application of the countervailing charge imposed by Article 9 (3) of Regulation No 816/70.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 30 April 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 2 APRIL 1974

My Lords,

This reference for a preliminary ruling by the Tribunal de première instance of Brussels is a sequel to Case 96/71 *R. & V. Haegeman v Commission* (Rec. 1972, p. 1005).

Your Lordships will remember that the S.P.R.L. R. & V. Haegeman (which I shall call 'the Plaintiff') is a company carrying on business in Brussels as an importer of wine, and in particular of Greek wine. It was the Applicant in Case 96/71 and is the Plaintiff in the present proceedings, in which the Defendant is the Belgian State.

The Plaintiff seeks repayment of 'countervailing charges' exacted from it by the Belgian customs authorities, in pursuance or purported pursuance of Regulation (EEC) No 816/70 of the Council and of the Community legislation implementing that Regulation, on certain importations into Belgium of Greek wine.

The amount of the charges at stake is, according to the Plaintiff, of the order of 30 million Belgian francs. The contention of the Plaintiff is, in brief, that the imposition of those charges was unlawful having regard to the terms of the Agreement of Association between the EEC and Greece which was signed at Athens on 9 July 1961.

Most of the arguments put forward on behalf of the Plaintiff in support of that contention were dealt with by Mr Advocate-General Mayras in his Opinion in Case 96/71 and it may be helpful if I say at once that I respectfully agree with all that he said about them. I say 'most' because, in the present proceedings, some additional arguments are put forward on behalf of the Plaintiff, with which Mr Advocate-General Mayras did not have occasion to deal.

Your Lordships will remember that, in July 1961, when the Agreement of Association with Greece was signed, the common agricultural policy provided for by Articles 38 *et seq.* of the EEC Treaty had not yet been adopted. It is plain however from a perusal of that

Agreement that its authors had very much in mind that that policy would in due course be adopted, that its adoption would involve, in accordance with Article 40 of the Treaty, a common organization of agricultural markets in the Community and that the measures envisaged by paragraph (3) of that Article for the regulation of prices were likely to include the system of levies with which we are familiar today.

Article 6 of the Agreement provided that the Association thereby created should be based on a customs union which, save as otherwise provided in the Agreement, should cover all trade in goods and should involve the prohibition between Member States of the Community and Greece of customs duties on imports and exports and of all charges having equivalent effect, and the adoption by Greece of the Common Customs Tariff of the Community in its relations with third countries. That Article also prescribed a transitional period for the attainment of the customs union which, save as otherwise provided in the Agreement, was to be twelve years.

A fasciculus of Articles concerned with the achievement of the customs union began with Article 12 which provided that the Contracting Parties (who included each of the then Member States of the Community as well as the Community itself and Greece) should refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect; and from increasing those which they already applied in their trade with each other at the date of entry into force of the Agreement. Subsequent Articles provided for the progressive abolition of customs duties (including customs duties of a fiscal nature) and of charges having equivalent effect in force between Member States of the Community and Greece, for the gradual alignment of the Greek Customs Tariff on the Common Customs Tariff during the transitional period, and for the elimination of quantitative restrictions and of all measures having an equivalent effect between the Contracting Parties. I shall, for convenience, refer to all these provisions as 'the general rules for the customs union'.

Agriculture was dealt with by Articles 32 to 43. Putting it shortly, Article 32 provided that the Association should extend to agriculture and to trade in agricultural products and that the Agreement should apply to such products save as otherwise provided in Articles 33 to 43. Article 33 provided that the functioning and development of the Association in respect of agricultural products should be accompanied by progressive harmonization of the agricultural policies of the Community and Greece over a transitional period of 22 years. To facilitate this, the Community was, in establishing the common agricultural policy, to 'take due account' of the special situation, potential and interests of Greek agriculture. Articles 34, 35 and 36 contained machinery for the achievement of that harmonization, product by product, together with provisions designed to take effect in the event of a failure to achieve it by a certain time in respect of any particular product.

