Lecourt Pescatore Monaco

Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 14 December 1972.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 21 NOVEMBER 1972[1]

Mr President,
Members of the Court,

On 26 July 1971 and 17 September 1971 respectively Marimex, a limited company having its registered office in Milan, imported frozen beef and veal and live cattle from the Federal Republic of Germany into Italy via the Brenner Pass. At the border the meat and live animals were examined by an official veterinarian. The importing undertaking had to pay the customs authority a sanitary charge as provided for in Article 32 of the Testo Unico (legislation consolidated by the executive) relating to sanitary legislation of 27 July 1934 (completed by the law of 30 December 1970). On the first occasion the undertaking paid Lit. 10 per kilogram of meat and on the second occasion Lit. 1 000 per imported animal.
Marimex considered that this charge was unlawful. It is of the opinion that it constitutes a charge having an effect equivalent to a customs duty, that is to say, a charge the levy of which is prohibited under Article 9 of the Treaty and, in so far as it related to intra-Community trade in cattle and beef and veal, under Article 22 of Regulation No 805/68 on the common organization of the market in beef and veal (OJ, Special Edition, 1968 I, p. 187). Since Marimex further considers that the said provisions are directly applicable, creating individual rights for private persons, it applied to the President of the Tribunale di Trento to issue an order for payment to the Italian Minister for Finance in order to secure the reimbursement of the amounts paid by it for the sanitary inspection.
The President of the Tribunale di Trento thus suspended the proceedings by an order of 17 May 1972 in view of the problems arising from the application of Community law and in accordance with Article 177 of the EEC Treaty requested a preliminary ruling on the following question:

'Must a pecuniary charge imposed by the Italian State for the sanitary inspection of live cattle and beef and veal on crossing the frontier be considered as a charge having an effect equivalent to a customs duty within the meaning of Article 22(1) of Regulation (EEC) No 805/68 despite the fact that corresponding goods produced within the territory of the Italian State are subject to a pecuniary charge which is (a) levied by authorities other than the State and (b) calculated in accordance with criteria which are not comparable to the criteria employed to determine the amount of the pecuniary charge imposed on imported live cattle and beef and veal?'

1 — Translated from the German.

I shall now express my view on this question after noting the statements—partly controversial—of the plaintiff in the main action, the Italian Government, the Netherlands Government and the Commission of the European Communities.

1. I should like to open my remarks with an initial statement on the wording of the question submitted to the Court.

It is clear from the wording of the question that it is intended to establish the classification of the sanitary charge which is at issue in the main action. Naturally the Court cannot go so far in proceedings under Article 177 since establishing the classification of the charge would imply subsumption and thereby application, and furthermore because—as will shortly be shown—all the facts cannot be established reliably. In the present proceedings the Court can only give an abstract interpretation of the concept 'charge having an effect equivalent to a customs duty' although, in order to limit the interpretation to essentials and to make it applicable in the main procedure, the Court must have regard to the particular problems of these proceedings. It is then the task of the national court, with the aid of the criteria developed, to provide a definitive solution for the question of classification which has arisen. Accordingly the question which has been submitted must be re-interpreted in the light of its regularity in accordance with the procedure under Article 177. This might be done, as the Commission has suggested, by considering whether a financial charge levied by a Member State for sanitary inspections of goods which fall under Regulation (EEC) No 805/68 when the frontier is crossed is to be regarded as a charge having an effect equivalent to a customs duty and if this is also the case if domestic products are likewise charged, although by other authorities and in accordance with criteria which are not comparable with the criteria employed in determining the charge in respect of imports. No objections are to be raised regarding the admissibility of the question expressed in this manner.

