OPINION OF ADVOCATE GENERAL TESAURO

delivered on 23 January 1997 *

1. The pending references for preliminary rulings draw the Court's attention back to the — now familiar — problem of the compatibility with Community law of charges imposed equally on domestic and imported products, the yield from which is intended to finance the institutional activities of a public body.

In order to be able better to appreciate the scope of the questions referred to the Court, a description should first be given of the nature of the charges at issue, the legislation which introduced them and the responsibilities of the various institutions for which the yield of the charges is intended. [1]

2. The charge involved in Case C-347/95 is levied on dairy products when they are marketed on the Portuguese market. The charge, which was introduced on an unspecified date before 1974, has been amended on several occasions. [2]

Case C-28/96 is concerned with three charges, which are imposed on the products concerned also at the time of marketing on the Portuguese market: a charge on meats, offal and eggs; a charge on beef and veal and sheepmeat and goatmeat specifically intended to combat diseases of ruminants; a tax on pigmeat specifically intended to combat swine fever. Those charges, which have been in force since before 1949, have also been amended on various occasions. [3]

3. The proceeds from those charges were initially intended to finance an economic coordination body set up in 1939 under the name of Junta Nacional dos Produtos Pecuários (JNPP). Following Portugal's accession to the European Communities, all the rights and powers of that body were

* Original language: Italian.

1 — The two orders for reference are in fact somewhat terse in that they are confined essentially to setting out the preliminary questions referred to the Court. Nevertheless, in my view, there is sufficient factual and legal material in the documents before the Court, especially in view of the explanations provided by the appellant in the main proceedings, the Portuguese Government and the Commission in response to specific written questions put by the Court. In view, *inter alia*, of the substantive nature of the cooperation which, to my mind, ought to obtain between the Community judicature and national courts, I shall therefore not venture to inquire into the formal adequacy of the orders for reference from the point of view of their admissibility before the Court.

2 — Article 1 of Decree-Law No 309/86 of 23 September 1986 lays down the rate applicable at the material time.

3 — The rates applicable to each of the charges were laid down at the material time by Decree-Law No 343/86 of 9 October 1986, Decree-Law No 240/82 of 22 June 1982 and Decree-Law No 44158 of 17 January 1962 respectively. The three charges were subsequently abolished by Decree-Law No 365/93 of 22 October 1993. As emerges from the Commission's observations, infringement proceedings were brought against all three charges for infringing Article 95 of the Treaty and subsequently shelved. The proceedings against the first were shelved because it was found that it had no discriminatory effects, those against the second and third because the charges were abolished.

transferred by Decree-Law No 15/87 of 9 January 1987 to a newly created public agency, Instituto Regulador e Orientador dos Mercados Agrícolas ('IROMA'), to which the proceeds of the charges in question also accrued.

Under Article 3(4) of the aforesaid Decree-Law, IROMA, a financially and administratively independent body with legal personality, was given responsibility for administering and coordinating the markets in agricultural products and livestock. More specifically, it carried out the following tasks: creation of the institutional guarantees laid down by the national and Community intervention systems; prices, premiums, aid and subsidies for such products; administration of the financial mechanisms provided for at national and Community level in support of intervention, regulation, guidance and organization in respect of the markets in question; monitoring the development and functioning of the agricultural and cattle markets in Portugal and the other Member States; governing and regulating foreign trade in agricultural products and cattle; national participation in the administration of the Community markets in those products; collaboration with the national administration and the competent departments in the Commission, in particular for the purposes of the collation and distribution of data on the operation of those markets; collaboration with bodies representing traders involved in the operation of the markets in question; information and training of producers, industrialists, traders and consumers in the sector; proposing legislation with regard to the regulation, guidance and organization of the markets concerned; lastly, administration of slaughterhouses.

4. In 1988, as a result of the adoption of Decree-Law No 282/88 of 12 August, IROMA was joined by a new body, Instituto Nacional de Intervenção e Garantia Agrícola ('INGA'). All the functions hitherto carried out by IROMA, with the exception of the administration of slaughterhouses, were transferred to this new body.

However, IROMA continued to receive approximately 50% of the proceeds of the charges at issue in these proceedings, whilst the remaining 50% was allocated to INGA.

