JUDGMENT OF THE COURT
27 October 1993 *

In Case C-72/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht (Administrative Court), Frankfurt am Main, for a preliminary ruling in the proceedings pending before that court between

Herbert Scharbatke GmbH

and

Federal Republic of Germany, represented by the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry)

on the interpretation of Articles 9, 12, 92 and 95 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse and M. Zuleeg, Judges,

Advocate General: G. Tesauro
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

* Language of the case: German.

— Herbert Scharbatke GmbH, by Lutz Liebenau, of the Ladenburg Bar,

— the Federal Republic of Germany, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

— the Commission of the European Communities, by Richard Wainwright, Legal Adviser, and Angela Bardenhewer, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Herbert Scharbatke GmbH, the Federal Republic of Germany and the Commission at the hearing on 20 April 1993,

after hearing the Opinion of the Advocate General at the sitting on 18 May 1993,

gives the following

Judgment

1 By an order of 11 December 1991, received at the Court on 9 March 1992, the Verwaltungsgericht, Frankfurt am Main (Republic of Germany), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions concerning the interpretation of Articles 9, 12, 92 and 95 of the EEC Treaty.

2 Those questions arose in proceedings between Scharbatke GmbH (hereinafter 'Scharbatke') and the Federal Republic of Germany relating to the legality of a compulsory contribution which is levied in Germany upon presentation for inspection of meat from pigs slaughtered for commercial purposes and which is credited to a Fund for the marketing of agricultural, forestry and food products (hereinafter 'the Fund').

3 The German Law of 26 June 1969 (BGBl. I, p. 635), in the version published in the official notice of 8 November 1976 (BGBl. I, p. 3109), provides for the establishment of a Fund to promote the marketing of German agricultural, forestry and food products. Under Article 2 of that Law, the purpose of the Fund is 'to promote, from a central point, the marketing and use of German agricultural, forestry and food products by opening up and developing domestic and foreign markets through the use of modern methods and techniques'.

4 Article 10, relating to the financing of the Fund, provides for the payment of appropriations by the Federal authorities and the levying of contributions on the agricultural, forestry and food sector. The same provision sets the contribution from undertakings presenting for inspection meat from pigs slaughtered for commercial purposes at DM 1 per pig.

5 The plaintiff in the main proceedings operates a wholesale meat business and a slaughterhouse in Germany. In 1985 it presented a number of slaughtered pigs for inspection. It appears from the order for reference that most of the pigs came from the Netherlands, where they had been subject to a national charge intended to finance measures to promote Netherlands products, which was disregarded when the contested contribution was paid, and that Scharbatke marketed the pork in Germany under a trade description indicating the country of origin of the animals.

6 The German authorities issued a notice to Scharbatke demanding payment of an amount corresponding to the contribution due under the Law of 26 June 1969, cited above. Following the rejection of its objection, Scharbatke commenced proceedings before the Verwaltungsgericht, Frankfurt am Main, for annulment of that demand for payment.

7 As it had serious doubts as to whether the contribution in question was compatible with the Treaty, the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does a national charge levied on pork imported from another Member State and marketed under a trade description that alludes to the slaughtered animals' country of origin qualify as a "charge having equivalent effect" within the meaning of Articles 9 and 12 of the EEC Treaty if, although levied on domestic meat as well, the charge is assigned entirely to a fund whose sole statutory purpose is to promote the sale and use of products from the domestic agricultural, forestry and food industry?

2. If not, does a charge as described in Question 1 qualify as "indirectly [imposed] ... internal taxation ... in excess" within the meaning of the first paragraph of Article 95 of the EEC Treaty, or as "internal taxation of such a nature as to afford indirect protection to other products" under the second paragraph of Article 95 of the EEC Treaty if, prior to importation, the slaughtered animals were subject to a similar charge in their country of origin which was disregarded for the purpose of levying the charge in the country of importation?

3. Is a national court authorized to determine whether the levying of a national charge as described in Question 1 is compatible with Community law under Article 92 of the EEC Treaty when the plaintiff shows conclusively in the national proceedings that he suffers discrimination owing to a national aid scheme inasmuch as he is obliged, by paying the charge, to contribute to financing the aid and yet, as an importer, does not belong to the class of persons entitled to receive it?

4. If Question 3 is answered in the affirmative, does the financing of the fund described in Question 1 above from charges levied on pork from other Member States represent an indirectly protectionist arrangement, comparable in its operation to a protectionist aid scheme for the purpose of Article 92 of the EEC Treaty? Is such an arrangement incompatible with the common market under Article 92? Is such an arrangement therefore prohibited under Article 92 in the same way as a comparable protectionist aid scheme?'

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the national legislation at issue and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Articles 9, 12 and 95 of the Treaty

9 In its first two questions, the national court seeks in essence to ascertain whether Articles 9, 12 and 95 of the Treaty preclude the levying of a compulsory contribution which constitutes a parafiscal charge imposed according to the same conditions on domestic and imported products alike, to be paid into a fund whose activities are for the benefit of domestic products alone.

10 As the Court has consistently held (see, in particular, the judgments in Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest* [1992] ECR I-1847, paragraph 27, and in Case C-17/91 *Lornoy* [1992] ECR I-6523, paragraph 21), if the advantages stemming from the use of the revenue from a contribution which constitutes a parafiscal charge fully offset the burden borne by the domestic product when it is placed on the market, that contribution constitutes a charge having an effect equivalent to customs duties, contrary to Articles 9 and 12 of the Treaty. If those advantages only partly offset the burden borne by domestic products, the charge in question is subject to Article 95 of the Treaty. In the latter case, the charge would be incompatible with Article 95 of the Treaty and is therefore prohibited to the extent to which it discriminates against imported products, that is to say to the extent to which it partially offsets the burden borne by the taxed domestic product.

