OPINION OF ADVOCATE GENERAL GULMANN

delivered on 26 January 1993 *

Mr President,
Members of the Court,

1. The Supremo Tribunal Administrativo (Supreme Administrative Court) of Portugal has referred to the Court for a preliminary ruling five questions on the interpretation of provisions of the EEC Treaty in order to enable it to rule on the legality under Community law of a parafiscal charge.

2. A Forestry Products Institute (Instituto dos Produtos Florestais) was established in Portugal by legislation in 1972. The Institute was a body for economic coordination and had its own legal *persona*.

The operations of the Institute were financed by charges levied on a range of forestry products coming within the scope of its activities. At the time of Portuguese accession to the EC in 1986, the method of financing was amended in order to bring the system into line with Community-law requirements. The charge material to the present case — a charge on 'chemical pulp' — was accordingly changed from a specific charge to an *ad valorem* duty. It is common ground that the charge is, at least in formal terms, a general internal charge which affects both domestic and imported products according to the same criteria.

3. As in the cases concerning parafiscal charges on which the Court has previously ruled, it is the use to which the charge is put that forms the background to the questions as to whether it is compatible with Community law. Thus, the national court points out in this regard that the charge is

'used to finance the discharge of the duties entrusted to the IPF, which are intended essentially to "defend production and the higher interests of the national economy" — cf. Article 2(b) of Decree-Law 428/72.10.31. In Case 94/74 *IGAV* v *ENCC*, judgment of 18 June 1975, the decision given was affirmative where "the duty is intended exclusively to support activities which specifically benefit the taxed domestic product" ... and although the use of the receipts of the IPF does not fall into that category (the activities are so diversified that they even cover the regulation ... of import operations and cooperation in the negotiation of international agreements ...), it approximates thereto in so far as the IPF's main purpose is to safeguard the interests of domestic products.'

The Portuguese Government explained in its observations what the activity of the Institute consists of. It pointed out that the Institute's duties have been somewhat modified in the light of developments in Portugal and submitted that in 1987, the period at issue in

* Original language: Danish.

the main proceedings, those duties centred around two principal areas: first, the completion of technical, economic and statistical studies, along with laboratory research within the forestry sector, and, second, the monitoring of compliance with rules in force on the production and processing of sector products.

4. According to the information in the case, the Institute was abolished in 1988, when its duties were taken over by the Ministry of Agriculture, and the various charges on forestry products were no longer levied.

5. The Court has had the opportunity, most recently in three judgments delivered on 16 December 1992, to consider the interpretation of the Treaty provisions relevant to the present proceedings. Those judgments were delivered in cases concerning the levying of parafiscal charges within the agricultural sector in Belgium. The cases in question are Case C-17/91 *Lornoy* [1992] ECR I-2623, Joined Cases C-144/91 and C-145/91 *Demoor Gilbert en Zonen* [1992] ECR I-6613, and Case C-114/91 *Claeys* [1992] ECR I-6559. Those judgments contain in large measure the answers to the questions which have been submitted by the Supremo Tribunal Administrativo. I shall refer in what follows to the judgment in Case C-17/91 *Lornoy*.

The interpretation of Articles 9 and 12, Article 95 and Article 30 of the EEC Treaty

6. The first, second and fifth questions submitted by the Supremo Tribunal Administrativo are as follows:

'1. Does the concept of a charge having an effect equivalent to an import customs duty referred to in Articles 9, 12 et seq. of the Treaty of Rome extend to a charge levied by a public institute on the sale of chemical pulp, without distinction between domestic and imported products, the proceeds of which finance the activities of that body (specifically the IPF, whose objects are laid down in Chapter I of Decree-Law No 428/72.10.31)?

2. To what extent does the legally prescribed use of the receipts of a charge levied on both domestic and imported products affect the application of Article 95 and justify its being classified as a charge having equivalent effect?

...

5. Can the levying of a charge representing a percentage of the total value of the sales of the domestic and imported product and intended to finance the activity of a public institute which takes the action mentioned in the legislation constitute an infringement of Article 30 of the Treaty of Rome?'

In my opinion, the answer to these three questions corresponds to that which the Court gave to the questions submitted in *Lornoy*. The Court's reply, the reasoning of

which is set out in paragraphs 14 to 26 of its judgment, is as follows:

'A compulsory contribution constituting a parafiscal charge, applied under the same conditions as regards its collection to both domestic and imported products, the revenue from which is used for the benefit of domestic products only, so that the advantages accruing from it fully offset the burden borne by those products, constitutes a charge having an effect equivalent to customs duties prohibited by Article 12 of the Treaty. If those advantages only partly offset the burden borne by domestic products, such a charge constitutes discriminatory taxation prohibited by Article 95 of the Treaty.

