OPINION OF ADVOCATE GENERAL TESAURO

delivered on 29 February 1996 *

1. Once again the question of the legality of 'dock dues', a subject which has already been addressed in Case C-163/90 *Legros*, decided by judgment of 16 July 1992, [1] and in Joined Cases C-363/93 and C-407/93 to C-411/93 *Lancry and Others*, decided by judgment of 9 August 1994 [2] has come before the Court. As we know, the charge in question was levied in the French overseas *départements* on all goods brought into those territories to be released for consumption, irrespective of whether their provenance and/or origin was another Member State of the Community, a non-member country or even another region of France itself.

The rules governing dock dues, which were first introduced during the 17th century, have been amended several times over the years (or, to be more exact, over the centuries). At the material time for the purposes of the main proceedings, the basic rules were set out in Law 84-747 of 2 August 1984 [3] concerning the powers conferred on the regions of Guadeloupe, Guyana, Martinique and Réunion, in the section devoted to financial and fiscal provisions.

2. In *Legros*, the Court classified dock dues as charges having equivalent effect to customs duties — and therefore as prohibited by Article 9 of the Treaty — in so far as they were levied on goods imported from another Member State. That finding was held to be unaffected by the fact that dock dues were also levied on goods entering those regions from elsewhere in France.

The Court also pointed out in *Legros* that the way in which the prohibition on charges having equivalent effect is interpreted cannot differ according to whether that prohibition concerns intra-Community trade or features in a bilateral or multilateral agreement between the Community and one or more non-member countries for the elimination of obstacles to trade. On that basis, the Court considered that the free-trade agreement then in force between the Community and Sweden, in which a similar prohibition was expressly imposed, precluded the levying of dock dues on goods imported from Sweden.

3. In its later judgment in *Lancry*, the Court declared first of all that Decision

* Original language: Italian.

1 — [1992] ECR I-4625.

2 — [1994] ECR I-3957.

3 — JORF of 3 August 1984, p. 2559.

89/688/EEC, [4] in which the Council authorized the French Republic to maintain until 31 December 1992 the dock dues arrangements that were in force when that decision was adopted, was invalid. Furthermore — by a ruling which marks a watershed in the case-law established over more than 30 years on the question of purely internal situations — the Court, on the basis of the unity of the Community customs territory, classified dock dues as charges having equivalent effect to customs duties even where they are levied on the entry into the overseas *départements* of goods originating solely from another region of France. [5]

4. However, the Court had not as yet had occasion to address the question whether the Treaty precludes the levying of dock dues on goods imported into the French overseas *départements* from non-member countries with which the Community has no trade agreement. That gap has now been filled by the preliminary reference under consideration here, in which the national court essentially asks whether the levying of dock dues on imports from non-member countries is compatible — now that dock dues have been recognized as charges having equivalent effect to customs duties — with the adoption of a Common Customs Tariff under Articles 9 and 18 to 29 of the Treaty, and with the principles on which the common commercial policy is based under Article 113. Notwithstanding their imprecise wording, that is the thrust of the following questions which have been submitted by the Tribunal d'Instance, Paris XII, the court hearing the plaintiffs' claim for reimbursement of all amounts paid by way of dock dues in respect of various periods falling between 1 November 1988 and 30 November 1991:

'Can the principle of non-discrimination, as laid down by the EEC Treaty, be interpreted as prohibiting a Member State from levying an internal charge, which has been held to have an effect equivalent to a customs duty, on goods from non-member countries not connected to the Community by a special agreement, even though goods imported by other Member States from the same non-member countries are not subject to that charge?

If not, does the levying of such a charge by the Member State constitute disparate treatment liable to compromise equality between traders in the Member States and to give rise to distortions in or undermine the common market?'

5. It should be noted first of all that, in the context of the preliminary ruling procedure under Article 177 of the Treaty, the Court is not competent to rule on the compatibility of a national measure with Community law, but only to provide the national court with

4 — Council Decision of 22 December 1989 concerning the dock dues in the French overseas *départements* (OJ 1989 L 399, p. 46).

