OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 11 June 1991 *

Mr President,
Members of the Court,

1. Aliments Morvan S. à r. l. (hereinafter referred to as 'Morvan'), the applicant in the main proceedings, manufactures feedingstuffs for cereals. As such, it had to pay a parafiscal storage charge levied for the benefit of the Office National Interprofessionnel des Céréales (National Cereals Trades Board) (hereinafter referred to as 'ONIC') on the cereals which it utilized. Morvan applied for the charge to be repaid for the period 1 July 1986 to 31 May 1988 on the ground that the charge was contrary to Community law. When its application was dismissed by the tax authorities it brought proceedings before the Tribunal de Grande Instance (Regional Court), Morlaix, which has requested the Court to provide it, by way of preliminary ruling, with

'such guidance as to the interpretation of Community law as will enable it to determine whether the storage charge introduced by Decree No 53-975 of 30 September 1953, the period of application of which was extended by Decrees Nos 82-732 and 82-733 of 23 August 1982 and by Decree No 87-676 of 17 August 1987 and its implementing order of 14 March 1988, is compatible with Community law as interpreted by the Court'.

2. During the period to which the proceedings relate the essential characteristics of the charge in question were defined by Decrees No 82-732 of 23 August 1982 and No 87/676 of 17 August 1987 on the parafiscal storage charge in the cereals sector,[1] Articles 1 to 4 of which provided as follows.

'Article 1

The levying of a parafiscal charge intended to cover national expenditure for storage and intervention on the market in cereals shall be authorized for the . . . marketing year and the four subsequent marketing years.

That charge shall be levied on approved collectors and producers of cereals in respect of all quantities of common wheat, durum wheat, barley and maize sold or utilized. It shall also be levied on importers in respect of the quantities of those cereals imported.

That charge shall be wholly borne by the users and the proceeds shall be allocated to the Office National Interprofessionnel des Céréales.

1 — *Journal Officiel de la République Française* of 25 August 1982, p. 2644, and 19 August 1987, p. 9520.

* Original language: French.

Article 2

The following shall be exempt from the charge introduced by this decree:

— exported cereals;

— certified seed grain exchanged for cereals of ordinary quality, within the limit of a ceiling fixed by decree.

The charge shall be repaid in respect of cereals utilized in the manufacture of products eligible for the production refund provided for in Article 11 of Regulation No 2727/75 of the Council of the European Communities, as amended.

Where products derived from cereals are imported or exported, the charge shall be levied or repaid, as the case may be, taking account of the corresponding quantities of cereals laid down by the regulations of the European Economic Community.

Article 3

The chargeable event shall be the sale or utilization of the cereals by approved collectors or producers of grain or the importation of the cereals.

Article 4

The maximum rates of the charge shall be as follows:

— 0.30% of the intervention price for common wheat, barley and maize;

— 0.20% of the intervention price for durum wheat.'

3. The applicant in the main proceedings maintains that that charge constitutes either a charge having equivalent effect to a customs duty prohibited by Article 9 et seq. of the Treaty, or internal taxation with discriminatory effect within the meaning of Article 95, that it is incompatible with the machinery of the common agricultural policy and that it constitutes an aid prohibited by Article 92 of the Treaty. I shall examine those different aspects in turn.

The compatibility of the tax with Articles 9 and 95 of the Treaty

4. It appears from Article 9 of the Treaty establishing the EEC that the Community is to be based on a customs union which is to cover all trade in goods and to involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect.

5. That prohibition also applies in respect of products subject to a common organization of the market, so much so that such a prohibition no longer appears in the regulations on the common organization of the markets adopted after the end of the transitional period (the so-called 'definitive' regulations). Article 18(2) of Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (Official Journal 1975 L 281, p. 1), referred to by Morvan, which prohibits the levying of any customs duty or charge having equivalent effect, save as otherwise provided in that regulation or where derogation therefrom is decided by the Council, is to be found in Title II of that regulation, entitled 'Trade with third countries'.

