JUDGMENT OF THE COURT
14 January 1997 *

In Joined Cases C-192/95 to C-218/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal d'Instance, paris, for a preliminary ruling in the proceedings pending before that court between

Société Comateb (C-192/95),

Société Panigua (C-193/95),

Société Édouard et Fils (C-194/95),

Société de Distribution de Vins et Liqueurs (C-195/95),

Établissements André Haan (C-196/95),

Société Diffusion Générale de Quincaillerie (C-197/95),

Société Diffusion Générale (C-198/95),

* Language of the case: French.

Société Cama Renault (C-199/95),

SCP Ovide et Dorville (C-200/95),

Société Ducros Guadeloupe (C-201/95),

Société Comptoir Commercial Caraïbes (C-202/95),

Société Giafa (C-203/95),

Société LVS (C-204/95),

Société Catherine et Jean-Claude Tabar Nouval (C-205/95),

Société l'Heure et l'Or (C-206/95),

Société Général Bazar Bricolage (C-207/95),

Société Grain d'Or (C-208/95),

Société Cash Service (C-209/95),

Établissements Efira (C-210/95),

Société Farandole (C-211/95),

Société Carat (C-212/95),

Société Rio (C-213/95),

Société Guadaloupéenne de Distribution Moderne (SGDM) (C-214/95),

Martinique Automobiles SA (C-215/95),

Socovi SARL (C-216/95),

Établissements Gabriel Vangour et Cie SARL (C-217/95),

Simat Guadeloupe SARL (C-218/95),

and

Directeur Général des Douanes et Droits Indirects,

on the interpretation of Community law concerning repayment of sums not due,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. C. Moitinho de Almeida and J. L. Murray (Presidents of Chambers), P. J. G. Kapteyn, D. A. O. Edward (Rapporteur), J.-P. Puissochet, P. Jann and H. Ragnemalm, Judges,

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

after considering the written observations submitted on behalf of:

— Comateb and Others, by John Sylvanus Dagnon, of the Guadeloupe Bar,

— the French Government, by Catherine de Salins, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in the same Directorate, acting as Agents,

— the Spanish Government, by Alberto Navarro González, Director General of Community Institutional and Legal Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, of the State Legal Service, acting as Agents,

— the Commission of the European Communities, by Michel Nolin, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Comateb and Others, represented by John Sylvanus Dagnon and by Jean-Claude Bouchard and Olivier Cortez, of the

Hauts-de-Seine Bar; the French Government, represented by Anne de Bourgoing; and the Commission, represented by Jean-François Pasquier, a national civil servant on secondment to its Legal Service, acting as Agent, at the hearing on 23 April 1996,

after hearing the Opinion of the Advocate General at the sitting on 27 June 1996,

gives the following

Judgment

1 By 27 interlocutory judgments of 20 December 1994, received at the Court on 19 June 1995, the Tribunal d'Instance (District Court), Paris, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question concerning the repayment of a charge levied in breach of Community law.

2 The question was raised in proceedings brought by 27 companies ('Comateb and Others') against the Directeur Général des Douanes et Droits Indirects (Director-General of Customs and Indirect Taxes) for the repayment of *octroi de mer* (dock dues) levied by the Service des Douanes et Droits Indirects (Department of Customs and Indirect Taxes), Guadeloupe, on the importation into Guadeloupe of various goods from another Member State, from non-member countries and from other parts of French territory, between 17 July 1992 (the day after judgment was given in Case C-163/90 *Administration des Douanes et Droits Indirects* v *Legros and Others* [1992] ECR I-4625) and 31 December 1992, and for an order that the customs authority should pay them compensation on the basis of Article 700 of the new French Code of Civil Procedure.

3 In *Legros*, which concerned dock dues, the Court ruled that a charge proportional to the customs value of goods, levied by a Member State on goods imported from another Member State by reason of their entry into a region of the territory of the former Member State, constituted a charge having an effect equivalent to a customs duty on imports, notwithstanding the fact that the charge was also imposed on goods entering that region from another part of the same State.

4 The Director-General of Customs and Indirect Taxes maintains that since the charges in question have been passed on to the purchaser they cannot be reimbursed, because Article 352a of the Customs Code provides that: 'Where a person has paid domestic duties or charges, levied in accordance with the procedures laid down by this Code, when those duties or charges were not due, that person may obtain reimbursement of such duties or charges, provided that they have not been passed on to the purchaser'.

5 The national court notes that 'it is common ground that the dock dues in dispute have been passed on to the purchasers' by the plaintiff companies.