11 It is also well-established case-law that it is for the national court to determine whether the burden borne by the domestic product is wholly or partly offset by the use of the revenue from the charge in question (Joined Cases C-149/91 and C-150/91 *Sanders* [1992] ECR I-3899 and in *Compagnie Commerciale de l'Ouest* and *Lornoy*, cited above). It is also for the national court to establish, in conjunction with the other national authorities concerned, the extent of any discrimination against imported products.

12 The German Government maintains that the Fund's activities are aimed at promoting finished food products for the benefit of the final consumer, irrespective of whether those finished products have been manufactured from domestic or imported basic products. In its view, the Fund's activities benefit both domestic and imported products.

13 It must be observed on that point that the questions referred to the Court relate only to a parafiscal charge, the revenue from which is for the benefit of domestic products alone.

14 In its second question, the national court also asks whether a parafiscal charge of that kind at issue in the main proceedings constitutes internal taxation prohibited by Article 95 of the Treaty when a similar charge which has already been levied on the same products in the exporting State has not been taken into account.

15 It must be observed in that regard that although under the system of value added tax (VAT) and on the basis of the harmonization rules in this field the VAT paid in the exporting Member State must be taken into account, as stated in the judgment in Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, that solution cannot be applied to charges regulated by independent national legislation, such as those at issue in the main proceedings.

16 In the light of the foregoing considerations, the answer to the national court's questions must be that a compulsory contribution constituting a parafiscal charge applied under the same conditions as regards its collection to both domestic and imported products, the revenue from which is used for the benefit of domestic products only, so that the advantages accruing from it wholly offset the burden borne by those products, constitutes a charge having an effect equivalent to customs duties prohibited by Articles 9 and 12 of the Treaty. If those advantages only partly offset the burden borne by domestic products, the charge constitutes discriminatory internal taxation prohibited by Article 95 of the Treaty. The mere fact that the charge is levied on imported products without deduction of a domestic

charge, similar in kind but regulated independently by national legislation which was imposed on the same products in the exporting Member State, does not render the charge incompatible with Article 95 of the Treaty.

Article 92 et seq. of the Treaty

17 In its last two questions the national court seeks in substance to ascertain whether the levying of a parafiscal charge of the kind at issue in the main proceedings may constitute, as a method of financing State aid, an arrangement prohibited by Article 92 of the Treaty and whether a national court is authorized to verify whether the levying of such a charge is compatible with the provision in question.

18 As the Court has stated on several occasions, although a parafiscal charge may fall within the scope of Article 12 or Article 95 of the Treaty, the use to which the revenue from that charge is put, for the benefit of domestic products, may nevertheless constitute State aid incompatible with the common market, if the conditions for the application of Article 92 of the Treaty, as interpreted by the Court in previous decisions, are met (*Compagnie Commerciale de l'Ouest*, *Sanders* and *Lornoy*, cited above).

19 However, the Court has consistently held that the incompatibility of State aid with the common market is neither absolute nor unconditional. The intention of the Treaty, in providing through Article 93 for aid to be kept under constant review and supervised by the Commission, is that the finding that an aid may be incompatible with the common market is to be determined, subject to review by the Court, by means of an appropriate procedure which it is the Commission's responsibility to set in motion. Individuals cannot therefore simply, on the basis of Article 92 alone, challenge the compatibility of an aid with Community law before national courts or ask them to decide as the main or a subsidiary issue on any incompatibility (Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557, in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595 and *Compagnie Commerciale de l'Ouest*, *Sanders* and *Lornoy*, cited above).

20 The answer to the national court's questions must therefore be that the collection of a contribution constituting a parafiscal charge of the kind at issue in the main proceedings may, depending on how the revenue from it is used, constitute State aid incompatible with the common market if the conditions for the application of Article 92 of the Treaty are met, that being a matter which the Commission alone is competent to determine in accordance with the procedure laid down for that purpose in Article 93 of the Treaty and subject to review by the Court.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the the Verwaltungsgericht, Frankfurt am Main (Federal Republic of Germany), by order of 11 December 1991, hereby rules:

1. A compulsory contribution constituting a parafiscal charge applied under the same conditions as regards its collection to both domestic and imported products, the revenue from which is used for the benefit of domestic products only, so that the advantages accruing from it wholly offset the burden borne by those products, constitutes a charge having an effect equivalent to customs duties prohibited by Articles 9 and 12 of the EEC Treaty. If those advantages only partly offset the burden borne by domestic products, the charge constitutes discriminatory internal taxation prohibited by Article 95 of the Treaty. The mere fact that the charge is levied on imported products without deduction of a domestic charge, similar in kind but regulated independently by national legislation which was imposed on the same products in the exporting Member State, does not render the charge incompatible with Article 95 of the Treaty.

2. The collection of a parafiscal charge of that kind may, depending on how the revenue from it is used, constitute State aid incompatible with the common market if the conditions for the application of Article 92 of the Treaty are met, that being a matter which the Commission alone is competent to determine in accordance with the procedure laid down for that purpose in Article 93 of the Treaty and subject to review by the Court.

Due Mancini Moitinho de Almeida Diez de Velasco

Edward Kakouris Joliet

Schockweiler Rodríguez Iglesias Grévisse Zuleeg

Delivered in open court in Luxembourg on 27 October 1993.

J.-G. Giraud O. Due

Registrar President