6. Morvan maintains that the disputed charge has restrictive effects on both imports and exports. For the sake of clarity, I shall distinguish between those two aspects.

A — *Effects of the charge on imports of goods*

7. The Court has consistently held that the fact that a charge such as the one at issue in this case applied without distinction to domestic products and to products from other Member States raises the question whether the charge in question comes within the prohibition set out in Article 9 or the rule against discrimination in internal taxation laid down by Article 95. A single charge cannot, under the system of the Treaty, belong simultaneously to both those categories and in principle financial charges within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria are not to be considered charges having equivalent effect (see in particular the judgment in Case 77/76 *Cucchi* v *Avez* [1977] ECR 987, paragraph 12 et seq.).

8. According to Morvan, that is precisely not the case here because the chargeable event, and accordingly the machinery for the charge, are not the same. For domestic products the chargeable event is the sale or utilization of the cereals by approved collectors or producers of cereals, whilst for imported products it is purely and simply the fact of crossing of the frontier. Imported products are thus taxed at an earlier stage than domestic products.

9. I am unable to share that view, however. In my opinion, the situation is quite different from the facts of the case concerning excise duties imposed on alcohol in Ireland (judgment in Case 55/79 *Commission* v *Ireland* [1980] ECR 481), cited by Morvan. Irish spirits producers had the advantage of payment periods for exercise duty which exceeded the date on which the products were put on the market by four to six weeks, whilst importers were required to pay the duty at the time when the products were released for consumption.

10. It cannot be said that domestic producers benefit from a comparable advantage in the present case since the charge is payable at the time when the

product is either sold by approved collectors or utilized by producers of cereals. As regards domestic and imported products alike, the charge is imposed on the product at the time when it is released for consumption.

11. The circumstances in question are therefore different from those that formed the subject-matter of the judgment in the *Denkavit Loire* case,[2] where the charge in question was levied, in the case of domestic products, on the weight of unprepared product whilst imported products were taxed on the weight of finished product.

12. It is necessary, moreover, to reject Morvan's argument that the collection of the charge at the frontier involves inspections the cost of which will necessarily have to be borne by the importer, because, first, there is nothing to prove that any importer has been compelled to pay such costs and, secondly, it has also not been established that the levying of the charge on domestic cereals does not also require inspections.

13. I thus conclude that the charge is levied on domestic and imported products according to the same criteria.

14. In the second place, it follows from the case-law of the Court that a charge limited to particular products could, however, constitute a charge having equivalent effect if it had the *sole* purpose of financing activities for the specific advantage of the taxed domestic products so as to *make good* the fiscal charge imposed on them. Such a fiscal device would in fact only appear to be a system of internal taxation and accordingly could by reason of its protective character be termed a charge having an effect equivalent to customs duties, with the result that the prohibitions set out in Article 9 and Article 8 of the regulation on the common organization of the market in cereals would be applicable. According to the case-law of the Court, 'such a definition would nevertheless imply a clearly established connection between, on the one hand, the collection of a fiscal duty levied without distinction on the products in question, whether domestic or imported, and, on the other hand, the advantage which enures only for the benefit of the domestic products by reason of the proceeds of that same duty'. It is necessary 'that the charges imposed on the domestic product are made good in full' (judgment in the *Cucchi* case, paragraphs 18 and 19).

15. It appears from the decrees governing the parafiscal charge that it is 'intended to cover national expenditure for storage and intervention on the market in cereals' incurred by the Office National Interprofessionnel des Céréales. As ONIC acts as an intervention agency within the meaning of the regulation on the common organization of the markets in cereals, and as it follows from Article 7 of that regulation that 'the intervention agencies designated by Member States shall be obliged to buy in cereals . . . which are offered to them and have been harvested *in the Community*', it cannot be claimed that the proceeds of the charge are used to secure advantages for domestic products *alone*. Furthermore, the fact that those products may be delivered into intervention does not constitute an 'advantage' within the meaning of that case-law. That right derives from Community legislation.