2. A further point should be made at the outset, namely that it is a matter of indifference with regard to interpretation whether the concept contained in Article 9 of the Treaty (that is to say the prohibition which has been directly applicable since 1 January 1970) is adopted as a basis or the corresponding concept in Article 22 of Regulation No 805/58 which likewise and indeed with effect from 29 July 1968 has prohibited, in intra-Community trade in cattle and in beef and veal, the levying of any customs duty or charge having equivalent effect. This is so because the decisions of the Court have already made clear that the concept 'charge having an effect equivalent to a customs duty' was simply transposed from the Treaty to the relevant agricultural regulations and bears no other meaning than that which it has in the Treaty itself. I refer to the judgment in Case 24/68, *Commission of the European Communities* v *Italian Republic* ([1969] ECR 193), which has been followed in subsequent decisions.

3. When, after these preliminary remarks, we come to consider the question actually submitted we must turn first of all, in view of the arguments submitted in the procedure, to Article 36 of the Treaty, that is to say, to the clause in accordance with which 'The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property'.

It can indeed be accepted that on the basis of this provision sanitary inspections at the internal frontiers of the Community are certainly admissible in the absence of complete harmonization of the relevant national rules. This follows in particular from the Directive of the Council of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine and the Directive of the Council of the same date on health

problems affecting intra-Community trade in fresh meat. I refer to Article 6 of the first-mentioned directive and to Article 5 of the last-mentioned directive.

I should however like to state from the outset that this is irrelevant in deciding the admissibility of the Italian sanitary *charges* which now concern us.

In particular it seems mistaken to argue, as the Netherlands Government does, that, because under Article 189 of the Treaty which with regard to the implementation of directives leaves 'to the national authorities the choice of form and methods', the Member States are also free to settle the nature of the financing of sanitary inspections. In fact, an argument of this nature cannot be led precisely because both the abovementioned directives, on which the Netherlands Government apparently bases its argument do not *prescribe* sanitary inspection for the importing countries; in this respect they create no obligation on the Member States and at the most they indicate *tolerance* of the situation. Thus the two directives are irrelevant with regard to the admissibility of the relevant sanitary charges.

It is also an important point that the Court has already set out clearly strict rules of interpretation with regard to the determination of the scope of Article 36 of the Treaty. Thus we learn from the judgment in Case 7/68, *Commission of the European Communities* v *Italian Republic* ([1968] ECR 423), that, because it comes within the chapter on elimination of quantitative restrictions, Article 36 relates exclusively to provisions which constitute prohibitions on imports, exports or goods in transit. As the Court stated, these prohibitions are by nature clearly distinct from customs duties and assimilated charges. In addition it must further be accepted that exceptions to the principle of the elimination of obstacles to the free movement of goods must receive a *strict* interpretation. Thus, the exceptions in Article 36 cannot be extended to measures which are unrelated to the prohibition mentioned in the chapter on the elimination of quantitative restrictions. It has been expressly stated that Article 36 does not embrace customs duties and charges having equivalent effect. Thus it is clear in my view that the fact that Article 36 does not include carrying out sanitary inspections at the internal frontiers of the Community in no way provides grounds for the conclusion that the *charges* levied in this connexion are admissible.

Finally it is likewise impossible, as the Commission has indicated, to maintain that the sanitary charges represent an essential component of the rules regarding the carrying out of sanitary inspections and that they therefore constitute part of the essence of the latter. In this connexion, it is indeed correct that the said charges are used to finance the sanitary inspections; however there can be no question of entertaining the view that it would be impossible to carry out the inspections without levying the charges.

It is thus certain that Article 36 provides no justification for the charges in dispute; in other words, if they represent charges having an effect equivalent to a customs duty, the prohibition in Article 9 of the Treaty and the corresponding prohibition in Regulation (EEC) No 805/68 cannot be deprived of their effect by reference to Article 36.