Paragraph (1) of Article 37 provided that 'in anticipation of harmonization of the agricultural policies of the Community and Greece' the Contracting Parties should, in effect, apply to each other, in respect of certain agricultural products listed in Annex III to the Agreement, of which wine was not one, the general rules for the customs union. Paragraphs (2) and (3) of Article 37, on the other hand, prescribed certain derogations from those rules in respect of other agricultural products, including wine. Paragraph (2) (a) repeated however, in relation to these products, the requirements of Article 12, including in particular the requirement that the Contracting Parties should refrain from introducing between themselves new customs duties on imports or exports or charges having equivalent effect.

Paragraph (4) made it clear that the preceding paragraphs of the Article were to apply, in relation to each product, only until the expiration of the time limits fixed by Articles 35 and 36.

No one has suggested that any of the other Articles relating to agriculture has any bearing on this case, except Articles 41 and 43, on which the Plaintiff relies. To these I think it will be convenient if I revert later.

Two of the Protocols annexed to the Agreement are of crucial importance.

The first is Protocol No 12. This provided so far as material:

'The levy system envisaged within the framework of the common agricultural policy constitutes a measure specific to that policy which in the case of its application by either Party is not to be considered as a charge having equivalent effect to customs duties within the meaning of Articles 12 and 37 of the Agreement of Association... (OJ 26, 1963)'.

The second is Protocol No 14 relating to Greek exports of wine. This was expressed to have been agreed upon by the Contracting Parties 'Conscious of the special problems involved in working out a common agricultural policy for wine on the one hand and of the importance of wine exports to the Greek economy on the other'. In order to understand the provisions of this Protocol, it is necessary to have in mind that, at the time of the signature of the Agreement, importations of wine into the Federal Republic, France and Italy were the subject of customs duties and of quantitative restrictions in the form of quotas, whereas importations of wine into the three Benelux countries were subject to no duties or restrictions of any kind.

Paragraph 1 of Protocol No 14 provided that the Federal Republic should open in favour of Greece tariff quotas for specified quantities at the rate of duty chargeable on imports from other Member States of the Community.

Paragraph 2 provided:

'The Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands shall apply to imports from Greece the treatment accorded to imports from Germany France and Italy.'

By paragraph 3 France and Italy declared their readiness to open quotas in favour of Greece in certain events and paragraph 4 provided that France should charge on imports of Samos muscatel wines the duties chargeable on liqueur wines imported from Member States. Paragraph 5 defined circumstances in which quotas in favour of Greece should be increased and finally paragraph 6 contained a provision on the same lines as Article 37 (4) of the Agreement limiting the application of the Protocol to the period until the expiration of the time limit ascertained under Articles 35 and 36. This was of course the period during which, among other things, the common agricultural policy for wine was to be established.

In fact, for political reasons with which your Lordships are familiar, the machinery prescribed by Articles 35 and 36 has never been put into operation.

The common organization of the Community market in wine was established by Regulation (EEC) No 816/70 of the Council, which took effect on 1 June 1970. This Regulation is described in its title as 'laying down additional provisions' (OJ L 99, 1970) for that organization. This is because it had been preceded by Regulation No 24 of the Council, of 4 April 1962, 'on the progressive establishment of a common organization of the market in wine' (OJ 30, 1962), but Regulation No 24 did not in substance go further than to provide for the gathering of information.

My Lords, I need not recite the provisions of Regulation No 816/70 in any detail. Among its stated objects were 'to stabilize markets and ensure a fair standard of living for the agricultural community concerned'. To this end it

contained provisions for intervention, on the basis of 'guide prices', provisions about trade with third countries, rules concerning production and for the control of planting, and rules concerning oenological processes and conditions for release on the market.

The important provision of the Regulation, for present purposes, is Article 9. This provided for the annual fixing of 'reference prices' for different kinds of wine and for the determination, in respect of each wine for which a reference price was fixed, on the basis of all available information, of a 'free-at-frontier offer price' for all imports into the Community. It then provided, by paragraph (3):

'Where the free-at-frontier offer price for a wine, plus customs duties, is lower than the reference price for that wine, a countervailing charge equal to the difference between the reference price and the free-at-frontier offer price plus customs duties shall be levied on imports of that wine and of wines in the same category.

However, the countervailing charge shall not be levied as regards third countries which are prepared and in a position to guarantee that the price for imports of products originating in and coming from their territory will not be lower than the reference price less customs duties and that any deflection of trade will be avoided.'

