OPINION OF ADVOCATE GENERAL TESAURO

delivered on 25 June 1992 *

Mr President,
Members of the Court,

These proceedings once again raise the question of the compatibility with Community law of national arrangements concerning parafiscal charges. In brief the case presents the following features:

contributions are imposed either on national products or on imported products and, at least formally, are not discriminatory in effect, since they are charged at the same rate, on the same fiscal basis and according to the same methods of collection;

the proceeds of those contributions are intended (by way of a body to whom that power is delegated) to finance activities for the benefit of the national products upon which the charge is levied.

The rules of Community law governing the parafiscal charges which exhibit the features mentioned above have been progressively elaborated in administrative practice and in the case-law. In the majority of the cases examined by the Court, the legality of such contributions has been assessed essentially in the light of the fiscal provisions of the Treaty, namely Articles 9 and 12, on the one hand, and Article 95, on the other.

In addition to those decisions, however, there are others which show that the parafiscal charges in question, specifically because they are intended to finance measures in favour of certain undertakings, are *also* subject to the (substantive and procedural) provisions on State aid. In particular, it may be seen from the Commission's practice on State aid that in certain circumstances the financing of aid by means of parafiscal charges must be deemed incompatible with Article 92 of the Treaty.

In the light of those premises, I will seek in the observations which follow to determine the criteria according to which the above-mentioned Treaty provisions fall to be applied to the parafiscal charges in question. I will then examine certain particular aspects of the disputes underlying the national proceedings in order to formulate replies as detailed as possible to the questions raised by the national court.

* Original language: Italian.

(a) *Application to parafiscal charges of Articles 9 and 12, or of Article 95*

It should first be recalled that the Treaty provisions on charges having equivalent effect (Articles 9 and 12) and on the imposition of discriminatory internal taxation (Article 95) do not apply cumulatively (see most recently the judgments in Cases C-228/90 to C-234/90, C-339/90, C-353/90 *Simba* [1992] ECR I-3713). With regard to parafiscal charges, the fact that these two sets of provisions are alternatives has been clearly and specifically confirmed by the Court (see the judgment in Case 94/74 *IGAV* v *ENCC* [1975] ECR 699 and, most recently, the judgment in Cases C-78/90 to C-83/90 *Société Commerciale de l'Ouest* [1992] ECR I-1847, and in Cases C-149-150/91 *Sanders* [1992] ECR I-3899).

Moreover, the Court has held that in order to classify and to assess for legal purposes parafiscal charges with the abovementioned features, it is necessary to take account of the *purpose* to which the fiscal proceeds are put. Consideration of this question is essential, inasmuch as, leaving aside the purely formal aspects, it makes it possible to determine whether such contributions, though affecting both national products and imported products under the same conditions, may, specifically owing to their purpose, have an essentially different effect on the two products so as to constitute, depending on the circumstances, either charges having equivalent effect or internal taxation incompatible with Article 95. Under the Court's settled case-law, even fiscal charges which are not formally discriminatory, if intended to finance activities which specifically benefit the national products subject to the charge, entail for the national product a financial outlay which is essentially compensated by the benefits received, whilst for the imported product they represent a net burden not compensated by the grant of any other benefits or subsidies (see in addition to the *IGAV* and *Société Commerciale de l'Ouest* judgments, cited above, the judgments in Case 77/72 *Capolongo* [1973] ECR 611; in Case 78/76 *Steinike* [1977] ECR 595; in Case 77/76 *Cucchi* [1977] ECR 987; in Case 105/76 *Interzuccheri* [1977] ECR 1029; in Case 73/79 *Commission* v *Italy* [1980] ECR 1533; and in Case 32/80 *Kortmann* [1981] ECR 251).

In those circumstances, as is stated in the *Société Commerciale de l'Ouest* and *Sanders* judgments, it is therefore necessary to determine to what extent the contribution levied on the national product is offset by the benefits received. Where the set-off is total, the burden will be found in fact to affect solely imported products, thus constituting a charge having equivalent effect; where the set-off is partial, it will be found that the burden imposed on the national product is lower than that imposed on imported products and is, therefore, discriminatory within the meaning of Article 95.