5 — The fresh approach taken by the Court was confirmed in the recent judgment in Joined Cases C-485/93 and C-486/93 *Simitzi* [1995] ECR I-2655, in which a local charge was again at issue, levied on the entry of goods into the Greek Dodecanese Islands and displaying considerable similarities to the dock dues levied in the French overseas *départements*.

all criteria for the interpretation of Community law which may enable it to determine the issue of compatibility for the purposes of the decision in the case before it. [6] Consequently, the questions now before the Court should be understood as asking whether the provisions of the Treaty concerning the customs union preclude the levying of charges having equivalent effect to customs duties, with respect not only to intra-Community trade, but also to trade with non-member countries.

6. On that point, the Court has consistently stated that the abolition of charges having equivalent effect pursues different objectives and has a different legal basis, according to whether it relates to trade with non-member countries or to intra-Community trade. 'In so far as intra-Community trade is concerned, the prohibition is laid down in Article 9 of the Treaty itself, and is unconditional and absolute because it is designed to establish free movement of goods within the Community; on the other hand, in so far as trade with non-member countries is concerned, the question whether it is necessary to abolish, maintain, amend or introduce charges having equivalent effect must be related both to the requirements of the common commercial policy and to the requirements, consequent upon the introduction of the Common Customs Tariff, of harmonization of conditions of importation from non-member countries.' [7]

7. In order to take account of those requirements, the Court has held, since its judgment of 13 December 1973 in *Diamantarbeiders*, [8] that Member States may not introduce, subsequent to the establishment of the Common Customs Tariff on 1 July 1968, in a unilateral manner, new charges on goods imported directly from non-member countries or raise the level of existing charges. A similar prohibition, although not expressly laid down in Council Regulation (EEC) No 950/68, [9] which had introduced the Common Customs Tariff for the Community in its original form, was an inevitable corollary of the obligation imposed by that regulation not to amend, by means of supplementary charges, the level of protection as defined by the common tariff.

That finding was also confirmed by the fact that, pursuant to Article 113(1), the common commercial policy must, after the transitional period has elapsed, be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade. The definition of those principles — as the Court pointed out in *Diamantarbeiders* — also involves the elimination of national disparities, whether in the field of taxation or commerce, affecting trade with non-member countries.

6 — To that effect, see, most recently, Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 19.

7 — Case 70/77 *Simmenthal* [1978] ECR 1453, paras 22 and 23.

8 — Joined Cases 37/73 and 38/73 [1973] ECR 1609.

9 — Regulation of 28 June 1968 (OJ, English Special Edition 1968 (I), p. 275).

Since, however, the prohibition in question is not absolute, the Court also stated — in *Simmenthal* [10] — that, when imposing it, the Community institutions may allow exceptions or derogations, provided that, where any additional pecuniary charges are thus permitted, 'the intrinsic effect of such charges on ... trade with non-member countries [is] uniform in all the Member States'. [11]

8. In any case, as regards charges already in existence at the time when the Common Customs Tariff was introduced, it is for the Commission and the Council to determine their compatibility with the Treaty. [12] The need to eliminate such charges may also derive, in particular, from provisions adopted in the context of agricultural policy, trade agreements concluded by the Community or even association arrangements existing between the Community and certain States. However, the fact remains — save as otherwise decided by the Community authorities — that increases in charges already existing at the time when the Common Customs Tariff entered into force are prohibited.

9. This approach has been consolidated in subsequent decisions of the Court. [13] Contrary to the contention of the plaintiffs in the main proceedings, that is also the approach adopted in the recent judgment of 5 October 1995 in *Aprile*. Admittedly, that judgment confirms in wholly general terms that Member States are prohibited from unilaterally imposing charges having equivalent effect with respect to trade with non-member countries; but, as the Advocate General rightly pointed out in his Opinion, there the Court did not have to consider the issue of a charge being maintained in force which already existed when the Common Customs Tariff was introduced. It was common ground that the charge in question had been introduced by a measure adopted after 1 July 1968.