A parafiscal charge of that kind, being governed by Article 12 et seq. or Article 95 of the Treaty, is not governed by Article 30 thereof.'

7. The third question submitted by the Supremo Tribunale Administrativo is worded as follows:

'3. (In the event of an affirmative answer to the first two questions): To what extent does the requirement that "the charges imposed on the domestic product are made good in full" laid down in Community case-law refer to monetary equivalence between the amount of the charge levied on domestic economic agents and the advantages accruing to them or could it rather be understood as a requirement relating to the nature and extent of and the necessity for services provided for the benefit of the domestic product which (like all the activities of the said body) are financed by the receipts from the levying of the charge in accordance with the said legislation?'

8. It is clear from the order for reference that the national court is familiar with the Court's case-law on the legality of parafiscal charges. Thus, it is evident that, by its third question, the national court is seeking clarification on the criteria which, according to the Court's case-law, are relevant to the application of the Treaty rules on parafiscal charges.

Even though paragraph 22 of the *Lornoy* judgment states that it is for the national court to determine 'whether the burden borne by the domestic product is wholly or partly offset by the use of the revenue from the charge in question', it is, in my view, possible to be more specific regarding the interpretation of the relevant Treaty provisions in certain respects.

This more specific consideration must essentially take as its basis the Court's reasons for the view that the manner in which a charge is applied may mean that a charge which is formally non-discriminatory may be covered by either Article 12 or Article 95 of the Treaty. The Court stressed at paragraph 18 of the judgment in *Lornoy* that:

'when such a pecuniary charge or duty is intended exclusively to support activities which specifically benefit taxed domestic products, the result may be that the general duty levied, according to the same criteria, on the imported product and the domestic product nevertheless constitutes for one of them a net additional financial burden, *whilst for the other it constitutes in reality a set-off against benefits or aid previously received*' (emphasis added).

The Court similarly emphasized in paragraph 20 that:

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

The reasoning is thus straightforward. While the group of products on which the charge is levied is formally subject to uniform treatment, the use to which the revenue generated by that charge is put means that there is none the less unequal treatment between domestic and imported products. The actual discrimination results from the fact that, through the use of the revenue generated by the charge, domestic products are able fully or partially to offset the charge which has been levied on them.

9. On this basis, the first more detailed analysis to be made was that formulated as follows by Advocate General Tesauro in his Opinion of 25 June 1992 in *Lornoy*:

'as the Court expressly acknowledged in the *Cucchi* (Case 77/76 [1977] ECR 987) and *Interzuccheri* (Case 105/76 [1977] ECR 1029) judgments, the application to parafiscal charges of Articles 9 and 12, or of Article 95, presupposes that the product subject to the charge and the national product benefited are *identical*. In determining whether the fiscal burden has been offset, the proceeds of the tax must clearly enure, at least in part, to the benefit of the national product subject to the charge and not exclusively to the benefit of products other than those subject to the charge. Thus, clearly the question whether there is set-off does not arise at all where a parafiscal charge levied for example on the marketing of (domestic and imported) pigs is subsequently used to finance incentives benefiting only other sectors, for example bovine or avicultural production.' (emphasis added).

This is the same reasoning as that adopted by the Court in paragraph 17 of its above judgment in *Cucchi*, in which the Court held that there must be:

'a clearly established connection between, on the one hand, the collection of a fiscal duty levied without distinction on the products in question, whether domestic or imported and, on the other hand, the advantage which enures only for the benefit of the domestic products by reason of the proceeds of that same duty.'

10. The second detail which may be appropriate has also found clear expression in the Court's case-law. The Court has emphasized that the parafiscal charge will be unlawful only if the revenue generated by the charge is used 'to support activities which *specifically* benefit the taxed domestic products' (emphasis added). There will thus be no prohibited set-off if the revenue generated by the charge is not used solely for the benefit of the domestic products on which it has been levied, but is also of benefit to imported products. This, for instance, may be the case where the revenue is used for general consumer information with a view to promoting sales of the product in question, whether manufactured domestically or imported.

