OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 11 July 1991 *

Mr President,
Members of the Court,

The present proceedings are concerned with circumstances which crop up with some frequency in the case-law of the Court: parafiscal charges specifically appropriated to a public body in order to finance its activities.

The payment in question is a charge levied on petroleum products when they are placed on the French market. The charge was introduced by the French Republic by two decrees (No 78-903 of 30 August 1978 and No 78-1043 of 2 November 1978) in order to offset the fall in the price of petroleum brought about by a fall in the rate of exchange of the dollar (the currency of settlement for dealings in oil) so that the final price of petroleum products remained unchanged.

It should be observed that the charge was payable irrespective of whether product was of domestic or foreign origin. Moreover, there was no difference in the conditions applied to domestic and foreign products as regards the basis of assessment, the rate of the charge and other matters relating to collection.

However, the charge, being a parafiscal charge, was appropriated to a particular purpose. The proceeds of it accrued by law to the Agence pour les Economies d'Energie (Energy Saving Agency, hereinafter referred to as 'the AEE'), a public body operating in the industrial and commercial sector under the supervision of the Minister for Energy. By virtue of the national provisions then in force, the AEE was required to use the financial resources resulting from the charge to take action designed to encourage energy savings and rationalize the use of insufficiently exploited energy resources.

Considering that the system of charges was unlawful in several respects under both domestic and Community law, the appellants in the main proceedings, which import and market petroleum products in France, instituted legal proceedings to recover the sums paid by them. When the case came before it, the Cour d'Appel, Poitiers considered it necessary to stay the proceedings and refer a number of questions to the Court of Justice as to the compatibility of the system of charges in question with a wide range of Treaty provisions, namely Articles 3, 5, 6, 12, 13, 30, the first paragraph of Article 31, the first paragraph of Article 32, 37, 92 and 95.

Quite apart from the legislative references in the questions from the national court, the essential points that the Court is asked to clarify are fairly clear. A ruling is required on the compatibility of the parafiscal charge at issue with five distinct groups of provisions relating respectively to: the prin-

* Original language: Italian.

ciples of the Community, measures having equivalent effect, charges having equivalent effect and discriminatory internal taxation, commercial monopolies and, finally, the provisions on State aids.

(a) *The principles*

This aspect raises few difficulties and can, I think, be disposed of quite rapidly. In the first place, it is clear that both Article 3, which identifies the fundamental activities of the Community, and Article 6, which lays down the principle of coordination of national economic policies, are prospective in character and do not therefore ranks as provisions which lay down specific, unconditional obligations for the Member States.

They are, therefore, provisions which do not produce direct effects for the purpose of governing a particular legal relationship.

The situation regarding the application of Article 5 is only slightly more complex. As a rule, that provision has no direct effect:[1] in my view wrongly so, but I do not think it appropriate to examine the question in detail in this opinion. It seems to me that it can at least be argued that that article, in particular its second paragraph, may be a self-sufficient legal provision from which subjective legal rights may be derived. It is certain, however, that Article 5 is intended in any event to come into play only on an entirely residual basis. Normally, a measure that is incompatible with the second paragraph of Article 5 will fall within the scope of some other, more specific prescriptive provision of the Treaty. In such cases, it will be the special provision that must be applied and not the prohibition laid down by the second paragraph of Article 5. That seems precisely to be the position in the present case, since the Treaty contains specific provisions which enable a proper assessment to be made of the contested system of charges.

I therefore consider that, regardless of the problem of its direct effect, Article 5 is not relevant to the present case.

(b) *Measures having equivalent effect*

The appellants in the main proceedings and the Commission are of the opinion that the contested parafiscal charge may be declared incompatible with Article 30 of the Treaty. In particular, the Commission, whilst expressly recognizing that Article 30 is not applicable to the charge as such, observes that it forms an integral part of a system of controlled prices, all the components of which are defined by authority of the French Government. In that context, it may be concluded that the introduction of the charge in question at least had the effect of impeding imports of the products concerned.

1 — See the reply to parliamentary question No 1144/82 (OJ 1982 C 312, p. 23). In the case-law, see in particular the judgment in Case 9/73 Schlütter [1973] ECR 1162 which, on a closer reading, does not however seem to me to be decisive on this point.

Let me say straight away that I do not believe that that argument can be accepted, for two reasons: one relates to the relationship between Article 30 and the other provisions of the Treaty, in particular those specifically concerned with national measures relating to taxes, and the other relates to the substance of the arguments expounded by the Commission and the appellants in the main proceedings.