2 — Judgment in Case 132/78 *Denkavit* v *France* [1979] ECR 1923.

16. The question whether the financing, in whole or in part, of ONIC's intervention and storage activities by producers and importers of cereals is compatible with the Community agricultural rules is a separate question, which will be examined later.

17. The Court of Justice of the European Communities may not, in preliminary-ruling proceedings, examine ONIC's balance-sheet and other factual evidence in order to establish whether the charge is actually used for the purpose claimed or whether it is, on the other hand, repaid to domestic producers in one form or another (for example, aids to increase productivity of domestic production, attempts to improve quality, advertising for the benefit of French products alone). It is for the national court before which the main proceedings were brought to decide whether any evidence which may have been submitted to it in support of that argument is cogent. If it is, that court must declare that the charge in question is a charge having equivalent effect to a customs duty contrary to the Treaty.

18. A particular problem arises with regard to the starch products referred to in Article 11 of Regulation No 2727/75 (starch and glucose). The second paragraph of Article 2 of the French decrees in issue provides that the parafiscal charge is to be repaid for cereals utilized in the manufacture of those products. The third paragraph of that provision provides, *inter alia*, that 'Where products derived from cereals are imported or exported, the charge shall be levied or repaid, as the case may be, taking account of the corresponding quantities of cereals laid down by the regulations of the European Economic Community'.

19. Should it prove that during the material period the storage charge was levied on the products derived from cereals referred to in Article 1 of Regulation No 2727/75 in proportion to the quantity of maize, common wheat or maize groats and meal used in their manufacture, and that the charge was repaid to French producers of those goods, then one would be faced with a charge having equivalent effect unlawfully imposed on imports of the goods in question.

20. Subject to that particular problem, I thus come to the conclusion that the charge in question constitutes a charge having equivalent effect only if — and this is purely hypothetical — the proceeds are wholly repaid in the form of advantages which accrue to French producers only.

21. If the parafiscal charge is not a charge having equivalent effect to a customs duty, it constitutes internal taxation coming within Article 95 of the Treaty. Therefore, in order to be compatible with the Treaty it must not have a discriminatory effect on imported products. It has not been claimed that the rate of the charge imposed on imported products is higher than that imposed on domestic products. Admittedly it is necessary to take into consideration, for the purposes of the application of the rule against discrimination set out in Article 95, not only the rate of the charge, but also the provisions relating to the basis of assessment and the rules for levying the various charges (see in particular the judgment cited above in *Commission* v *Ireland*, paragraph 8). In that respect, however, the only argument put forward regarding the discriminatory nature of the charge is the one claiming that it is levied on imported products at an earlier stage than on domestic products, an argument which I have already rejected.

22. Consequently, any possible discrimination could exist only if the charge was repaid *in part* to domestic producers or if, as regards *part* of its amount, advantages were conferred on domestic producers alone. It is for the national court to examine whether that is so.

B — *The effects of the charge on exports*

23. According to Morvan, the storage charge is also a charge having equivalent effect to a customs duty on exports. It refers in that respect to the Court's judgment in Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association* v *Ireland* [1981] ECR 735, paragraph 23, which reads as follows:

'It is appropriate to point out . . . that in so far as it may be established that application of an internal duty falls more heavily on sales for export than on domestic sales, that duty has an equivalent effect to a customs duty on exports.'

24. Morvan accepts that cereals exported unprocessed are exempt from the storage charge, but maintains that in reality the equivalent effect to a customs duty on exports occurs not in connection with exports of cereals but in connection with exports of the products of the persons subject to the charge, namely domestic users of cereals. That is precisely the situation regarding producers of feedingstuffs.

25. In that respect, it should first be observed that it appears from the last paragraph of Article 2 of the decrees in question that:

'Where products *derived from* cereals are imported or exported, the charge shall be levied or repaid, as the case may be, taking account of the corresponding quantities of cereals laid down by the regulations of the European Economic Community'.

