearly not comparable, however, with the impugned tax.

30. None the less, a doubt persists regarding the existence of a tax at the rate of 2% of the price of tobacco sold by producers to tobacco brokers or processors. The National Tobacco Organisation, in apparent contradiction of the information supplied by the Ministry of Finance, has provided information (Annex C to the response) that this tax exists and that, up to 1994, its basis of assessment comprised the total of the sale price of raw tobacco as augmented by the value of the relevant Community tobacco premium, while, more recently, the basis of assessment has comprised only the price paid for the tobacco. The existence of this tax was acknowledged at the hearing by counsel for Kapniki. [32] She asserted, however, that it applies to all unprocessed tobacco put into circulation within Greece regardless of its intended destination and that it affects tobacco destined for export, which is thus doubly taxed.

31. The Court does not have sufficient information to compare this tax with the impugned tax. Neither the IKA nor Greece referred to it in their observations. If the national court finds that Greek-cultivated unprocessed tobacco intended both for the home and export markets is subject to that tax, it is comparable in at least one respect to the impugned tax. However, the latter would then remain all the more clearly an impermissible tax on exports.

32. For Greece's contention to succeed, the national court must ultimately be satisfied of the precise comparability of the relevant taxes. Several points are noteworthy in this

31 — See, in particular, Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products; OJ 1992 L 76, p. 1.

32 — Article 10 of Legislative Decree 3758/1957 (FEK I, p. 184) is cited, along with several earlier laws, as providing the legal basis in Greek law for its application. The agent for the Commission, who described it as 'a tax on cultivation', was of the impression that it had been abolished and that its appellation alone had been retained in the 1992 Law.

respect. It was accepted in response to questions posed at the hearing that the impugned tax only applies to the exportation of unprocessed tobacco. It was agreed that the tax on land under cultivation has been abolished. The consumption tax referred to by the Greek Ministry of Finance clearly applies to retail sales of processed tobacco products in Greece and cannot, therefore, be comparable with a tax imposed on exported unprocessed tobacco.

33. Accordingly, in my view, it is clear that a charge such as the impugned tax constitutes a charge having equivalent effect to a customs duty on exports that is incompatible with the Treaty.

B — *The scope of the obligation to refund*

34. In the light of the view I have taken regarding the nature of the impugned tax, it is necessary to consider the national court's second question. It is clear from the wording of that question that the national court wishes to know whether Community law would permit a Member State to refuse to refund unlawfully levied charges in circumstances where it is established that an unjust enrichment would arise, and on whom the burden of establishing such a possible enrichment would lie.

35. There is no indication on the case-file suggesting that such an anti-unjust-enrichment principle would apply in respect of a similar claim for reimbursement of taxes based purely on national law. Moreover, Greece rightly accepts in its observations that a Member State is, in principle, obliged to reimburse taxes levied in violation of Community law and that, while it retains competence to determine both the courts before which such claims may be brought and the procedural rules applicable to them, the right of review available and rules applicable to its exercise must satisfy the requirements both of non-discrimination and effectiveness *vis-à-vis* those governing comparable claims based solely on national law. [33] It is for the national court to determine whether a fiscal reimbursement claim based purely on national law would be subject to satisfying a comparable condition to the effect that the person subjected to the charge did not actually pass on its financial burden. If no such condition would be imposed, then the defence of unjust enrichment invoked by the IKA to defend the reimbursement claim brought in the main proceedings by Kapniki must fail. [34]

36. The real recovery issue raised in the present case concerns the question of proof. There is no discussion in the order for reference of any findings of fact having been made by the national court regarding the passing on by Kapniki of the burden of

33 — See, *inter alia*, Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595 (hereinafter '*San Giorgio*'), Joined Cases C-192/95 to C-218/95 *Comateb and Others* v *Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165 (hereinafter '*Comateb*') and Case C-343/96 *Dilexport* [1999] ECR I-579.

34 — Kapniki forcefully submitted at the hearing that both Greek legislation and Council of State case-law precludes reliance on purported unjust enrichment to defeat claims by taxpayers for repayment of unlawfully levied charges.

the impugned tax. In its second question, it refers to Kapniki's failure to claim that the effect of passing on the charge caused it to suffer reduced sales. In its observations before this Court, the IKA claims that, to the extent that Kapniki has not alleged in its pleadings in the main proceedings that the effect of passing on the charge was to provoke a price increase and a corresponding reduction in its sales, it necessarily follows, once it is established that the charge has effectively been passed on, that an unjust enrichment would ensue if reimbursement were ordered. Greece, on the other hand, appears to assume that the national court has found that the burden of the tax was passed on by Kapniki, although at the hearing it submitted that the national court had assumed from the documents presented to it that the tax had been passed on.