6 It adds that 'French law requires the taxpayer to incorporate the charge in dispute in the price of acquiring the materials needed for his business, and accordingly in the cost price of the goods sold, for the purposes of calculating the taxable profits. In other words, French law provides for dock dues to be levied by way of input tax, without any possibility of subsequent deduction since, unlike VAT, they are not separately itemized on invoices, and requires them to be passed on, which requirement the fiscal authorities rely upon in challenging reimbursement'.

7 In that connection, the parties referred, at the hearing before the Court of Justice, in particular to the prohibition of resale at a loss laid down by Article 1 of the French Law of 2 July 1963, as amended by Article 32 of the Regulation of 1 December 1986, which provides:

'A trader who sells a product at a price lower than its actual purchase price shall be fined between FF 5 000 and FF 10 000. The actual purchase price shall be deemed to be the price shown on the purchase invoice, with the addition of turnover taxes, specific taxes on that sale and, where relevant, the cost of transport.'

8 The national court took the view that the French legislation had 'established a system whereby dock dues are to be passed on, and therefore not reimbursed' and stayed the proceedings in order to refer the following question to the Court of Justice for a preliminary ruling:

'Where a Member State resists repayment of a charge, levied in breach of Community law, on the ground that it has been passed on to the purchaser, does this, or does it not, make it virtually impossible or excessively difficult to obtain reimbursement when the undertaking concerned is required by the law of that Member State to incorporate the charge in the cost price of the goods sold?'

9 As a preliminary point, it should be noted, first, that the question referred by the national court does not concern reimbursement of dock dues levied on products from non-member countries, in respect of which the Court gave an interpretation of Community law in Case C-126/94 *Cadi Surgelés and Others* [1996] ECR I-5647.

10 Second, Comateb and Others rely upon Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1).

11 As the Court observed in a previous judgment (Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 20), that regulation applies, by virtue of Article 1(2) thereof, only to taxes, charges, levies and duties created by various Community provisions and collected by the Member States on behalf of the Community.

12 It does not apply, therefore, to national taxes, charges and duties, even when they are levied in breach of Community law.

13 The question referred asks in essence whether a Member State may object to repayment of a charge levied but not due on the ground that it has been passed on to the purchaser, when that State's legislation actually requires the charge to be passed on.

14 All the parties refer to the decisions of the Court concerning the refund of sums not due, particularly in Case 68/79 *Just* v *Ministry for Fiscal Affairs* [1980] ECR 501, Case 61/79 *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205, Case 199/82 *San Giorgio*, cited above, and Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* v *Directeur Général des Douanes et Droits Indirects* [1988] ECR 1099.

15 According to the French and Spanish Governments, it is clear from that case-law that provisions which prevent the reimbursement of taxes, charges and duties levied in breach of Community law cannot be regarded as contrary to Community law where it is established that the person required to pay those charges has in fact passed them on to other persons.

16 Comateb and Others consider that that case-law does not apply where the laws of a Member State contain provisions constraining traders to incorporate the charge in the cost price of goods. Even if those provisions do not place on the taxpayer the burden of proving that the charge has not been passed on to the purchaser, they make it virtually impossible to obtain reimbursement of charges levied in breach of Community law.

17 The French Government and the Commission contend that the legal obligation to incorporate the charge in the cost price does not mean that traders are required to pass it on to purchasers. Traders can always take the commercial decision to absorb the charge in whole or in part, and thus eliminate its effect on the sale price.

18 In the view of the French Government and the Commission, a legal obligation to incorporate the charge in the cost price is irrelevant as regards the case-law of the Court concerning recovery of sums not due. Consequently, it is necessary to determine in each case whether or not the disputed charge has actually been passed on.

19 Since the premise on which the question is based is thus itself in dispute, it is necessary, in order to give a useful reply to the national court, to clarify the effect of the case-law concerning recovery of charges levied in breach of Community law.

20 The first point to note is that entitlement to the repayment of charges levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting such charges (*San Giorgio*, cited above, paragraph 12). The Member State is therefore in principle required to repay charges levied in breach of Community law.

21 There is, however, an exception to that principle. As the Court stated in *Just*, *Denkavit* and *San Giorgio*, cited above, the protection of the rights so guaranteed by the Community legal order does not require repayment of taxes, charges and duties levied in breach of Community law where it is established that the person required to pay such charges has actually passed them on to other persons (see, in particular, *San Giorgio*, paragraph 13).

22 In such circumstances, the burden of the charge levied but not due has been borne not by the trader, but by the purchaser to whom the cost has been passed on. Therefore, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge.

23 It is accordingly for the national courts to determine, in the light of the facts in each case, whether the burden of the charge has been transferred in whole or in part by the trader to other persons and, if so, whether reimbursement to the trader would amount to unjust enrichment.