26. At the hearing, Morvan produced an order of the French Minister of Agriculture of 14 March 1988 (*Journal Officiel de la République Française* of 10 April 1988, p. 4750), which confirms that when processed products, and even goods not coming within Annex II of the Treaty of Rome, derived from common wheat, durum wheat, barley and maize are exported, the charge is repaid. I find it very surprising that the charge should be repaid in respect of cereals incorporated in biscuits or pasta products but not in respect of those incorporated in feedingstuffs.

27. However, since there was no discussion between the parties to the proceedings regarding the tariff heading or headings under which animal feedingstuffs come, I am unable to reach any definitive view on this matter on the basis of the annexes to that ministerial order.

28. In any event, that question is irrelevant for purposes of the resolution of the main proceedings, because even if the charge was not repaid on exports of feedingstuffs, the

fact remains that the amount imposed on feedingstuffs is exactly the same as the amount imposed on feedingstuffs sold on the French domestic market. In other words, the charge only affects 'produce intended for export in the same way as produce sold on the home market'[3] and thus does not constitute a charge having an equivalent effect to a customs duty on exports.

Compatibility of the charge with the common organization of the markets

29. Morvan asserts that the charge is contrary to the principle according to which all intervention expenditure is to be financed by the Community. It refers to Article 2 of Council Regulation (EEC) No 1883/78 of 2 August 1978 laying down general rules for the financing of interventions by the European Agricultural Guidance and Guarantee Fund, Guarantee Section,[4] which provides that:

'where, within the framework of a common organization of the market, a sum per unit is determined for an intervention measure, the resulting expenditure shall be met entirely by Community funds'.

30. That provision must be read in conjunction with Article 6 of the same regulation, according to which:

'Material operations arising from the storage and, where appropriate, processing of intervention products shall be financed by the EAGGF, Guarantee Section, by means of standard amounts uniform throughout the Community, to be laid down in accordance with the procedure provided in Regulation (EEC) No 729/70 and, where necessary, after examination of the matter by the management committee concerned'.

31. Morvan does not dispute, however, that, during the period in respect of which repayment of the charge is requested, Council Regulation (EEC) No 1334/86 of 6 May 1986,[5] which, in the context of budgetary constraints, restricts the EAGGF's responsibility to 75% of the costs in question, was applicable.

32. It is thus clear that a balance remains to be paid by the Member States. That being so, it is not necessary to comment on the arguments of the French Government, which claims that the charge is used to cover the difference between the actual costs incurred by the national agency and the flat-rate amount paid by the Fund, a difference which arises because the Fund applies an average interest rate lower than the rates actually in force in France, whereas Morvan vigorously disputes that claim. Suffice it to say that there are storage costs which the Member States have to bear under Community law and that it follows from the Decree of 1987 concerning the charge that the aim of the charge is to pay those costs.

3 — See judgment in Case 222/82 *Apple and Pear Development Council* v *Lewis* [1983] ECR 4122, paragraph 30.

4 — OJ 1978 L 216, p.1.

5 — OJ 1986 L 119, p. 18.

33. However, according to Morvan, the national authorities cannot be authorized to pass on that residual charge to traders, since that would create distortions of competition and deflections in trade which are incompatible with the rules of the common organization of the markets. Those are precisely the effects of the disputed charge. What is to be made of that claim?

34. With more particular reference to the observations submitted by the French Government and to the judgments to which it refers, it can be said that it follows from the case-law of the Court that a contribution levied on agricultural producers (most often on the basis of the areas cultivated by them for certain products) or an indirect tax expressed as a percentage of the value of a product is compatible with the common organization of the markets only where the following conditions are observed.

35. First of all, the measure must not be used to finance activities which are themselves regarded as being contrary to Community law (see in particular the judgment in the *Apple and Pear Development Council* case, cited above). As I have already pointed out, it is for the national court to determine whether part of the resources resulting from the storage charge are allocated for such activities.