37. I agree with Kapniki and the Commission that all exceptions to the taxpayer's prima facie right of reimbursement must be narrowly construed. In the absence of any clear indication in the order for reference of the existence of proof that Kapniki had passed on the burden of the charges in question, this fact cannot be presumed. The criteria to be borne in mind by national courts when considering whether passing on of an unlawful charge has occurred are well-established.

38. It has been clear since *Just* v *Ministry for Fiscal Affairs* that, subject to the requirements of non-discrimination and effectiveness, 'Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those entitled'. [35] A few years later, in *San Giorgio*, the Court confirmed *Just* by declaring that 'national legislative provisions which prevent the reimbursement of taxes, charges and duties levied in breach of Community law cannot be regarded as contrary to Community law where it is established that the person obliged to pay such charges has actually passed them on to other persons'. [36] Nevertheless, the Court confirmed recently in *Comateb* that a supposed fear of unjust enrichment may not genuinely be said to arise unless the burden of the charge in question has, in effect, been fully passed on by the taxpayer. [37] The Court continued that 'even where it is established that the burden of the charge has been passed on in whole or in part to the purchaser, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment', since, for example, the increase in the price of the products occasioned by adding on the charge may have provoked a decrease in sales. [38]

39. Furthermore, Community law also precludes the application of any presumptions or rules of evidence intended to shift the burden of establishing that the charge at issue has not been passed on to the taxpayer. In this respect, it suffices to recall the Court's recent statement in *Dilexport* that 'any rules of evidence which have the effect of making it virtually impossible or

35 — Case 68/79 [1980] ECR 501 (hereinafter '*Just*'), paragraph 26.

36 — Loc. cit., footnote 33 above, paragraph 13.

37 — Loc. cit, footnote 33 above, at paragraphs 27 and 28 in particular.

38 — Paragraph 29.

excessively difficult to secure repayment of charges levied in breach of Community law are incompatible with Community law' and that this would particularly be the case in respect of 'presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence'. [39] The Court explained how national-law procedural presumptions should be assessed: [40]

'If, as the national court considers, there is a presumption that the duties and charges unlawfully levied or collected when not due have been passed on to third parties and the plaintiff is required to rebut that presumption in order to secure repayment of the charge, the provisions in question must be regarded as contrary to Community law.

If, on the other hand, ... it is for the administration to show, by any form of evidence generally accepted by national law, that the charge was passed on to other persons, the provisions in question are not to be considered contrary to Community law.'

39 — Loc. cit., footnote 33 above, paragraph 48.

40 — Ibid., paragraphs 52 and 53.

40. In the present case, Kapniki asserts that the proof that it has effectively passed on the burden of the charge should be based not on the documents that it was obliged to submit to the fiscal authorities for the purposes of paying the impugned charge but, rather, on the contractual documents drawn up with the purchasers of the affected tobacco. However, since the question of whether a charge has been passed on constitutes a question of fact, it is for the national court to determine the documentary evidence which may be relied upon to establish if it has occurred. The application of national rules of evidence remains subject, of course, to the overriding Community-law requirement that vindication by the taxpayer of rights derived from Community law must always remain possible. To my mind, the fundamental principle of Community law requiring effective protection of Community rights requires that the evidence, documentary or otherwise, adduced by a national fiscal administration seeking to resist reimbursement must be cogent and probative and may not be based on mere presumptions. [41] It follows, therefore, that if an administration seeks to satisfy the burden of proof resting upon it by referring to official documents submitted in a required format by a taxpayer pursuant to the imposition of the impugned charge, it must be possible for that taxpayer to adduce commercial or other documentation showing that the charge,

41 — See, in this respect, paragraph 50 of the Opinion of Advocate General Jacobs in Case C-228/98 *Dounias* v *Ypourgou Oikonomikon* [2000] ECR I-577, where he took the view that national legislation restricting the calling of witnesses could, if their evidence were critical to a claimant's case, render impossible the exercise of its Community-law-derived rights. The Court agreed but (in its judgment of 3 February 2000) held that the legislation in question would only be incompatible with Community law if the claimant could not benefit from the exceptions and if adducing written evidence would not permit him to establish his case; see paragraphs 71 and 72.

or at least some of it, despite declarations to the contrary in such official documents, was not actually passed on.