24 In this respect it should be made clear, first, that if the final consumer is able to obtain reimbursement through the trader of the amount of the charge passed on to him, that trader must in turn be able to obtain reimbursement from the national authorities. On the other hand, if the final consumer can obtain repayment directly from the national authorities of the amount of the charge which he has paid but which was not due, the question of reimbursing the trader does not, as such, arise.

25 Second, it must be noted that in *Bianco and Girard*, cited above, paragraph 17, the Court stated that even though in national law indirect taxes are designed to be passed on to the final consumer and even if in commerce they are normally passed on in whole or in part, it cannot be generally assumed that the charge is actually passed on in every case. The actual passing on of such taxes, either in whole or in

part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts. Consequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court which may freely assess the evidence. However, in the case of indirect taxes, it may not be assumed that there is a presumption that they have been passed on and that it is for the taxpayer to prove the contrary.

26 The same applies where taxpayers have been obliged by the relevant legislation to incorporate the charge in the cost price of the product concerned. The fact that such a legal obligation exists does not mean that there is a presumption that the entire charge has been passed on, even where failure to comply with that obligation carries a penalty.

27 Accordingly, a Member State may resist repayment to the trader of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment.

28 It follows that if the burden of the charge has been passed on only in part, it is for the national authorities to repay the trader the amount not passed on.

29 It should be borne in mind, however, that even where it is established that the burden of the charge has been passed on in whole or in part to the purchaser, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment.

30 In *Just*, cited above, the Court stated at paragraph 26 that it would be compatible with the principles of Community law for courts before which claims for repayment were brought to take into consideration the damage which an importer might have suffered because the discriminatory or protective tax provisions had the effect of restricting the volume of imports from other Member States.

31 As the Advocate General pointed out in paragraph 23 of his Opinion, the trader may have suffered damage as a result of the very fact that he has passed on the charge levied by the administration in breach of Community law, because the increase in the price of the product brought about by passing on the charge has led to a decrease in sales. Thus, the levying of dock dues may make the price of products from other parts of the Community significantly higher than the price of local products which are exempt from those dues, with the result that importers suffer damage, regardless of whether the charge has been passed on.

32 In such circumstances, the trader may justly claim that, although the charge has been passed on to the purchaser, the inclusion of that charge in the cost price has, by increasing the price of the goods and reducing sales, caused him damage which excludes, in whole or in part, any unjust enrichment which would otherwise be caused by reimbursement.

33 It follows that where domestic law permits the trader to plead such damage in the main proceedings, it is for the national court to give such effect to the claim as may be appropriate.

34 Furthermore, traders may not be prevented from applying to the courts having jurisdiction, in accordance with the appropriate procedures of national law, and subject to the conditions laid down in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, for reparation of loss caused by the levying of charges not due, irrespective of whether those charges have been passed on.

35 The reply to the question referred for a preliminary ruling must therefore be that:

— a Member State may resist repayment to the trader of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by another person and that reimbursement of the trader would constitute unjust enrichment. It is for the national courts to determine, in the light of the facts in each case, whether those conditions have been satisfied. If the burden of the charge has been passed on only in part, it is for the national authorities to reimburse the trader the amount not passed on;

— the fact that there is a legal obligation to incorporate the charge in the cost price does not mean that there is a presumption that the entire charge has been passed on, even where failure to comply with that obligation carries a penalty;

— where, although the charge has been passed on to the purchaser, domestic law permits the trader to claim that the illegal levying of the charge has caused him damage which excludes, in whole or in part, any unjust enrichment, it is for the national court to give such effect to the claim as may be appropriate.

Costs

36 The costs incurred by the French and Governments and 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 action, 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 question referred to it by the Tribunal d'Instance, Paris, by judgments of 20December 1994, hereby rules:

1. A Member State may resist repayment to the trader of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by another person and that reimbursement of the trader would constitute unjust enrichment. It is for the national courts to determine, in the light of the facts in each case, whether those conditions have been satisfied. If the burden of the charge has been passed on only in part, it is for the national authorities to reimburse the trader the amount not passed on.

2. **The fact that there is a legal obligation to incorporate the charge in the cost price does not mean that there is a presumption that the entire charge has been passed on, even where failure to comply with that obligation carries a penalty.**

3. **Where, although the charge has been passed on to the purchaser, domestic law permits the trader to claim that the illegal levying of the charge has caused him damage which excludes, in whole or in part, any unjust enrichment, it is for the national court to give such effect to the claim as may be appropriate.**

Rodríguez Iglesias Mancini Moitinho de Almeida

Murray Kapteyn Edward

Puissochet Jann Ragnemalm

Delivered in open court in Luxembourg on 14 January 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President