36. Secondly, the levies or charges must not have the effect of interfering with the functioning of the machinery established within the framework of the common organization of the markets for the fixing of *common* prices and to regulate market supply (see the judgment in the *Irish Creamery Milk Suppliers Association* case, cited above).

37. A charge such as that at issue in the main proceedings can obviously have no effect on the *fixing* of the *common* prices (target price, threshold price, intervention price) which are adopted by the Council. Nor does it prevent a producer delivering cereals to ONIC from obtaining the intervention price. It is true that, in that case, the storage charge is not repaid to him and therefore continues to be borne by him. However, in its judgments in the *Irish Creamery Milk Suppliers Association* case, cited above, and in Case 297/82 *Samvirkende Danske Landboforenigen* v *Ministry of Fiscal Affairs* [1983] ECR 3299, the Court declared that:

'the fixing of common prices within the framework of the common organization of markets does not serve to guarantee to agricultural producers a net price independently of any taxation imposed by the national authorities'.

That argument thus cannot be upheld.

38. In the judgment in the *Irish Creamery* case, however, the Court also referred, in the grounds but not in the operative part, to the effect which a charge may have on the *market* price which is itself left to the free play of supply and demand and which may vary from one part of the Community to another.

39. In paragraph 20 of that judgment, the following may be read.

'The essential aim of the machinery of the common organizations in question is to

achieve price levels at the production and wholesale stages which take into account both the interests of Community production as a whole in the relevant sector and those of consumers, and which guarantee market supplies without encouraging over-production. Those aims might be jeopardized by national measures adopted unilaterally, which have an *appreciable influence*, even if unintentionally, on price levels on the national market at the same stage, or on supplies on that market. In the case of a duty such as the one in this case, the risk of such influence *depends* not only *on its rate* and the period for which it is in force, but equally on the situation on the market in question and, as regards supplies, above all on how general its effect is, that is to say, the number of agricultural products to which it applies. A short-term duty on a large number of products may be neutral in the sense that it does not alter the structure of agricultural production. On the other hand, if the duty encourages producers to replace some of the production of the goods subject to the duty by production of other goods not subject thereto, the duty is liable to create distortion on a number of markets.'

40. Similar wording is to be found in the judgment in Case 297/82 *Samvirkende Danske Landboforenigen*, cited above.

41. In the present case, it may be asked whether, by making cereals more expensive, the charge might encourage feedingstuffs manufacturers to turn to substitute products and thus cause cereal producers to lose outlets. Feedingstuffs manufacturers might, in particular, be encouraged to use substitute products for the part of their production intended for export if the charge imposed on processed cereals was not repaid in respect of feedingstuffs. On the other hand, French breeders, and more particularly poultry breeders, might be encouraged to give preference to feedingstuffs not containing cereals.

42. Clearly, it is not for the Court, within the framework of a reference for a preliminary ruling, to embark upon an appraisal of the effects that the charge may have had on the production and marketing of cereals. That is something that can be done only by the national court.

43. It should be emphasized in that respect that, contrary to the situation regarding charges having equivalent effect to customs duties where the Court declares that 'any pecuniary charge — however small' [6] imposed on goods at the time of crossing the frontier is unlawful, it has regarded only internal taxation exerting an *appreciable influence* on the level of market prices as being contrary to the aims of the common organization of the markets, while at the same time indicating a whole series of parameters that must be taken into consideration.

44. The mere fact that the use of cereals for the manufacture of compound feedingstuffs may have declined in a particular Member State has not necessarily been the result of a charge which, throughout the period in question, has not exceeded 0.30% of the intervention price for common wheat, barley and maize and 0.20% of the intervention price for durum wheat.

6 — See, in particular, the judgment in Joined Cases 2/69 and 3/69 *Sociaal Fonds Diamantarbeiders* v *Brachfeld* [1969] ECR 211.