It appears that Greece has at no time been 'prepared and in a position' to offer the guarantees mentioned in that proviso, although such guarantees have been accepted from other countries (notably Algeria, Morocco, Tunisia and Turkey) imports from which are accordingly not subject to countervailing charges.

Such are the circumstances (for I need not take up your Lordships time with an account of the legislation adopted in implementation of Article 9) in which, since June 1970, the Plaintiff has been required to pay, albeit under protest, countervailing charges on imports of Greek wine.

During 1970 and 1971 the Plaintiff made representations about the matter first to the appropriate Belgian Ministry and then to the Commission, claiming that, by virtue in particular of paragraph 2 of Protocol No 14, it was entitled to import Greek wine into Belgium free of countervailing charges notwithstanding that Regulation No 816/70 conferred no express exemption on such imports. The Plaintiff's correspondence with those bodies culminated in a letter dated 15 October 1971 from the Commission refusing to concede any such exemption.

The Plaintiff thereupon took proceedings against the Commission by way of direct action in this Court — that was Case 96/71 — in which, in substance, it claimed (1) a declaration that the 'decision' of the Commission embodied in the letter of 15 October 1971 was void and (2) damages under Article 215 of the EEC Treaty. The Court, in its Judgment, held that, since the countervailing charges in question were part of the Community's own resources, the ascertainment and collection of which were, by virtue of the Council's Decision of 21 April 1970 relating to such resources and of Regulation No 2/71 of the Council, in the first instance matters for the Member States, proceedings as to the validity and interpretation of Community legislation relating to them must be brought before the national Courts, to whom the procedure under Article 177 of the Treaty was available. The Court accordingly dismissed the action without entering into its merits.

Hence the present proceedings.

Before the Tribunal de première instance of Brussels the Plaintiff put foward four main contentions, which it has developed in this Court.

First the Plaintiff contends that paragraph 2 of Protocol No 14 governs every aspect of the importation of Greek wines into the countries of the Benelux and that, since no countervailing charges

are imposed on imports into those countries of wines from Germany, France or Italy, none may be imposed on such imports from Greece. To this the Belgian State and the Commission answer that, as was held by Mr Advocate-General Mayras in Case 96/71, Protocol No 14 is concerned only with customs duties and tariff quotas, and not with levies or similar charges introduced as part of the common agricultural policy. My Lords, with this view I agree, as I do with the reasoning that led Mr Advocate-General Mayras to adopt it. The relevant passage in his Opinion is to be found at pp. 1025-1026 of the report of Case 96/71, and it would, I think, be a work of supererogation on my part, if not worse, to seek to repeat what he said. An attempt to undermine it was, naturally, made on behalf of the Plaintiff in the present proceedings, but, in my opinion, that attempt failed.

The second contention put forward on behalf of the Plaintiff is that the countervailing charges in question are not 'levies', the introduction of which was permitted by Protocol No 12, but charges having an effect equivalent to customs duties, the introduction of which was forbidden by Article 37 (2) (a) of the Association Agreement. This point too was dealt with by Mr Advocate-General Mayras in his Opinion in Case 96/71 — see pages 1026-1028 of the report. There again I refrain from repeating what he said. In the present proceedings the Plaintiff sought to attack it on two grounds.

First the Plaintiff argued that the expressions 'levy' and 'charge having equivalent effect to customs duties' must, in the context of the Association Agreement, be construed, not according to Community law, but according to International law and that, in the eyes of International law, for instance in the context of GATT, any charge imposed on imports that has a protective purpose or effect (as undoubtedly the countervailing charges in question here have) is in the nature of a customs duty. The Plaintiff submits that, accordingly, the reference in Protocol No 12 to 'the levy system envisaged within the framework of the common agricultural policy' must be taken as a reference to a system of levies imposed as between Member States in the period of transition towards a common agricultural policy. My Lords, I think there is a twofold answer to that argument. First, the expressions in question must be interpreted in the context of the Association Agreement read as a whole and against the background of the provisions of the EEC Treaty. In that context, and against that background, there is no warrant for giving to the expression 'the levy system' the narrow interpretation contended for by the Plaintiff. Secondly, an examination of the terms of Protocol No 12 shows that that interpretation is untenable. The Protocol refers to the application of that system 'by either Party'. Manifestly a system of levies on trade between Member States could not be 'applied' by Greece. Furthermore the Protocol contains a proviso, which reads, in part, as follows:

'The Community declares, however, that at the present time the levy system is not envisaged for products listed in Annex III. If, however, levies are also imposed on those products, Greece shall enjoy the same treatment as that applied by Member States to each other.'