4. Further consideration of the question how the concept 'charges having an effect equivalent to a customs duty' is to be defined with regard to the special features of the main action must above all proceed on the basis of what has already been developed in the case-law of the Court and which has been stated to be relevant. Accordingly, it is important that the concept should be defined with regard to the fundamental purpose of the Community which is to ensure that the free movement of goods is guaranteed. The importance of the prohibition on levying customs duties and charges having equivalent effect on intra-Community trade and the need to maintain this prohibition intact call for a *broad* definition of the concept. Accordingly, one is confronted with charges having an effect equivalent to a customs duty if Member States unilaterally subject imported goods to financial burdens because they cross the frontier, without regard being had to the purpose for which

such burdens are created or collected. It was also emphasized that it does not depend upon the denomination and nature of the levy and it is a matter of indifference whether they are levied for the benefit of the State and whether they have discriminatory or protectionist effects. This may be deduced in particular from the judgments in Case 24/68 ([1969] ECR 193) and in Joined Cases 2 and 3/69 ([1969] ECR 211). In accordance with these judgments the basic requirement thus is that a duty is imposed because of crossing the frontier and that crossing the frontier constitutes the decisive reason for this.

(a) On the other hand, the Italian Government maintains that these circumstances are not present in the levying of the sanitary charges. These charges must really be considered as a *consideration* for the service rendered by the administration and as thereby excluded from the ambit of charges having an effect equivalent to a customs duty.

In this way reference is likewise made to the relevant case-law where in fact it has been repeatedly stated that the concept 'charge having an effect equivalent to a customs duty' must accommodate the said restriction that charges of this nature do not exist if in fact the service rendered by the State is paid for by appropriate considerations. For example reference may be made to the judgment in Case 24/68 and to the judgment in Joined Cases 2 and 3/69.

Let us then consider this case-law and what conclusions may be drawn with regard to the problems in the main action. From such consideration it is clear in particular that the Court, contrary to certain views which I have set out in Joined Cases 52 and 55/65 ([1966] ECR 219), have applied extraordinarily *strict* conditions to the concept of the consideration for administrative services, in view of the principle that every exception to the prohibition on levying customs duties and charges having equivalent effect must be restrictively interpreted. It was thus emphasized that in this connexion no significant administrative service could be held to exist if the entire trade derived benefit from it. It must instead be possible to perceive an advantage on the market for the imported products themselves and the consideration of the persons concerned must be appropriate to this advantage, although it need not correspond to the costs actually incurred by the administration. Finally, recourse to the legal concept of the consideration of the persons concerned is excluded if their advantage can only be considered as general and difficult to evaluate.

In accordance with these principles serious doubt must be harboured whether the sanitary charge under Italian law is actually classified as a consideration for an administrative service and can thus be excluded from the scope of charges having an effect equivalent to a customs duty. In this connexion it certainly cannot be considered as a significant advantage that the importer, through the implementation of the sanitary controls and after settlement of the dues therefor, is enabled to put the goods into free circulation.

This has already been stated in the judgment in Joined Cases 52 and 55/65. Properly understood, the right freely to market imported goods is rather something which comes about automatically, a right flowing from the Treaty, when it is ascertained that the goods fulfil the requirements of the law. In addition, it may be maintained that there is a general public interest in bringing about a free exchange of goods.

When general interests are involved (the Italian Government itself admits that this is the case with regard to the exercise of sanitary inspections at the frontier), the question arises in particular whether this public interest is predominant and the particular advantages obtained by the importer are subordinate, that is to say, appear irrelevant. It seems that this is in fact the position in the present case. It certainly cannot be denied that importers scarcely have a private interest in sanitary inspections and assessments of quality precisely when the frontier is crossed, thus at a considerable distance from the destination of the goods. Furthermore, there is considerable doubt as to the existence of a concrete quantifiable benefit

which, in the view of the Italian Government, arises from the circumstance that it is certified after the completion of the sanitary inspections that the goods are free from disease and of good quality. It is at all events essential that precisely because of the guidelines which have already been mentioned the exporting state must ensure that with regard to Community trade certain products comply with certain conditions and that a certificate issued after inspection by an official veterinarian must accompany the goods to their destination. Viewed in this light, inspections at the frontier can only constitute summary checks and not proceedings which can bring about a quantifiable increase in value and improvement of marketing prospects of the relevant goods. Finally it does not appear to be the case that the inspections at the frontier (and this might represent a material benefit) render superfluous other inspections which apply generally to products of that kind, within the country. If I am correct it is indeed the case—the national court must naturally scrutinize this point—that internal inspections (for example before and after slaughtering and in other circumstances) are without distinction and without regard to origin of all the goods referred to in the relevant provisions.