With respect to the first reason, I would point out first of all that Article 30 is, of course, a pivotal provision amongst those governing the free movement of goods, and constitutes a *lex generalis* in relation to other specific provisions including, in particular, those relating to taxes and charges having equivalent effect. As the Court recognized in its judgment in *Ianelli and Volpi*: [2]

'However wide the field of application of Article 30 may be, it nevertheless does not include obstacles to trade covered by other provisions of the Treaty. In fact, since the legal consequences of the application or of a possible infringement of these various provisions have to be determined having regard to their particular purpose in the context of the objectives of the Treaty, they may be of a different kind and this implies that their respective fields of application must be distinguished, except in those cases which may fall simultaneously within the field of application of two or more provisions of Community law. Thus, obstacles which are of a fiscal nature or have equivalent effect and are covered by Articles 9 to 16 and 95 of the Treaty do not fall within the prohibition in Article 30'.

2 — Case 74/76 [1977] ECR 577, paragraph 9.

That wording, which has been consistently confirmed in subsequent decisions, is wholly unequivocal. It indicates that Article 30 and the provisions on charges having equivalent effect and discriminatory internal taxation apply *on an alterative basis*; thus, where the Treaty requirements are fulfilled, it will be the latter provisions that must be applied and not the one concerning charges having equivalent effect.

It is true that in its judgment in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509 the Court advanced the hypothesis that, in certain circumstances, an internal tax not contravening Article 95 may be examined in the light of Article 30. However, the case to which the judgment related displayed two specific features: first, the tax at issue escaped the prohibition in Article 95 in that there was no domestic production whatsoever which competed with or was similar to the taxed imported product; secondly, it was necessary to establish whether, in such circumstances, the amount of the tax was so great as to impede the movement of goods within the Community. My view, however, is that that case is confined to its own facts.

In particular, where — as in the present case — there is a domestic product competing with or similar to the taxed imported product, all that is necessary to determine is whether or not the charge has discriminatory effects. The legality of the charge must therefore be assessed solely in the light of Article 95 (or possibly Articles 9 and 12, as will be shown shortly), and not in the light of Article 30. Otherwise, the

latter provision would be disproportionately extended and turned into a 'master' provision not fitting into the scheme of the Treaty which, taking for granted the fiscal sovereignty of the Member States, laid down *special* conditions, in Article 95 et seq., governing national measures concerning taxation.

In that regard I cannot hide my puzzlement at the approach taken by the Court in *Commission* v *Denmark* where it advances the hypothesis of the applicability of Article 30 without even addressing the problem of the possible relevance of Articles 9 and 12, that case being concerned with pecuniary charges levied on imports. However, in any event, I consider that, leaving aside the exceptional hypothesis considered in *Commission* v *Denmark*, Article 30 cannot come into play in a role subsidiary to that of the tax provisions of the Treaty.

As far as the present case is concerned, I would emphasize that both the Commission and the appellants in the main proceedings agree in their contention that the contested parafiscal charge falls within the scope both of *Articles 9 and 12* and of *Article 95*.

I think that that view — which seems in principle to be well founded — is a sufficient basis for ruling out any appraisal of the contested charge by reference to the general provisions of Article 30 of the Treaty.

But even if one were unwilling to subscribe to those views on matters of principle, there is, as I said earlier, another reason which leads me to the conclusion that Article 30 is not applicable to the present case. To better illustrate the grounds for that conclusion it is appropriate to examine in detail the reasoning of the Commission in particular. The latter's observations include data concerning the fixing of prices for petroleum products which illustrate the situation that obtained before and after the introduction of the contested charge. That information shows that, when the charge was introduced, the 'ex-refinery price', which is the basis on which the final price is worked out, was reduced by an amount equal to the incidence of that charge.

It must also be noted that that reduction in the 'ex-refinery price' represented, as is apparent from the decrees which introduced the charge, nothing more than an adjustment prompted by the fall in the price of crude oil, which in turn derived from the fall in the parity of the dollar. Nevertheless, that change in the French regulated price went 'against the trend' set by the prices of petroleum products on the international markets. As emerged at the hearing, that discrepancy appears to be attributable to the fact that traders on the international markets, taking advantage of a favourable economic situation and not being subject to a regulated price system, chose to keep the selling prices of petroleum products unchanged (increasing their profit margins) rather than reduce prices by passing on the benefit of the fall in the cost of crude resulting from the fluctuating value of the United States dollar.

That combination of circumstances could, however, have had the perverse effect of creating serious difficulties for those importing into the French market. The latter in fact had to cope with unchanged

purchase prices on the international markets (whilst the ex-refinery price on the domestic French market had fallen, as has been stated, in order to take account of the fall in the dollar parity) and at the same time they saw their profit margin cut by the contested parafiscal charge. Faced with that situation, therefore, importers found it impossible to achieve profitable sales at the price level fixed by the French Government and therefore had to reduce their imports drastically.