Three supplementary remarks are appropriate in connection with that principle. First, as the Court expressly acknowledged in the *Cucchi* and *Interzuccheri* 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.

Secondly, it should be emphasized that the Court has never given particulars of the criteria by which it is to be determined whether and to what extent set-off has been achieved. Nevertheless, since the *ratio decidendi* of the abovementioned case-law is that it is necessary to establish whether the national products have enjoyed benefits such as to neutralize wholly or in part the charge imposed on them, I would maintain, as I already argued in *Société Commerciale de l'Ouest*, that 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). Where the benefits offset *in toto* (or exceed) the burden borne by national production, the charge levied on imported products must, as I have stated, be deemed to be entirely unlawful and, if already levied, may be recovered in full; where, on the other hand, the benefits offset the burden borne by national production only in part, there must be a proportionate reduction (and where appropriate repayment) of the charge levied on imported products.

Thirdly, it remains to be determined who bears the burden of proof. In my view, the person on whom the charge is imposed, and who contests payment thereof, need only prove that the proceeds of the charge are intended to finance aid to national products subject to the charge: in that way, it may be established that national products are essentially subject to a more favourable regime than that applied to imported products (inasmuch as the former enjoy benefits not received by the latter) and therefore allows the determination that the charge is discriminatory and, therefore, incompatible with Article 95. Once that has been established, it seems to me that it is for the Member State concerned to show that the discrimination arising from the aid granted to national products subject to the charge is of limited significance, and to prove specifically to what *extent* such aid offsets the fiscal burden borne by national products.

I consider that solution to be in accordance with the principles laid down by the Court in applying Article 95 whereby, once it is established that a contribution is applied under different conditions to national products and imported products, it is for the Member State to show that that difference in the arrangements in no way results in fiscal discrimination (see the judgment in Case C-152/89 *Commission* v *Luxembourg* [1991] ECR I-3141). If it is for the State to

demonstrate that under different arrangements there is no discrimination, it makes sense to take the view that, in a case such as the one before the Court in which the difference in the arrangements is found in fact to result in fiscal discrimination, it is for the Member State to establish the quantum of that discrimination.

However, it may not always be easy for a court to make such a determination 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.

(b) *Application to parafiscal charges of Article 92 et seq.*

As stated, in the case-law and in the Commission's practice parafiscal charges have been assessed in the light not only of the fiscal provisions of the Treaty but *also* of the provisions relating to State aid. That turns specifically on the *means of financing* the charge, as an element and a condition of the aid. As such, that factor influences the impact of the aid on competition and trade and must therefore be examined in order to establish whether, and to what extent, it may be deemed compatible with the common market within the meaning of Article 92.

In its judgment in Case 47/69 *France* v *Commission* [1970] ECR 487, the Court adjudicated on an application relating to a decision adopted by the Commission under Article 93(2) of the Treaty. The decision relating to aid financed by means of a parafiscal charge provided for either the abolition of the aid in question or its authorization on condition that the charge intended to finance it was no longer imposed on imported products.

In rejecting the application, the Court held that the appraisal under Article 92 of the Treaty must take into account 'the connection which may exist between the aid granted by a Member State and the method by which it is financed' and does not therefore allow the aid to be isolated 'from the method by which it is financed or for that method to be disregarded if, in conjunction with the aid in its narrow sense, it renders the whole incompatible with the common market.' On that basis, the Court seems to be acknowledging that the provisions on aid and the fiscal provisions of the Treaty, in particular Article 95, may be applied cumulatively to the parafiscal charge intended to finance State aid. As it stated in the judgment:

'The fact that a national measure complies with the requirements of Article 95 does not imply that it is valid in relation to other provisions, such as those of Articles 92 and 93.

When an aid is financed by taxation of certain undertakings or certain producers, the Commission is required to consider not only whether *the method by which it is financed* complies with Article 95 of the Treaty but also whether in conjunction with the aid which it services it is compatible with the requirements of Articles 92 and 93.' (emphasis added)

Along the same lines, it seems to me, although in less explicit terms, the Court stated in *Commission* v *Italy* and, more recently, *Société Commerciale de l'Ouest*, that:

'A parafiscal charge like the one at issue 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, it being understood that a finding that those conditions are met must be made in accordance with the procedure laid down for that purpose in Article 93 of the Treaty'.