10. Accordingly, it follows from the case-law that, in order to determine whether a charge having equivalent effect is compatible with Community law, where it is levied in the context of trade with non-member countries which are not linked to the Community through bilateral or multilateral agreements prohibiting such charges, it is necessary to ascertain whether the charge in question was already in force at the time when the Common Customs Tariff was introduced.

As regards dock dues, the basic rules at the material time for the purposes of this case were laid down, as stated earlier, by Law 84-747 of 2 August 1984, amending the previous rules set out in Law 46-51 of 19 March 1946, and in various decrees issued in

10 — Case 70/77, see footnote 7.

11 — Ibid., paras 26 and 27.

12 — To that effect, see again Joined Cases 37/73 and 38/73, cited in footnote 8, paras 18 to 21.

13 — See Case 266/81 *SIOT* [1983] ECR 731, in particular, para. 18; Joined Cases 267/81 to 269/81 *SPI and SAMI* [1983] ECR 801, in particular, paras 26 to 28; Case C-125/94 *Aprile* [1995] ECR I-2919; Case C-36/94 *SIESSE* [1995] ECR I-3573.

December 1947. [14] It is useful to note here that Article 38 of Law 84-747 reclassified dock dues as a consumption tax, establishing at the same time that, as in the past, they were to be calculated by reference to the value of the goods for customs purposes on their entry into the overseas *départements*. Article 38 also conferred on the regional councils of the territories concerned the power to fix the rates applicable to the various products, allocated the revenue from dock dues to the *communes* and, regarding determination of the taxable amount and the detailed rules for collecting the tax, deferred to the rules already in effect when that Law entered into force.

In addition to dock dues, the regions in question could also, pursuant to Article 39 of Law 84-747, levy for their own benefit, and subject to the same conditions as dock dues, a surcharge of up to 1%.

11. That said, it will be for the national court to ascertain whether, aside from the reclassification of the charge, which is not in itself conclusive, and from the new powers conferred on the regional councils in that connection, Law 84-747 has so altered the characteristic features of dock dues as they were when the Common Customs Tariff entered into force that they may be regarded as a new tax. The national court must in particular take into account any changes in the pre-conditions for imposing the tax, those liable to pay it or the applicable scales or rates. On that last point — and particularly in the light of the prohibition on raising the level of charges in existence on 1 July 1968, other than customs duties in the true sense, levied on trade with non-member countries — all measures subsequent to that date, which have extended the levy to new categories of products or have in some way increased the tax burden on products already subject to it, must be regarded as unlawful. As the Commission rightly points out, the levying of dock dues, at least in these conditions, must be considered incompatible with Community law.

12. On the other hand, given that any national levy unilaterally introduced in addition to the duties payable under Community law must inevitably have negative repercussions for the necessary uniformity of the common commercial policy and for the proper and cohesive operation of the customs union, it is clear that the criteria to be adopted in order to determine whether a given charge should be regarded as already in

14 — Law 84-747 has been amended by Law 92-676 of 17 July 1992 (JORF of 19 July 1992, p. 9697), which entered into force on 1 January 1993, that is, after the events in this case. Law 92-676 was adopted in compliance with the obligation placed on the French authorities by Article 1 of Decision 89/688/EEC to amend the dock dues arrangements so as to extend them to all products without distinction, whether imported into or produced in the French overseas *départements*, by 31 December 1992.

force at the time of the introduction of the common tariff must perforce be very restrictive. In consequence, without prejudice to the competence of the national court as regards the interpretation of national law, and in deference thereto, it seems to me very difficult to deny the 'novelty' of the additional duty provided for by Article 39 of Law 84-747 with respect to the rules prior to 1968, a fact also conceded by the French Government at the hearing.