Whilst taking note of this complex factual background (which ultimately is a matter to be verified by the national court), I do not think that it provides a basis for concluding that the charge in question is incompatible with Article 30. The criticism levelled at the French Government is that it fixed the price of petroleum products at too low a level for imports to be profitable. However, even if the final price was actually, during the period in question, at an insufficiently profitable level for imports, that seems to flow exclusively from the French Government's decision to reduce the 'ex-refinery price' to take account of the fall in dollar parity. That indeed is the reason given in the decrees issued by the French authorities and no evidence has been produced in the course of the proceedings to show that the reduction in the purchase price was, in point of fact, motivated by other factors or was in any way not commensurate with the currency fluctuations recorded.

As regards the French Government's decision, taken at the same time, to introduce the parafiscal charge, such measures are fairly commonplace in economic situations of that kind. Rather than allow the fall in the purchase price to be translated into an increase in traders' profits or a windfall for consumers, the government chose to give the benefit of the resultant savings to the revenue authorities. In those circumstances, as they have emerged in the course of the procedure, I do not see how the French Government can be blamed for the adverse effect on importers. The latter bore the burden of the charge to the same extent as the domestic traders; what actually disadvantaged the importers was not the charge but rather the fact that they had to purchase products on the international market where the non-regulated price had not been cut by the oil companies despite the weakness of the dollar.

The foregoing considerations point, I think, to two conclusions. In the first place I do not think there are any grounds for the view that the French Government's intervention regarding prices created any obstacle to imports, since it was limited to offsetting the fluctuating parity of the dollar. Secondly, even if it were conceded that that was not the case, it would be impossible to say that the parafiscal charge with which the question from the national court is concerned was incompatible with Article 30. What might possibly have affected imports was not the charge as such but rather the decision simultaneously to reduce the purchase price of the products. That is clearly the case since if, when introducing the charge, the government had decided not to reduce the purchase price fixed by the administration or had even increased it, importers would not have found themselves in difficulty on the French market. It

follows that it was the decision to reduce the ex-refinery price that may have impeded imports and might possible be open to criticism in the light of Article 30. But even if it were concluded that the reduction in the purchase price constituted a measure having equivalent effect, that would have no repercussions for the other decision, by which the charge was introduced. In other words, even if Article 30 had required the French Government not to reduce the prices in the present case and to maintain them at a level sufficient to guarantee the profitability of imports, importers, whilst finding that they were operating under conditions more favourable to their interests, *would nevertheless have had to pay the charge and could not therefore have made any claim for reimbursement.*

In short, I am of the opinion that the following conclusions can be drawn on this point. Either: the contested charge, for reasons which will be examined in due course, did not display the required neutrality in relation to imports, and therefore that situation is to be examined not by reference to Article 30 but exclusively in the light of the other provisions of the Treaty which are specifically relevant (Articles 9 and 12 or Article 95); or else the parafiscal charge was perfectly neutral and therefore the loss allegedly suffered in respect of imports is to be associated not with the charge as such but with the specific governmental decision to reduce the ex-refinery purchase price (rather than keep it unchanged or even increase it); but, as noted, the second hypothesis is beyond the scope of the present case, which is concerned solely with reimbursement of the charge that is considered unlawful, not with the price system applied to petroleum products.

(c) *Charges having equivalent effect and discriminatory internal taxation*

It is therefore in relation to Articles 9 and 12 or Article 95 that the compatibility of the charge at issue with Community law must be appraised.

It will be remembered that the charge is levied both on domestic products and on imported products under procedures which are not discriminatory. *Prima facie,* therefore, it does not fulfil the conditions to be classified either as a charge having equivalent effect or as discriminatory internal taxation. It is well established, however, that in order to guarantee the full efficacy of the Treaty provisions on the movement of goods it is necessary to go further than an examination of the system by which the charge was introduced and investigate the use to which the revenue from it is put. Parafiscal charges are designed to finance the activities of particular public or quasi-public bodies which not infrequently engage in activities which are beneficial to the domestic product on which the charge is levied.

In such circumstances, the burden actually borne by the domestic product is less than that borne by the imported product or is even nil. It is with such distortions of competition and trade that Articles 9 and 12 and Article 95 are concerned.