As for the possibility that under proper conditions a national court may apply Article 93(3), a provision having direct effect, to internal legislation giving effect to parafiscal charges intended to finance aid, that possibility, in addition to being accepted in principle in the passage cited from the *France* v *Commission* judgment, has very significantly been confirmed in the recent and well-known judgment Case C-354/90 *Fédération Nationale du Commerce Exterieur* [1991] ECR I-5505. That judgment originated in a reference for a preliminary ruling by the French Conseil d'Etat concerning a national decree giving effect to a system of parafiscal charges intended to finance aid. Once the decree had entered into force in breach of the obligations laid down in Article 93(3), the national court referred questions to the Court concerning the consequences of that breach as regards the validity of the decree. In its judgment the Court held that non-compliance with Article 93(3) entailed at domestic level the invalidity of the legislation whereby effect was given to the aid measures, and that such invalidity could not be deemed remedied even by a subsequent Commission decision declaring the measures in question to be compatible with the common market. It follows that a decree must be deemed to be unlawful if it gives effect, in breach of the obligations contained in Article 93(3), to a system of parafiscal charges intended to finance by way of an appropriate fund measures in favour of a national industry; it is for the national court to make the declaration of illegality which cannot be remedied even by a subsequent decision of compatibility adopted by the Commission. That finding of illegality seems to me to be confirmed by the *Sanders* judgment, cited above, in which the Court affirmed that Article 93(3) is applicable in the context of an action for recovery of an undue fiscal payment brought by a person subject to a parafiscal charge.

That said, it should also be remembered that the Commission's practice on State aid has always been to find it inconsistent with the common market for Member States to finance State aid with the proceeds of parafiscal charges imposed not only on national products but also on products imported from other Member States (cf. Second Report on competition policy, point 108). That approach, as is clear from the decisions adopted by the Commission in relation to the arrangements which gave rise to the main proceedings, is based on various considerations.

First, a Commission decision under Article 93(2) cannot declare to be compatible with the common market a charge intended to finance an aid which is, at the same time, found to be contrary to Treaty provisions having direct effect, such as Articles 9 and 12 and Article 95 (in that connection, see also the *Commission* v *Italy* judgment, cited above).

Secondly, even when the conditions for the application of those Treaty provisions are not met, there is nothing to prevent the parafiscal charges *intended for financing aid* from being deemed incompatible with the common market on the ground that they conflict with the very requirements of the system of State aid, and in particular with the fundamental criteria of *compensatory justification* and *transparency* of the aid.

Thus, in the decisions adopted by the Commission under Article 93(2) it is stated — consistently moreover with the Court's judgment in *France* v *Commission* — that the financing of aid by means of a parafiscal charge, which is imposed on imported products *as well*, is not necessary in order to achieve the objectives of the aid as such and exacerbates wholly without justification the protectionist effects inherent in any public intervention in support of national undertakings.

Moreover, the financing of the aid by means of parafiscal charges may prove to lack transparency, to the extent that the amount of aid granted depends solely on the amount of the fiscal proceeds, which makes it difficult to predict the *intensity* of the aid which will actually be granted.

Irrespective, therefore, of the fact that a parafiscal charge may be subject to the fiscal provisions of the Treaty, it may be assessed in the light of the provisions contained in Article 92 et seq. whenever, clearly, it constitutes the method by which State aid is financed.

Finally, it should be emphasized that it is clear from the case-law and above all from the Commission's practice that Articles 92 and 93 are applied in these situations to the *charge* by means of which the aid is financed and not to the aid itself (that is to say, the intervention financed by means of the charge). Thus the aid by itself may even be compatible with the common market; that does not, however, prevent the Commission in its decision from finding a specific feature or condition of the aid as regards the *method by which it is financed* to be incompatible with Article 92, and requiring the State to alter that method (independently of the aid itself) so as to bring it back into line with the requirements of the Community rules on competition (the decisions concerning the charges in the present proceedings, as well as the contested decision already referred to in *France* v *Commission*, are very clear examples of cases in which the Commission has expressly recognized aid properly so called to be consistent with the common market and has restricted itself to finding the system of parafiscal charges introduced in order to finance such aid to be incompatible with Article 92).