It is clearly implicit in this that the levies with which the Protocol is concerned may be imposed by the Community on trade with third countries.

The second ground on which the Plaintiff attacked the Opinion of Mr Advocate-General Mayras on this point was that the countervailing charges in question do not, in the case of imports of Greek wine into the Benelux, achieve the purpose which is said to be their justification, i.e. to bring the prices at which wines from third countries enter the Community up to the level of the reference prices. This is because, by virtue of Article 9 (3) of Regulation No

816/70, the countervailing charge is 'equal to the difference between the reference price and the free-at-frontier offer price plus customs duties' and because, by virtue of paragraph 2 of Protocol No 14, there are no customs duties on imports of Greek wine into the Benelux. As was pointed out by Counsel for the Commission at the hearing, Article 9 (3) could have been interpreted as meaning that in that case the countervailing charge should have been fixed on the footing that the relevant customs duties were nil. Suppose a reference price of 125 u.a., a Common Customs Tariff duty of 20 and a free-at-frontier offer price of 100. The countervailing charge on imports into Member States other than the countries of the Benelux would be 5 u.a., so as to make the aggregate of the free-at-frontier offer price, the customs duty and the countervailing charge equal the reference price. Article 9 (3) could have been interpreted as meaning that, in the case of imports of Greek wine into the Benelux, the countervailing charge should be 25 u.a., to make up for the fact that the customs duty is nil. But in practice, in order to preserve to Greece the benefit of paragraph 2 of Protocol No 14, Article 9 (3) has been interpreted as meaning that, in the case of such imports, the countervailing charge must be ascertained after notionally adding to the free-at-frontier offer price the duty under the Common Customs Tariff. The effect of this is that Greek wines are subjected on entry into the Benelux to the same countervailing charge as is applicable on their entry into other Member States, so that, in the example put, they enter (assuming the free-at-frontier offer price to have been accurately fixed) at 105 u.a. — that is at 20 u.a. less than the reference price. Hence the argument for the Plaintiff. But, my Lords, this argument is of the kind that proves too much, because it would be equally applicable to Greek wines entering the Federal Republic, France, or Italy under the special tariff quotas provided for by the other paragraphs of Protocol No 14. In any case, as was pointed out on behalf of the Commission, it is at the end of the day an untenable view that the Community, in the example put, was entitled to impose a charge of 25 u.a. but not one of 5. This would amount to saying that the Community was entitled to exercise the rights reserved to it by Protocol No 12 to the full, but not partially, even though the latter course would be to the advantage of Greece and more consonant with the spirit of Protocol No 14. I conclude that this second ground of attack on the opinion expressed by Mr Advocate-General Mayras also fails.

The third contention of the Plaintiff is concerned with Article 43 of the Agreement of Association with Greece. This is in the following terms:

'Where a product is subject to a market organization or to internal rules having equivalent effect, or where a product is directly or indirectly affected by such a market organization for other products, and where the resulting disparity in the price of the raw materials used has a damaging effect on the market of one or more Member States or of the Community, on the one hand, or of Greece on the other, a countervailing charge may be applied to imports of that product by the Contracting Party concerned . . .

The amount of and the rules concerning this charge shall be determined by the Council of Association.

Until the decision of the Council of Association takes effect the Contracting Parties may determine the amount of and rules concerning the charge.'

The Council of Association there referred to is that provided for by Articles 3 and 65 of the Agreement. Article 65 provides that it is to consist of members of the Governments of the Member States and of Greece, and of members of the Council and of the Commission of the Community, and that it is to act unanimously.