41. Consequently, a Member State is obliged to refund a taxpayer the sum of charges levied in breach of Community law, unless the relevant tax administration establishes to the satisfaction of the national court or tribunal hearing the repayment claim that the taxpayer actually passed the charges on entirely to other persons and in so doing did not suffer, whether through reduced sales or profits, any consequential financial loss or damage.

C — *The temporal effects of the judgment*

42. The IKA submitted, for the first time, at the hearing that the Court should limit *ex nunc* the effects of its judgment if it decides that a charge such as the impugned tax is incompatible with Community law. The request was based on the important adverse financial effects for the financial stability of the IKA of having to reimburse the amounts collected. No details of these alleged financial difficulties were presented to the Court. Moreover, its application was vigorously opposed by Kapniki.

43. Interpretations of Community law given by the Court apply *ex tunc*. It is only in exceptional circumstances that the Court may, in the interest of the general principle of legal certainty which is inherent in the Community legal order, consider it appropriate 'to restrict for any person concerned the opportunity of relying upon the provisions thus interpreted with a view to calling in question legal relationships established in good faith'. [42] It is only the Court, 'in the actual judgment ruling upon the interpretation sought', which 'may allow' such a restriction. Although the practical consequences of its judgment must 'be weighed carefully', the Court will not permit legal objectivity to be diminished or the future application of Community law to be compromised 'on the ground of the possible repercussions which might result, as regards the past, from a judicial decision'.

44. In applying this exceptional principle, the Court has had regard to whether the relevant provision of Community law has already been interpreted by the Court and the extent to which the Commission might have contributed to any uncertainty regarding its interpretation. [43] No such factors are applicable in the present case. The Court's case-law defining the scope of the prohibition of charges having equivalent effect to a customs duty has been well-established since the late 1960s and has been fully applicable in the Hellenic Republic since its accession. To consider limiting the effects

42 — See Case 24/86 *Blaizot* v *University of Liège and Others* [1988] ECR 379 (hereinafter '*Blaizot*'), paragraphs 28 and 30, Case C-163/90 *Administration des Douanes et Droits Indirects* v *Legros and Others* [1992] ECR I-4625 (hereinafter '*Legros*'), paragraph 60 and Case C-437/97 *Evangelischer Krankenhausverein Wien* [2000] ECR I-11 (hereinafter '*Krankenhausverein*'), paragraph 57.

43 — See *Blaizot*, paragraphs 29 and 33, *Legros*, paragraphs 31 and 32 and *Krankenhausverein*, paragraph 58.

ratione temporis of Articles 9, 12 and 16 of the EC Treaty in Greece as regards the impugned tax would represent a major and, to my mind, unwarranted extension of what should remain a wholly exceptional judicial power. In any event, it must be for the Greek exchequer to redress any financial strain felt by social security institutions such as the IKA as a result of a judgment interpreting a charge such as the impugned tax in the instant case to be incompatible with Community law.

IV — Conclusion

45. In the light of the foregoing, I recommend that the Court answer the questions referred as follows:

(1) A charge levied by a Member State on the exportation of unprocessed tobacco to other Member States constitutes a charge having equivalent effect to customs duties on exports which is incompatible with Articles 9 and 12 of the EC Treaty (now, after amendment, Articles 23 EC and 25 EC) and Article 16 of the EC Treaty (repealed by the Treaty of Amsterdam), unless it is applied, in accordance with objective criteria and within the framework of a general system of taxation, to compensate for a comparable domestic charge affecting unprocessed tobacco which is applied at the same marketing stage, on the same basis of assessment, at the same rate and consequent to the same chargeable event as that affecting exports. The fact that the revenues generated from a charge affecting exports are used to finance social security contributions paid to workers involved in the industry concerned cannot

affect its characterisation as a charge having equivalent effect to a customs duty on exports;

(2) A taxpayer who has been obliged to pay a charge which constitutes a charge having equivalent effect to a customs duty on exports may only be precluded from claiming the repayment of the sums levied if the relevant tax administration is able to establish that the taxpayer passed on the entire financial burden of the charge to third parties and in so doing suffered, whether through reduced sales or profits, no consequential financial loss or damage.