11. It is in my opinion also possible to be more specific with regard to the third question from the Supremo Tribunal Administrativo cited above. So far as I can ascertain, that question in fact consists of two sub-questions: first, whether the application of one of the two alternative prohibitory provisions in the Treaty requires that the advantage conferred on domestic products by the use made of the revenue is quantifiable in economic terms, inasmuch as it is must be possible to determine more accurately the value of the economic advantages enuring to domestic products through application of the charge; second, whether it is sufficient that the economic advantages enuring to domestic products benefit domestic production merely in general terms, or whether it is necessary that it should be demonstrable that individual domestic producers have received specific set-off for the charges which they have paid.

12. On the basis of the Court's case-law, the answer to the first sub-question must, in my view, be that the advantage for domestic production must be quantifiable in economic terms. It must be possible, on the basis of the information available, to determine, at least in percentage terms, how much compensation for domestic production was represented by the application of the revenue generated by the charge. If the compensation is full, that is to say, 100% or more, the prohibition set out in Article 12 will be applicable, and if the compensation is less than 100%, Article 95 will be applicable. The correctness of that result, in my view, already follows from the fact that the prohibition in Article 95 can be applied only if it can be determined in this manner how large the partial set-off will be.

13. The second sub-question was, in my view, correctly answered as follows by Advocate General Tesauro in his Opinion in *Lornoy*:

'an *overall assessment* is needed, comparing, over a significant period of time, the total amount of the contribution borne by the national products in question with the total amount of the financial benefits received by them (which information should normally be obtainable from the accounting and statistical management records of the bodies responsible for collecting the proceeds of the parafiscal charge and for granting subsidies or incentives to the national industry in question)' (emphasis added).

The opposite result, requiring it to be specifically shown that each individual domestic product obtained a specific economically quantifiable advantage from the application of the revenue generated by the charge, would confer on the two relevant Treaty provisions a scope which would be too narrow bearing in mind the background to the Court's interpretation of those provisions. Such a result would mean that application of the prohibition would be limited to cases in which the revenue from the charge was directly used to pay aid to individual producers. Application of the prohibition in Article 95 would also give rise to difficulties in such cases if the same aid was not granted to each individual producer.

14. In his Opinion in *Lornoy*, Advocate General Tesauro, like the Advocates General in the earlier similar cases, stressed that:

'However, it may not always be easy for a court to make such a determination [that is to say, the extent of the compensation accorded to domestic producers] and it certainly cannot be ruled out that, where several judges are called upon to give a decision in relation to the same contribution, guidelines and assessments may turn out to be quite different.'

It is, in my opinion, quite correct to stress this consideration. There is no difficulty in applying the Court's case-law in those instances where a large portion of the revenue generated by the charge is derived from imported goods and where it is a straightforward matter to determine, on the basis of national rules in force and administrative practice, that the revenue generated by the charge is in all essential respects applied for the benefit of the domestic products on which the charge has been levied. On the other hand, application of the Court's case-law can give rise to considerable difficulties in those cases where it is unclear whether the revenue generated by the charge, which may in all essential respects be derived from domestic products, and in which it is therefore not conclusively established that the case involves full set-off of the amounts of the charge levied on domestic products. It is, in particular, important to mention that the application of the Article 95 prohibition in such cases may be problematic. The only result of an application of Article 95 will be to require that the charge levied on imported products be reduced so as to correspond to the charge paid by national products after account has been taken of the set-off resulting from the use to which the revenue generated is put. Nor can one overlook the fact that situations may arise in which changes occur from one year to another in the use to which the revenue generated by the charge is put, which may have some bearing on, in particular, the prohibition in Article 95.

15. In his Opinion in *Lornoy*, Advocate General Tesauro mentioned that certain principles should be laid down in cases such as the present with regard to the allocation of the burden of proof. He accordingly proposed that persons subject to the charge who contest its legality should bear the burden of establishing that the revenue generated by the charge is being used to finance aid which benefits domestic products subject to the

charge, while the national authorities should, if the person subject to the charge has discharged his burden of proof, be required to demonstrate that the set-off is not in full.

Although that proposition is attractive, I have some doubt as to whether the problems in the present case ought to be resolved on the basis of such a rule concerning the burden of proof. It must — even having regard to Article 5 of the EEC Treaty — be up to the competent national authorities to provide the national court with all available information concerning the revenue generated by the charge and the use to which it is put. On that basis, the onus must be on the national court to decide whether the abovementioned conditions for the parafiscal charge to be covered by either Article 12 or Article 95 of the Treaty have been met. It cannot, in my view, be ruled out that the available information will not make it possible for the national court to determine with sufficient certainty whether the contested charge is or is not contrary to Articles 12 and 95 of the Treaty. The national court must, in such a case, find in favour of the national authority in question.