45. In so far as substitute products were imported from non-member countries, the movement of the prices of those products on the world market and fluctuations in the exchange rates of the currencies in which they were paid for may have exerted an influence equal to or greater than that of the storage charge.

46. It will also be necessary to consider whether the substitute products were not subject to another charge at a more or less equivalent level. The consequences arising from the storage charge will thus not be easy to assess.

The compatibility of the charge with Article 92 of the Treaty

47. According to the plaintiff in the main proceedings, the storage charge constitutes on two counts an aid prohibited by Article 92 of the Treaty.

48. Morvan takes the view, first, that the repayment of the charge on cereals used in the manufacture of the starch products eligible for the production refund provided for in Article 11 of Regulation No 2727/75 constitutes such an unlawful aid.

49. I have already indicated that if starch products imported into France are subject to the charge, then the repayment made in favour of home-produced starch products has the effect of transforming the charge levied on imports into a charge having equivalent effect to a customs duty.

50. If, on the other hand, imported starch products are not taxed, I do not understand why the repayment of the charge to French producers of starch products should call for criticism, since it is of no account whether those products are consumed in the country or exported. Since *ex hypothesi* no comparable charge exists in the other Member States, the fact that cereals processed in France into starch products are released from that charge does not create any distortion in competition in intracommunity trade; it actually puts French products back in the same situation as competing products produced in other Member States.

51. I would also note that, in so far as French starch products are exported, the repayment of the charge is lawful provided that it does not exceed the amount previously levied. Article 96 of the Treaty provides only that 'where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly'. I therefore take the view that the refund in question does not constitute aid which is incompatible with the common market.

52. I would add that if the repayment of the charge were an unlawful aid, it would already have been so at the time when the Community rules made provision for the production refunds to be granted in respect of starch products, since that repayment was made in addition to the refund. Furthermore and above all, it does not follow that the entire machinery of the storage charge is contrary to Community law, as Morvan claims. All that would be required to regularize the situation would be to abolish the

repayment of the charge in respect of starch products.

53. In the second place, Morvan maintains that the charge constitutes 'an aid to the operation of ONIC which is unlawful because it was not notified to the Commission, and substantively unjustified' (p. 48 of its observations).

54. In that respect, it must be emphasized that until the contrary is proved it must be taken that the storage charge is used to finance that part of ONIC's activities which consists in buying in, at the intervention prices fixed by the Council, and storing the cereals which are offered to it, no matter what their origin. If the part of the administrative expenditure incurred by that activity which is not reimbursed by the Fund were not financed by the storage charge, it would have to be covered by the budget of the French State. That financing must thus take place in any event and cannot constitute an aid prohibited by Article 92.

55. Commission Decision 90/189/EEC of 11 October 1989 on aid granted in the Netherlands and financed by means of levies payable by the Produktschap voor Landbouwzaaizaden (Commodity Board for the Seed Sector) (Official Journal 1990 L 101, p. 38), on which Morvan relied in support of its argument, is not relevant to this case. There is an essential difference between the two situations: the charge levied in the Netherlands was to enable national research to develop new products, which inevitably constituted expenditure from which imported produce was not capable of benefiting in the same way as domestic produce.

56. Article 92 of the Treaty must thus be interpreted as meaning that it precludes neither the levying nor the repayment of a charge displaying the features of the one at issue in the main proceedings.

Conclusion

57. In the light of all the foregoing considerations, I suggest that the Court should reply to the national court's question as follows.

Community law must be interpreted as meaning that it precludes a charge such as the one at issue in the main proceedings where:

— the financial resources coming from the charge are assigned in whole or in part to expenditure for the exclusive benefit of national producers;

— the charge is levied on imports of products derived from cereals, but repaid in respect of manufacture of the same derived products on the national territory;

— the charge has the effect of interfering with the operation of the machinery provided for within the framework of the common organization of the markets in question.