Having regard to the criteria which may be claimed as valid in the present context in accordance with the case-law of the Court, it is difficult to entertain the view that the Italian sanitary charge constitutes a consideration for an administrative service rendered and it is consequently impossible to classify it as a charge having an effect equivalent to a customs duty.

(b) It is also possible to discount the view that a charge having an effect equivalent to customs duties exists if a burden comes under *Article 95* of the Treaty, that is to say, the provision in accordance with which 'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products'. This is likewise clear from the case-law of the Court; it was in particular emphasized in the judgments in Case 24/68 and Joined Cases 2 and 3/69 that charges imposed in the same manner within a State on similar domestic products or within the framework of general domestic taxation or which are intended to equalize domestic taxation of this nature do not constitute charges having an effect equivalent to customs duties. This point brings us to consider the part of the question in which it is considered whether a financial burden is also imposed upon corresponding domestic products where it is in fact imposed by organs other than the State and calculated in accordance with other criteria which are not comparable with the criteria for the charges imposed upon imported live cattle and upon imported beef and veal. As has emerged clearly from all that was stated in the procedure, this certainly constitutes the most difficult section to consider in the present case.

Two facts can first of all be established without difficulty. First, it must certainly be irrelevant whether the charges under consideration accrue to different beneficiaries (on the one hand the State and on the other the local authorities) and whether they are contained in different provisions. In fact, fine distinctions of this nature are irrelevant with regard to Article 95; for its application the significant point is the resultant burden whilst in principle regard is not had for the means by which it is imposed. Furthermore, contrary to what the plaintiff in the main action considers, Article 95 does not come into play only when purely *fiscal* provisions are at issue, that is, provisions which serve to obtain revenue for generally financing the tasks of central government and in which it is impossible to perceive a benefit for the person from whom the charge is due. One should rather concur with the Commission that, as Article 95 employs the words 'internal taxation *of any kind*', it is of general application and accordingly should not be interpreted restrictively, in order that hiatuses should not occur in the arrangements of the Treaty. The designation of a charge is accordingly unimportant (in the present case for example the circumstance emphasized by the plaintiff that the charge would be termed 'para-

fiscal': viewed in this light it is by no means unthinkable that the Italian sanitary charge would also come within the scope of Article 95.

As the Court is aware the Italian Government is firmly convinced of this. It refers to the many similar sanitary inspections within its country which are carried out by local authority veterinarians and which also involve the payment of charges. Even although the relevant system is complex, rendering comparison difficult, it nevertheless constitutes a sufficient counterpart under Article 95. Correctly understood, it is indeed sufficient with regard to Article 95 that there can be found a structural correspondence, a certain equivalent of value and a correspondence which need only be in essential matters; it turns exclusively on the point whether the sanitary inspection at the frontier and the charges for it form part of a general comprehensive system of health control.

Can this basic conception really be entertained? That is the question which we must now consider. Anticipating the outcome it seems scarcely possible to do so. Even in the present context serious doubts arise as to the view of the Italian Government. The most important point appears to me that Article 95 prohibits *discrimination* against imported goods. Its application thus requires a comparison and thereby presumes that the relevant charges may be clearly compared. The decisions of the Court indicate this when they emphasize that Article 95 requires that domestic products should be charged *in the same way*; for example it requires that customs duties must *correspond to* internal charges (which must naturally be checked in detail). In addition, it has been emphasized from an early period in the case-law of the Court that Article 95 cannot be applied at random to all classes of charges and in this connexion it is impossible to have regard to any equalization whatsoever between a burden upon imported goods and burdens of another nature upon similar domestic products (Joined Cases 2 and 3/62 [1962] ECR 425). It thus seems appropriate that the Commission concurs with the plaintiff in the main action in the view that a general structural relationship between the charges to be compared is insufficient and that what is required instead is the existence of a precise correspondence. With reference to the present case, it is necessary that the purposes of the sanitary inspections correspond and that the criteria in accordance with which the extent of a burden is measured are comparable. This is the only way in which it is possible to prevent the restriction of an essential principle of the Treaty, the free movement of goods, by the imposition of charges within the meaning of Article 95, which would moreover afford no possibility of sufficient supervision by the Community.