Two consequences may be inferred from these premises. First, since Article 92 does not have direct effect, it is for the Commission alone to establish and declare, within the context of a decision adopted in accordance with Article 93(2), the *compatibility* with the common market of a parafiscal charge intended to finance State aid (see *Société Commerciale de l'Ouest*).

Secondly, in proceedings before the national courts, those subject to the charge may object to its being levied, or seek its recovery, either by invoking a Commission decision under Article 93(2) declaring it to be inconsistent with the common market (as is well known, such decisions have direct effect according to the judgment in *Steinike*, cited above), or on the basis of Article 93(3), where the charge intended to finance the aid has been applied by the national authorities without waiting for prior authorization by the Community authorities (see the *Fédération Nationale du Commerce Exterieur* judgment, which, as has been seen, is of particular significance inasmuch as the Court, in reply to a specific question raised by the French Conseil d'Etat, essentially acknowledged that a ministerial decree giving effect to a system of parafiscal charges intended to finance an aid was to be deemed unlawful at national level precisely on account of its entry into force in breach of Article 93(3); see also the *Sanders* judgment concerning the action for recovery of an undue payment brought by a person subject to a parafiscal charge).

That said, it should nevertheless be pointed out that the Treaty provisions on aid are also capable of a different construction: they may be read more restrictively in a manner which essentially limits the protection enjoyed by individuals under Article 92 et seq. of the Treaty.

It is of course undisputed that the provisions on aid require verification of whether or not a charge which finances an aid is compatible with the common market within the meaning of Article 92 et seq. If, however, on this other construction, it appears that under the provisions on aid the charge is incompatible with the common market (or has been unlawfully levied), the sole consequence of such incompatibility (or unlawfulness) would be that the *aid* financed by means of the charge cannot be granted. On the other hand, such incompatibility (or unlawfulness) does not affect the lawfulness of the charge as such.

In practice, this means that the persons subject to the charge, and in particular importers, may not invoke the rules on aid in order to prevent the contribution from being levied; they may do so only, as it were, *downstream*, to prevent public measures from being financed by the proceeds of the charge. Conversely, the levying of the charge may be challenged only if, and to the extent to which, the fiscal provisions of the Treaty are found to be applicable.

Examined in this light, therefore, and on the basis that it is always necessary to establish whether or not a charge infringes the rules on aid, the question which arises concerns the nature (or the content) of the rights which may be derived from such an infringement: does that entail merely the right to object to the grant of the aid or also the right to object to the levying of the charge?

The restrictive interpretation, which allows only for the first alternative, and was suggested by me on a previous occasion (see my Opinion in *Société Commerciale de l'Ouest*), seems to me on closer inspection to warrant reconsideration. Above all, it does not seem to me to be in line with the case-law cited above and, furthermore, appears to be negated by the recent judgments in *Fédération Nationale du Commerce Exterieur* and *Sanders*.

Moreover, that interpretation does not seem consistent with the rationale behind the approach consistently adopted by the Commission in the matter, and confirmed in the *France* v *Commission* judgment. In the light of that approach, what is actually deemed incompatible with the common market is not the aid as such (which instead is considered to be consistent with the interests of the Community), but the means by which it is financed, that is to say the parafiscal charge, (at least) to the extent to which it is imposed on the imported product. In other words, what is to be avoided in these circumstances is not the aid, but the fact that the aid is financed in a certain manner. In that context, therefore, it seems quite consistent to hold that Article 92 et seq. may be relied on precisely in order to challenge the *levying of the charge* (the sole feature which is inconsistent with the common market) and not to object to the *grant of the aid* financed by means of the charge (aid which in itself does not appear to be inconsistent with the common market). On the other hand, the restrictive construction canvassed above leads, as has been seen, to the opposite result: it permits the person concerned (and in particular the importer) to object to the grant of the aid but not to the levying of the charge.