It appears that in Case 96/71 Article 43 was placed in the forefront of the

Plaintiff's argument, the submission of the Plaintiff being that this was the only provision of the Agreement that permitted the application of countervailing charges as between the Community and Greece and that it could be implemented only by a decision of the Council of Association, of which there had been none.

This argument too was in my opinion convincingly disposed of by Mr Advocate-General Mayras — see in particular at p. 1028 of the report. He pointed out that Article 43 was in truth wholly irrelevant: it would have been relevant only if the countervailing charges here in question had been imposed in order to counteract some damaging effect on the market of one or more Member States, or of the Community, resulting from the way the market was organized in Greece, which, of course, they were not. They were imposed by the Community independently of Article 43, in right, so far as Greece was concerned, of Protocol No 12, as part of the establishment of the Community's own market organization.

In the present proceedings the Plaintiff does not maintain the submission that Article 43 was the only provision of the Agreement permitting the imposition of countervailing charges. Its submission seems to be confined to saying that Article 43 did not authorize the Community to impose countervailing charges without reference to the Council of Association. Since no one suggests that the countervailing charges with which this case is concerned were imposed pursuant to Article 43, this submission seems to me devoid of relevance.

The fourth and last contention of the Plaintiff, which was not put forward in Case 96/71, is based on Article 41 of the Association Agreement, paragraph (1) of which (the only paragraph relied on by the Plaintiff) is as follows:

In so far as progressive abolition of customs duties and quantitative restrictions between the Contracting Parties may result in prices likely to jeopardize the attainment of the objectives set out in Article 39 of the Treaty establishing the Community, the Community and Greece may, from the date of the introduction of the common agricultural policy in the case of the Community, and from the entry into force of this Agreement in the case of Greece, apply to particular products a system of minimum prices below which imports may be either

— temporarily suspended or reduced; or

— allowed, but subject to the condition that they are made at a price higher than the minimum price for the product concerned.

In the latter case the minimum prices shall not include customs duties.'

The argument of the Plaintiff is that this Article precluded the Community from protecting itself against excessively low Greek prices except by the method of minimum prices for which the Article provided. The Plaintiff points out, quite rightly, that a system of minimum prices is not the same as a system of countervailing charges since, so far as relevant here, in the case of the former, it is the Greek exporter who gets the benefit of the difference between the minimum price and the price at which he would otherwise invoice, whereas under a system of countervailing charges those charges go to swell the resources of the Community.

My Lords, I think that the fallacy underlying this argument is analogous to the fallacy underlying the Plaintiff's erstwhile argument based on Article 43. Article 41 is concerned only with a situation in which an excessively low level of prices for particular products, or a particular product, results from the 'progressive abolition of customs duties and quantitative restrictions between the Contracting Parties' under the Agreement. No one suggests that it was because of any such situation that the countervailing charges in question in this case were introduced. They were

introduced, if I may say so at the risk of being wearisomely repetitive, simply as a feature of the common organization of the Community market in wine. It follows in my opinion that the provisions of Article 41 are not germane to this case.

I turn to the actual questions referred to the Court by the Tribunal de première instance of Brussels. There are four, and they reflect the four contentions of the Plaintiff.

The first is:

'What interpretation is to be given to the word "treatment" in paragraph 2 of Protocol No 14 annexed to the Agreement establishing an Association between the European Economic Community and Greece?'

For the reasons I have indicated, I am of the opinion that this question should be answered as follows:

'Paragraph 2 of Protocol No 14 annexed to the Agreement establishing an Association between the European Economic Community and Greece is to be interpreted as relating only to the treatment to be accorded to imports from Greece as respects customs duties and tariff quotas.'

The second question is:

'Is the countervailing charge imposed by the Commission of the European Communities on Greek wines imported into Belgium and the Grand Duchy of Luxembourg a duty or charge having equivalent effect within the meaning of Article 37 (2) of the said Agreement of Association?'

This question is perhaps not quite accurately formulated in so far as it attributes the imposition of the charge to the Commission. It would be more accurate, I think, to attribute it to the Community, for Regulation No 816/70, which initiated the imposition of the charge, was of course a Regulation of the Council and the relevant Regulations of the Commission have been merely implementing ones. I would accordingly answer the question as follows:

'The countervailing charge imposed by the European Economic Community on the importation of Greek wines into Belgium and Luxembourg is not a duty or charge having equivalent effect within the meaning of Article 37 (2) of the said Agreement of Association but a levy permitted by Protocol No 12 annexed to that Agreement.'