Nevertheless, the requirements for the application of Article 95 are so stringent that it appears extremely doubtful whether it embraces the charge in dispute in the main action. These conditions are perhaps not so strict with regard to the sanitary inspection of *meat* (the details of which must be scrutinized by the court making the reference). The possibility of comparison could indeed exist in the sense which has just been indicated if the inspections within Italy at the place of origin of the goods, on the one hand, and at their destination, on the other, are considered and balance achieved in comparison with the sanitary inspections carried out at the time of customs clearance. Accordingly in this case it would probably be necessary only to consider the question whether the imported goods were subjected to double taxation, that is to say, whether the prohibition on discrimination in Article 95 has been complied with.

On the other hand, a different situation would appear to obtain with regard to the inspection of *live animals*. According to what the Court has heard in the procedure, it is difficult in this respect to justify the finding that the general and summary inspections at the frontier, with regard to the content of the provisions of the said guidelines, and the fixed fees charged for them find an exact correspondence in the inspections carried out within Italy and the charges for them. Perhaps it must only be considered that imported animals are *in addition* subjected to the inspections within Italy if the corresponding conditions obtain, and that double taxation must be

held to occur. It further appears to be established that the purpose and structure of the inspections at the frontier are not comparable with the purpose and structure of the numerous inspections within the country (one might for example think of the inspections before and after slaughtering, of the inspections at random which undertakings carry out in their own capacity—at sales outlets, slaughter-houses and on transport—of the inspections for particular reasons, for example on the transport of cattle from an area where there is disease or in such an area or the occasional inspections of animals which are intended for milk production or breeding). Furthermore, it appears that it is also impossible to compare the charges levied because the fixed fees on the occasion of the inspections at the frontier stand in contrast to the charges within Italy because of the different criteria for calculating them and owing to local differences. In this connexion I refer to Article 61 of the Testo Unico of the sanitary legislation and to the detailed and pertinent statements of the parties to the proceedings which the court making the reference must ultimately employ in reaching its decision.

In fact the impression must thereby be formed that, because it is impossible—to a large extent at any rate—to make a comparison of the criteria relating to the Italian sanitary charges which is essential with regard to Article 95, it is impossible to classify the charges under the provisions and, in that Article 95 does not come into play, they cannot be regarded as charges having an effect equivalent to a customs duty.

5. In sum, solely on the basis of the facts to be deduced in a procedure in accordance with Article 177, I suggest that the question submitted to the Court should be answered as follows:

If a Member State imposes fees for sanitary inspections carried out at the frontier on goods coming under Regulation (EEC) No 805/68 such fees cannot be regarded as considerations for services rendered by the administration if the inspections are carried out principally in the public interest and there does not result for the imported goods a corresponding benefit on the market, in proportion to the amount of the charge. Such fees must rather be considered as charges having an effect equivalent to a customs duty within the meaning of Article 9 of the EEC Treaty and of Article 22 of Regulation (EEC) No 805/68, unless similar charges calculated in accordance with comparable criteria are imposed on similar domestic products for internal sanitary inspections at the frontier and which are imposed solely on national products. If the last-mentioned conditions do not obtain Article 95 of the EEC Treaty must be applied, that is, an appropriate examination must be carried out as to the existence of discrimination, whether or not the charges on imported goods are imposed by other authorities than the charges payable for the internal sanitary inspections.