There is a further consideration. It seems to me that in the situation under discussion the rules on aid offer to those subject to the charge a fuller and more straightforward protection that that afforded by the fiscal provisions of the Treaty. Articles 9 and 12 and Article 95 apply only on condition that the product subject to the charge and the product benefiting from the aid are *the same*, and they require verification (which is not always easy) of the extent to which the aid granted to the national product was able to offset the burden borne by it in respect of the charge levied.

In the assessment of a charge viewed as a means of financing aid, on the other hand, those factors are not taken into account. In particular, under the rules on aid, the charge which affects imported products is in principle inconsistent with the common market, irrespective of the fact that the national product benefiting from the aid is identical to the imported product and irrespective of the extent to which set-off is determined by the aid.

Whilst that assessment must in any event be carried out under the rules on aid, I do not see why that result should not be achieved *directly*, that is to say by conferring on importers the right to rely on the Community rules on aid in order to contest the parafiscal charges (intended to finance the aid) whose inconsistency with the common market or unlawful implementation has been established. That solution is in line with precedent, is consistent with the rationale underlying the system of aid, affords fuller and more direct protection to interested parties and is easier to apply before the national courts.

Finally, in my view, there is no reason to hold that, with regard to parafiscal charges intended to finance aid, those subject to them may not rely on the rules (evidently having direct effect) concerning State aid. This means that:

— *after* the Commission has adopted a decision under Article 93(2), those affected may contest in proceedings before the national courts parafiscal charges intended to finance aid, where the Commission in its decision has declared them to be incompatible with the common market;

— *prior to* the adoption of a decision under Article 93(2), those affected may contest in proceedings before the national courts (as in *Fédération Nationale du Commerce Exterieur* and *Sanders*) parafiscal charges intended to finance aid, where they have been imposed in breach of the obligations laid down by Article 93(3).

Evidently, in the latter situation the consequences are particularly severe for a State in default, whose implementing measures adopted prematurely are vitiated on account of an infringement of Article 93(3). Nevertheless, it is an outcome fully justified both on grounds of legal reasoning and expediency. On the one hand, it is a corollary of the direct effect of Article 93(3), recognized by the Court on several occasions; on the other hand, it is entirely consistent with the fundamental importance which observance of that provision has for the effectiveness of the rules on State aid and the very equilibrium of the common market (in that connection, see most recently the judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-1005). It is therefore fully justified that a State which has not fulfilled its obligations under Article 93(3) should bear the consequences thereof. The State, by unilaterally giving effect to aid financed by means of parafiscal charges, without first submitting it for verification by the Community authorities, has prevented the Commission from carrying out its own assessment of two features likely to distort competition, namely the aid as such and the means by which it is financed.

(c) *The main proceedings*

With regard to Cases C-17/91 and C-144-145/91, the questions raised by the national courts concern parafiscal charges (compulsory contributions) levied in order to finance activities carried out by an appropriate fund (Fund for Animal Health and Livestock Production) established by a Belgian Law of 24 March 1987.

The parafiscal charges in question are laid down in the Royal Decree of 11 December 1987, which is intended to give effect to the Law of March 1987 cited above. Article 2 of the royal decree provides for a compulsory contribution of a fixed amount for each bovine animal, calf or pig slaughtered. Article 3 provides for a compulsory contribution of the same amount for live animals exported. The contributions in question are passed back, if necessary up to the producer stage.

The fund uses those contributions to finance compensation, allowances and other benefits in favour of national livestock farmers. [1]

The national court is essentially asking the Court to establish whether the Treaty provisions on State aid, on charges having equivalent effect and on discriminatory internal taxation, preclude the introduction of the parafiscal charges described above and confer on individuals rights which may be asserted before national courts. [2]

As I have already had occasion to point out, the direct effect of the provisions in question has been reaffirmed on several occasions in the abovementioned case-law to which reference is made.