One must not in this regard overlook the fact that an application of the prohibitions contained in Articles 12 and 95 is, despite everything, no more than an alternative to what can, at least from certain points of view, be regarded as the natural course of action, under the Treaty, against systems of national aid financed through the help of parafiscal charges, namely application of the Treaty rules on State aid. As is known, the Court has held in this area that the Commission bears the responsibility for the practical administration of these rules, bearing in mind that the sector presupposes an assessment of complex economic factors subject to rapid change (see paragraph 9 of the judgment in Case 78/76 *Steinike und Weinlig* [1977] ECR 595).

It was also presumably without consideration of such factors that, in his Opinion in Case 222/78 *ICAP* v *Beneventi* [1979] ECR 1163, Advocate General Mayras stated that a finding that a parafiscal charge is unlawful by reason of the use to which the revenue which it generates is put

'ought to be made by the Commission acting on the basis of Article 93 or 169 of the Treaty rather than by the national court, which cannot be asked to carry out laborious inquiries involving sometimes uncertain comparisons.'

As will be clear from the above, the Court did not follow Advocate General Mayras on this point. It is settled that national courts can decide that parafiscal charges are, having regard to their use, contrary to either Article 12 or Article 95 of the Treaty. There remains, however, in my view, good reason to continue to bear in mind that situations may arise in which the adoption of a position will

be so difficult and will involve such uncertain comparisons that the national court will be justified in leaving it to the Commission to take the initiative to resolve conclusively whether the parafiscal charge is lawful under Community law.

The interpretation of Article 92 of the Treaty

The fourth question submitted by the Supremo Tribunal Administrativo is as follows:

'Can the use of the receipts from a charge levied on domestic and imported products for the activities undertaken by the said body be regarded as a State aid for the purposes of Article 92?'

In its judgment in *Lornoy*, the Court replied as follows to a similar question:

'A parafiscal charge of the kind at issue in the main proceedings may, depending on how the revenue from it is used, constitute State aid incompatible with the common market if the conditions for the application of Article 92 of the Treaty are met, that being a matter for the Commission to determine in accordance with the procedure laid down for that purpose in Article 93 of the Treaty. In that respect, regard must also be had to the jurisdiction of the national courts where, in introducing the charge, the Member State concerned failed to comply with its obligations under Article 93(3) of the Treaty, and where a Commission decision under Article 93(2) of the Treaty has found the levying of the charge as a method of financing State aid to be incompatible with the common market.'

In my opinion, the Court can provide a similar reply to the question submitted by the Supremo Tribunal Administrativo and with reference to the grounds for that reply set out in paragraphs 27 to 32 of the judgment in *Lornoy*.

16. I have already mentioned that the fundamental rules governing the contested Portuguese scheme were laid down in 1972, that is to say, prior to Portugal's accession to the EC, and that in 1986, the year in which the rules contested in the present case were adopted, there were merely changes designed to remove earlier points of inconsistency with Community law. In the light of this, there may be reason in the present case to mention in the judgment that the duty to submit State-aid measures to the Commission applies under Article 93(3) only to 'new' measures, that is to say, measures introduced after Portugal's accession to the EC or measures which were amended in material respects after Portugal's accession.

Conclusion

17. In the light of the foregoing, I propose that the Court reply as follows to the questions which have been submitted:

(1) A compulsory contribution constituting a parafiscal charge, applied under the same conditions as regards its collection to both domestic and imported products, the revenue from which is used for the benefit of domestic products only, so that the advantages accruing from it fully offset the burden borne by those products, constitutes a charge having an effect equivalent to customs duties prohibited by Article 12 of the Treaty. If those advantages only partly offset the burden borne by domestic products, such a charge constitutes discriminatory taxation prohibited by Article 95 of the Treaty.

(2) A parafiscal charge of that kind does not come within the scope of Article 30 of the Treaty, since it is covered either by Article 12 et seq. or Article 95 thereof.

(3) A parafiscal charge of that kind may, depending on how the revenue from it is used, constitute State aid incompatible with the common market if the conditions for the application of Article 92 of the Treaty are met, that being a matter for the Commission to determine in accordance with the procedure laid down for that purpose in Article 93 of the Treaty. In that respect, regard must also be had to the jurisdiction of the national courts where, in introducing the charge, the Member State concerned failed to comply with its obligations under Article 93(3) of the Treaty, and where a Commission decision under Article 93(2) of the Treaty has found the levying of the charge as a method of financing State aid to be incompatible with the common market.