The need to take account of the ultimate use of the proceeds from the charge, for the purpose of classifying it under the Treaty, was first affirmed by the Court so as to bring within the concept of charges having equivalent effect to a customs duty charges which were presented by Member States as

forming part of a system of taxation which was applied, on the same terms, to both domestic and imported products and thus falling to be appraised only in the light of Article 95. As long ago as 1973 in its judgment in *Capolongo*,[3] the Court stated:

'In the interpretation of the concept "charge having an effect equivalent to a customs duty on imports", the destination of the financial charges levied must be taken into account. In effect, when such a financial charge or duty is intended exclusively to support activities which specifically profit taxed domestic products, it can follow that the general duty levied according to the same criteria on the imported product and the domestic product nevertheless constitutes for the former a net supplementary tax burden, whilst for the latter it constitutes in reality a set-off against benefits or aids previously received.

Consequently, a duty within the internal system of internal taxation applying systematically to domestic and imported products according to the same criteria, can nevertheless constitute a charge having an effect equivalent to customs duty on imports, when such contribution is intended exclusively to support activities which specifically benefit the taxed domestic product'.

The *ratio decidendi* of that decision was perfectly encapsulated in the Opinion delivered by one of my illustrious predecessors, Advocate General Trabucchi, in the later case *IGAV*,[4] where, in relation to a parafiscal charge intended to finance the activities of the Ente Nazionale per la Cellulosa e la Carta, he says:

'It is important to take a realistic view of the economic developments involved, looking beyond the formal position, so as to ensure that the law corresponds to the facts and that the objectives of the Treaty are at the same time successfully pursued; on that very clear assumption, this justified exempting from the operation of Article 95 a charge which, on a strictly formal view, would fall within its ambit, in order to bring it within the ambit of the rule in Article 13 which is a better instrument of control when the real nature of the charge is viewed against the particular national intervention mechanism of which it forms an integral part'.

That line of reasoning was followed in a number of later judgments, amongst which I shall refer only to the judgments in *Steinike*,[5] *Cucchi*,[6] *Interzuccheri*,[7] and *Kortmann*.[8]

The same trend was then confirmed specifically with regard to the application of Article 95 as well. In its judgment in *Commission* v *Italy*,[9] the Court stated:

'in an interpretation of the concept "internal taxation" for the purposes of Article 95 it may be necessary to take into account the purpose to which the revenue from the

3 — Case 77/72 Capolongo [1973] ECR 611, paragraphs 13 and 14.

4 — Case 94/74 IGAV v ENCC [1975] ECR 699; Opinion at 715, in particular at 718.

5 — Case 78/76 [1977] ECR 595.

6 — Case 77/76 [1977] ECR 987.

7 — Case 105/76 [1977] ECR 1029.

8 — Case 32/80 [1981] ECR 251.

9 — Case 73/79 [1980] ECR 1533, paragraph 15.

charge is put. In fact, if the revenue from such a charge is intended to finance activities for the special advantage of the taxed domestic product it may follow that the charge imposed on the basis of the same criteria nevertheless constitutes discriminatory taxation in so far as the fiscal burden on the domestic products is neutralized by the advantages which the charge is used to finance whilst the charge on the imported product constitutes a net burden'.

It must be remembered, however, that by virtue of now settled case-law, the provisions on discriminatory internal taxation and charges having equivalent effect cannot be applied in conjunction with each other; as was stated in the judgment in *IGAV*:[10]

'One and the same scheme of taxation cannot, under the system of the Treaty, belong simultaneously to both the categories mentioned, having regard to the fact that the charges referred to in Article 13(2) must be purely and simply abolished whilst, for the purpose of applying internal taxation, Article 95 provides solely for the elimination of any form of discrimination, direct or indirect, in the treatment of the domestic products of the Member States and of products originating in other Member States.'

It is therefore necessary to find a criterion by reference to which the two cases can be distinguished from each other. In the case of parafiscal charges, the discrimination is based on the following criterion, defined by the Court in its statement that a charge 'can . . . constitute a charge having an effect equivalent to a customs duty on imports, when such contribution is intended exclusively to support activities which specifically benefit the taxed domestic product'. Those conditions were defined even more clearly in its judgments in *Cucchi*[11] and *Interzuccheri*,[12] where it is recognized that a levy

'falling within a general system of internal taxation applying to domestic products as well as to imported products according to the same criteria can constitute a charge having an effect equivalent to a customs duty on imports only if it has the sole purpose of financing activities for the specific advantage of the taxed national product; if the taxed product and the domestic product benefiting from it are the same; and if the charges imposed on the domestic product are made good in full.'

Although there are some differences in the wording of the relevant decisions, the fundamental characteristic which distinguish a charge having equivalent effect from discriminatory internal taxation is clear: it is necessary to establish whether, by virtue of the particular use to which the revenue from the charge is put, the taxed national product — and not the imported product — benefited from a total or partial set-off of the burden.