With regard to contributions levied on exports, it is clear from the Court's case-law (see the judgment in Joined Cases 36 and 71/80 *Irish Creamery Milk Suppliers Association* v *Ireland* [1981] ECR 735) that charges of that nature are not subject to the prohibition on charges having equivalent effect, when they are of the same amount as contributions imposed upon the same product intended for the domestic market. According to the Court, only where it is established that the application of an internal duty falls more heavily upon export sales than on domestic sales, does the charge have an effect equivalent to a customs duty on exports. On the other hand, that does not apply in the case of a duty applied systematically and in accordance with the same criteria to 'animals ... whether for export or for slaughter'.

The export charges in question clearly do not fall within the scope of Article 95 either, since the latter provision prohibits only fiscal discrimination to the detriment of imported products. Furthermore, in its decision adopted under Article 93(2) in relation to the aid financed by the fiscal arrangements in question (decision of 7 May 1991), the Commission did not declare that method of financing the aid to be incompatible with the common market. That does not, however, remedy the unlawful nature under Article 93(3) of that method of financing, in respect of the period prior to the abovementioned decision.

Finally, the parafiscal charges levied on the slaughter of domestic or imported animals formed the subject-matter of the Commission decision in question, which refers essentially to the following matters:

— the aid financed by those charges was in breach of Article 93(3);

1 — According to a ministerial communication, 'the contributions are to be used to finance programmes for improving the competitive position of Belgian livestock.'

2 — In fact, the question raised in Cases C-144-145/91 expressly mentions only Articles 92 and 95 of the Treaty. Nevertheless, it is clear that the question raised by the national court in general concerns the problem of the validity under Community law of the parafiscal charges intended to finance State aid; it accordingly concerns not only Article 95 but also the provisions on charges having equivalent effect contained in Articles 9 and 12 of the Treaty.
Conversely, it should be pointed out that the question raised in Case C-17/91 refers also to Article 30 of the Treaty. I consider, however, that it is superfluous to give a reply under that head, having regard to the residual nature of that provision in contrast to special provisions such as Articles 9 and 12, 95 and 92 of the Treaty; that residual nature was confirmed most recently in the *Société Commerciale de l'Ouest* judgment.

— the aid as such, that is to say the action taken by the fund in question, is for the benefit of national producers;

— the aid is to be deemed compatible with the common market by virtue of the derogation contained in Article 92(3)(c);

— however, the fact that the parafiscal charge intended to finance aid also affects imported products entails 'a protectionist effect which goes beyond aid properly so-called.'

Accordingly, the Commission concludes that the aid must be deemed to be inconsistent 'in so far as the compulsory contribution is also imposed at the slaughtering stage on products imported from other Member States' and requires the recipient Government to inform it within two months of the measures adopted in order to comply with the decision.

It follows, therefore, that the levying of the parafiscal charges in question must be deemed to be unlawful in any event: prior to the decision, for breach of Article 93(3), and after the decision, for infringing the contents thereof.

Furthermore, as stated in the decision itself, the parafiscal charges in question are intended to finance aid which is, at least in part, for the benefit of national production subject to the levy. In particular, the Commission considers in the present case that the compulsory contributions in question are in breach of Article 95.

In my view, since the charges are inconsistent with the Community rules on aid, it is not necessary to examine whether, and to what extent, the fiscal provisions of the Treaty are applicable. In any event, I have already indicated the criteria according to which those rules should be applied.

With regard to Case C-114/91, the proceedings there concern the parafiscal charge levied on the slaughter of pigs in accordance with the Belgian Law of 11 April 1983 (amending the Law of 27 December 1938). The amount of the charge is laid down in the Royal Decree of 23 April 1986 (amending the Royal Decree of 31 January 1985). The contribution is paid to a body (National Agricultural and Horticultural Marketing Office) which engages in promotional activities for agricultural, horticultural and fishery products.