13. Lastly, the French Government requests the Court, in the event that a charge such as dock dues is found to be unlawful, even when levied in the context of trade with non-member countries which are not linked to the Community by any agreement, to limit the effects of the judgment in time. In support, the French Government pleads, first, the serious economic consequences for the local authorities of a judgment entailing the obligation to reimburse the charge in question hitherto unduly levied, and secondly, the objective uncertainty regarding the lawfulness of the levy concerned, at least until the ruling in *Legros*, in which the Court classified dock dues as charges having equivalent effect.

14. In that connection, it is well-known that the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 of the Treaty, the Court of Justice gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. In principle, therefore, the rule so interpreted must be applied by the courts even to legal relationships which arose before the ruling on interpretation, provided that their effects have not already been exhausted and that the conditions for bringing an action relating to the application of that rule before the courts having jurisdiction are satisfied.

15. It is only exceptionally that the Court has been moved, in application of the general principle of legal certainty, to restrict for any person concerned the opportunity of relying upon the provision thus interpreted with a view to calling in question legal relationships established in good faith. [15] In taking that approach, the Court has consistently applied two criteria. Above all, it has considered the possible consequences of any decision in the absence of a limitation as to its temporal effects and has therefore examined whether there was any objective uncertainty as to the scope of the provisions of Community law forming the subject of the ruling on interpretation.

16. In its judgment in *Legros*, the Court decided that the effects of its ruling should

15 — See, in particular, Case 24/86 *Blaizot* [1988] ECR 379, paras 27 to 33, Case C-163/90, cited above, paras 30 to 36, and, most recently, Case C-415/93 *Bosman* [1995] ECR I-4921, paras 139 to 146.

be limited in time, in that 'the particular characteristics of the dock dues and the specific identity of the French overseas *départements* have created a situation of uncertainty regarding the lawfulness of the charge at issue under Community law; that uncertainty is also reflected by the conduct of the Community institutions in relation to the problem of the dock dues'. [16] Since those circumstances could have led the French Republic reasonably to consider that the national legislation at issue was in conformity with Community law, the Court came to the conclusion that the provisions of the EEC Treaty could not be relied on in support of claims for reimbursement of dock dues paid before the date of that judgment, that is, before 16 July 1992, except of course by claimants who had, before that date, initiated legal proceedings or otherwise raised an equivalent claim.

In its later judgment in *Lancry*, the Court applied the same temporal limitation also to claims for repayment of sums levied as dock dues after Decision 89/688/EEC came into operation until the date of the judgment in *Legros*, in so far as that decision had not altered the character of the levy and only the judgment in *Legros* had resolved the uncertainties regarding its lawfulness under Community law.

17. It seems to me that, on the same grounds as were invoked in those two cases, the effects of the judgment in the present case should similarly be limited in time.

18. In the light of the foregoing considerations, I propose that the following reply be given to the national court:

(1) With effect from the introduction of the Common Customs Tariff on 1 July 1968, Member States may, in the absence of provisions of Community law to the contrary, maintain in force charges having equivalent effect levied on goods imported directly from non-member countries which are not linked to the Community by a particular agreement, but may not unilaterally introduce new charges or extend the scope or raise the level of those in existence at that date.

16 — See Case C-163/90, cited above, para. 31.

(2) It is for the national court to determine, in the light of the relevant provisions of national law, whether or not charges such as dock dues, as levied at the time of the events material to this case, should be regarded as existing at the date of the introduction of the Common Customs Tariff, taking account in particular of the pre-conditions for imposing the charge, those liable to pay it and the scales to be applied.

(3) The provisions of the EC Treaty concerning the introduction of the Common Customs Tariff and the common commercial policy may not be relied on in support of claims for reimbursement of charges such as dock dues paid before 16 July 1992, except in the case of claimants who have, before that date, initiated legal proceedings or otherwise raised an equivalent claim.