A finding of fact is thus required, and that is a matter for the national court. It must decide, in this case, whether and to what extent the activities of the AEE resulted in the transfer to national petroleum companies of resources of a value equivalent to the parafiscal charge borne by them.

10 — Cited above, paragraph 13.

11 — Cited above, paragraph 19.

12 — Cited above, paragraph 12.

Thus, taking account of the total revenue from the charge over the relevant period, a comparison must be made between the proceeds resulting from the marketing of domestic petroleum products and the advantages accruing to the undertakings which marketed them as a result of the action taken for their benefit by the AEE.

If those advantages offset *in its entirety* the burden borne in respect of the marketing of domestic products, the conclusion must be that the levy to which imported products are subject is a charge having equivalent effect. If, on the other hand, those advantages only partly offset the burden borne by domestic products, the conclusion must be that the system at issue gives rise to tax discrimination incompatible with Article 95. The latter will in all probability be the case if the proceeds of the charge are not used solely for the benefit of the taxed domestic product and consequently the taxed national product and the domestic product enjoying the advantages financed by the proceeds of the charge are not the same. Such a situation arose in fact in the *IGAV* case,[13] where — as clearly illustrated by Advocate General Trabucchi — the aids paid out by the Ente Nazionale per la Cellulosa e la Carta benefited various categories of undertaking, which included traders upon whose business the parafiscal charge in question had no impact.

In this second hypothesis, it is clear that the charge paid by the importers is not inherently unlawful but is unlawful solely *to the extent to which* it is discriminatory, that is to say where it exceeds the net burden borne by the domestic product. In such circumstances, it will be for the national court to decide *to what extent* importers are entitled to claim reimbursement of the sums paid.

(d) *Article 37*

As far as the application of Article 37 is concerned, it must first be stressed that at the material time the importation and marketing of petroleum products were the subject of a monopoly. However, the Commission properly points out that the tax regime at issue is entirely unconnected with that monopoly; firstly, that regime is not a means of organizing the monopoly and, secondly, it could exist — as often happens — even if there were no monopoly.

I therefore conclude that the charge at issue cannot be regarded as being specifically connected with the exercise by a State monopoly of its exclusive rights (see the judgment in Case 91/78 *Hansen* v *Hauptzollamt Flensburg* [1979] ECR 935, paragraph 8) and that, as a result, Article 37 is not applicable to the present case.

(e) *State aids*

Finally, the national court asks whether the contested charge is compatible with the rules on State aids.

13 — Cited above, in particular at page 718.

Let me say first, by way of outline, that according to a line of consistent decisions stretching back to the judgment in Case 6/64 *Costa* v *ENEL* [1964] ECR 585, the only provision concerning State aids which has direct effect is the last sentence of Article 93(3), which requires Member States not to put aid measures into effect until they have been examined by the Community institutions and declared compatible with the common market.

This means that it cannot be claimed in proceedings before a national court that an aid is unlawful by virtue of Article 92 (such an assessment being reserved to the Community institutions, and first and foremost the Commission) but only that it has been *improperly put into effect*, in breach of Article 93(3) (or of a Commission decision taken under Article 93(2) to the effect that the aid is unlawful).

That said, it must however be stressed that the present case is concerned with a parafiscal charge and not aid provided by the AEE from the revenue from that charge. And even if the aid was found to have been improperly paid, that would have no impact on the legality of the charge as such; it would continue to be payable and those paying it could not claim reimbursement of it in legal proceedings.

Conclusion

In the light of the foregoing considerations, I suggest the following answers to the questions submitted by the national court:

1. Articles 3, 5, 6, 30, 37 and 92 of the Treaty do not preclude the levy of a parafiscal charge of the kind at issue in this case.

2. Where a parafiscal charge is applied, in the same way, to domestic and imported products, it is necessary, in order to establish whether it is compatible with the provisions concerning charges having equivalent effect and discriminatory internal taxation, for the national court to take account of the use to which the revenue from the charge is put. Where the revenue is used to finance activities which specifically benefit taxed domestic products, so as to offset *entirely* the burden borne by them through collection of the charge, the latter falls to be classified as a 'charge having an effect equivalent to a customs duty' within the meaning of Articles 9 and 12 of the Treaty. Where the revenue is used to finance activities which also specifically benefit products other than the taxed domestic products, so as to offset *only in part* the burden borne by the domestic products through collection of the charge, the latter falls to be classified as discriminatory internal taxation within the meaning of Article 95 of the Treaty.