The third question is as follows:

'Under Article 43 of the same Agreement of Association, is the Commission of the European Communities empowered to determine on its own, i.e. without reference to the Council of Association, the amount of the countervailing charge to be imposed on imports of Greek wine into the territory of the EEC, and the way in which it is to be collected?'

This question is of course, if Mr Advocate-General Mayras and I are right in the views we have expressed, irrelevant to the solution of any issue pending before the Tribunal de première instance of Brussels. Its irrelevance was emphasized both by the Defendant, the Belgian State, and by the Commission in their submissions to this Court. That irrelevance is moreover underlined by the fact that, in substance, the Plaintiff and the Commission are agreed on the correct answer to the question, which is: 'No, subject to the applicability of the last paragraph of the Article'. The Defendant was content to say that the question was irrelevant, without hazarding a view as to what the correct answer to it might be.

How then should Your Lordships answer the question?

In general, of course, as has been laid down in a number of Judgments of the Court, it is, in references under Article 177 of the EEC Treaty, for the national Court or Tribunal making the reference to be the judge of the relevance of the questions referred and this Court has no jurisdiction to enquire into their relevance. But this general principle is subject, I apprehend, to at least one

exception, which is applicable here. This exception springs from the fact that the jurisdiction of the Court under Article 177 is to rule on the interpretation of the Treaty and on the validity and interpretation of acts of the Community Institutions. The Court has under Article 177 no direct jurisdiction to rule on the interpretation of such an instrument as the Agreement of Association with Greece: its jurisdiction to interpret that instrument arises only, I apprehend, where its interpretation is relevant to the question of the validity of an act of a Community Institution or to the question of the interpretation to be given to such an act. It follows in my opinion that, in the present case, the questions asked by the Tribunal de première instance of Brussels are admissible only in so far as they are related to the question of the validity and effect of Regulation No 816/70 and of the Community legislation implementing it.

I would therefore answer the question as follows:

'The provisions of Article 43 of the said Agreement of Association do not in any way affect the validity or the application of Regulation (EEC) No 816/70 of the Council or of any Community Regulation adopted in implementation thereof.'

The fourth question asked by the Tribunal de première instance is as follows:

'Assuming that the conditions for applying Article 41 of the Agreement of Association are satisfied, is it lawful for the Commission of the European Communities to put the protective measures for which it provides into operation otherwise than by means of a system of minimum prices, and, more particularly, by a system of compensatory charges levied by the Community?'

It seems to me, my Lords, that the same considerations apply to this question as to the previous one and that it should be answered in the same way:

'The provisions of Article 41 of the said Agreement of Association likewise do not affect the validity or the application of those Regulations.'

My Lords, the formulation by the Tribunal de première instance of its questions was criticized on behalf of the Defendant and of the Commission on two grounds.

First it was pointed out that the Tribunal had omitted to ask whether the various provisions of the Agreement of Association of which it sought the interpretation were directly applicable so as to confer on persons in the dosition of the Plaintiff rights which they were entitled to enforce in their

national Courts. As to this, I think that it is enough for me to say that, on the view I take of the interpretation of those provisions, that question does not arise.

Secondly, it was said that the Tribunal had omitted to ask the really crucial question, which was whether it was lawful to apply to imports of Greek wine into Belgium the countervailing charges provided for by Article 9 (3) of Regulation No 816/70 or whether such application was contrary to the Agreement of Association with Greece, with particular reference to Articles 37 (2) (a), 41 and 43 thereof and to paragraph 2 of Protocol No 14. Of the fact that that is the whole question in the case there can of course be no doubt. I am inclined for my part to think that the answer to it will be clear if Your Lordships answer the questions actually put by the Tribunal seriatim in the way I have suggested, but an alternative, which Your Lordships may prefer, would be to answer those questions compendiously by saying that nothing in the Agreement of Association renders unlawful the application to imports of Greek wine into Belgium of the countervailing charges provided for by Article 9 (3).