The national court raises a question on the compatibility of that charge with Community law. [3] In that connection, it should be pointed out that on 17 May 1989 the Commission adopted a decision under Article 93(2) in which, although it criticised certain aspects of the fiscal arrangements introduced by the Royal Decrees of 23 April 1986 and 31 January 1985, it raised no objection to the parafiscal charge levied on the slaughter of pigs which forms the subject-matter of the main proceedings. This specific aspect of the

3 — The question is formulated solely in relation to Articles 9 and 12. Nevertheless, in order to give the national court a useful reply to the question raised and to avoid obvious inconsistencies, it is necessary to refer to the various provisions already examined.

aid must therefore be deemed to be authorized and thus subject to the rules on *existing aids*. It therefore remains valid from the point of view of the rules on aid unless and until the Commission adopts a *final* decision in which it finds it to be incompatible with the common market, [4] a decision which, as is known, would not have retroactive effect and cannot therefore in any event call in question contributions previously levied.

Nevertheless, the possibility remains of examining the charges in question in the light of the fiscal provisions of the Treaty and according to the criteria set out in the first part of this Opinion.

Conclusion

Cases C-17/91 and C-144/91 and C-145/91

(1) Persons liable to parafiscal charges intended to finance State aid may contest the collection thereof, and if appropriate, seek recovery of such charges, where:

— the Commission, in the context of a decision adopted under Article 93(2) of the Treaty, has found that method of financing State aid to be incompatible with the common market;

— the national authorities have applied such charges in breach of the obligations to notify and not to give effect to State aid laid down in Article 93(3) of the Treaty.

(2) In the case of a parafiscal charge which affects under the same conditions both domestic and imported products, it is for the national court to take into consideration the purpose to which the revenue from the charge is to be put in order to assess the compatibility thereof with the provisions on charges having equivalent effect or discriminatory internal taxation. Where the revenue is intended to finance activities which are specifically for the benefit of the domestic products subject to the charge, so as to offset completely the burden imposed on those products by the collection of the charge, the latter must be classified as a 'charge having equivalent effect to a customs duty' within the meaning of Articles 9 and 12 of the Treaty. Where such revenue is intended to

4 — In relation to the charge which is the subject-matter of the main proceedings, the Commission has initiated the procedure laid down in Article 93(2) (see OJ 1990 C 22, p. 4). Nevertheless, until the completion of that procedure, all the aspects of the aid which are authorized, if only by implication, by the decision of 17 May 1989, may lawfully be applied.

finance activities which are specifically for the benefit of the domestic products subject to the charge, but which only partially offset the burden imposed on them by the collection of the charge, the latter must be classified as discriminatory internal taxation within the meaning of Article 95 of the Treaty. Articles 9 and 12 and Article 95 confer on individuals rights which may be asserted before the national courts.

(3) Compulsory contributions upon exportation of the type at issue in the main proceedings are not subject to the prohibition on charges having equivalent effect as provided for in Articles 9 and 12 of the Treaty, provided that the amount of the charge imposed on the product intended for export is the same as the amount of the charge imposed on the product intended for the domestic market.

Case C-114/91

(1) Persons liable to parafiscal charges intended to finance State aid may contest the collection thereof, and if appropriate, seek recovery of such charges, where:

— the Commission, in the context of a decision adopted under Article 93(2) of the Treaty, has found that method of financing State aid to be incompatible with the common market;

— the national authorities have applied such charges in breach of the obligations to notify and not to give effect to State aid laid down in Article 93(3) of the Treaty.

(2) In the case of a parafiscal charge which affects under the same conditions both domestic and imported products, it is for the national court to take into consideration the purpose to which the revenue from the charge is to be put in order to assess the compatibility thereof with the provisions on charges having equivalent effect or discriminatory internal taxation. Where the revenue is intended to finance activities which are specifically for the benefit of the domestic products subject to the charge, so as to offset completely the burden imposed on those products by the collection of the charge, the latter must be classified as a 'charge having equivalent effect to a customs duty' within the meaning of Articles 9 and 12 of the Treaty. Where such revenue is intended to finance activities which are specifically for the benefit of the domestic products subject to the charge, but which only partially offset the burden imposed on them by the collection of the charge, the latter must be classified as discriminatory internal taxation within the meaning of Article 95 of the Treaty. Articles 9 and 12 and Article 95 confer on individuals rights which may be asserted before the national courts.