5. Next, Decree-Law No 56/90 of 13 February 1990 set up a new specialized directorate at the Ministry of Agriculture, Direcção-Geral dos Mercados Agrícolas e da Indústria Agro-Alimentar ('DGMAIAA'). That decree-law also transferred all the functions formerly vested in IROMA and INGA, together with numerous other specific responsibilities in the sphere of the administration and regulation of the agricultural and cattle markets to DGMAIAA. [4]

With the entry into force of a further decree-law (Decree-Law No 284/91 of 9 August 1991), part of the proceeds of the charges at issue, approximately 15%, was earmarked

4 — See in particular Articles 2 and 6(1) of Decree No 56/90.

for DGMAIAA. Consequently, from 1991, the total yield of the charges in question was allocated among DGMAIAA, INGA and IROMA.

6. The facts which gave rise to the present proceedings go back to 1991 (Case C-347/95) and 1992 (Case C-28/96). It was for failure to pay the aforesaid charges for 1991 and 1992 that Fazenda Pública issued two tax demands to União das Cooperativas Abastecedoras de Leite de Lisboa ('UCAL') and Fricarnes S. A. ('Fricarnes') with a view to recovering the sums not collected.

UCAL and Fricarnes challenged the demands before the Tribunal Tributario, Lisbon, on the ground that the charges at issue were unconstitutional. The first-instance court upheld their claims, but on the ground that the charges at issue were unlawful because they were incompatible with Community law, specifically Articles 9 and 12 of the Treaty.

7. Fazenda Pública ('the appellant') appealed against the two judgments at first instance to the Supremo Tribunal Administrativo, which stayed both sets of proceedings and made two references to the Court for a preliminary ruling on the relevant Community provisions.

The three questions put by the national court, as set out in its orders of 11 August 1994 and 11 October 1995, are similarly worded and relate to the compatibility of the charges at issue with Article 95 and Articles 9 and 12 of the Treaty and with Article 33 of the Sixth VAT Directive (77/388/EEC). [5]

First and second questions

8. The national court's first and second questions, which are concerned with the compatibility of the charges at issue with Articles 9 and 12, on the one hand, and Article 95, on the other, are closely linked and should therefore be dealt with together.

I consider it worth starting by calling to mind, albeit briefly, the principles which the Court has formulated in its case-law, which I would unhesitatingly describe as particularly exhaustive and settled.

9. In the first place, the Court has repeatedly held that the Treaty provisions on charges having equivalent effect and Article 95 on discriminatory internal taxation cannot be applied together; consequently, the legality of fiscal (or parafiscal) national rules falling

5 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

within the scope of the former provisions cannot be assessed at the same time in the light of the latter provisions. [6]

The Court has also made it clear that, for the purposes of categorizing and effecting a legal assessment of charges imposed without distinction on domestic and imported products, it is necessary to have regard to the use to which their proceeds are put. If such charges are levied to an equal decree on domestic and imported products, they may even then — precisely because of the use to which they are put — have a substantially different impact on the two types of product so as to cause them to be regarded, depending on the circumstances, either as charges having equivalent effect or as discriminatory internal taxation. It is settled case-law that even charges which, on the face of it, are non-discriminatory, but are used to finance activities which specifically benefit the taxed domestic products, constitute, as far as domestic products are concerned, a burden which is substantially offset by the advantages received, whereas, in the case of imported products, they constitute a net burden which is not offset in any way by the grant of other advantages or subsidies. [7]

10. In that event, as the Court held most recently in *Scharbatke*, [8] it must therefore be determined to what extent the charge collected on the domestic product is offset by the advantages received. Where the burden is completely offset, it must be held that the burden is in reality borne solely by the imported product and that it therefore constitutes a charge having equivalent effect; where the burden is partially offset, it must be held that a less onerous burden is imposed on domestic products than on imported ones, and hence the charge will constitute discriminatory taxation within the meaning of Article 95 of the Treaty.

It is undisputed that this determination falls to be made by the national court, which alone has all the factual and other evidence necessary to make such assessments. [9]

11. It appears from that same case-law of the Court that, in order for the offsetting principle to apply, the taxed product and the domestic product benefited should be the same. [10] In order to determine whether or not the tax burden has been offset, it will obviously be necessary for the revenue from the charge to accrue, at least to some extent, to the taxed domestic product and not only

6 — See, among recent judgments, Case C-266/91 *CELBI* [1993] ECR I-4337, paragraph 9. The principle does, however, go back as far as the judgments of 8 July 1965 in Case 10/65 *Deutschmann* [1965] ECR 469 and of 16 June 1966 in Case 57/65 *Lütticke* [1966] ECR 205.

7 — There is abundant case-law on the point: see, for example, Case 77/72 *Capolongo* [1973] ECR 611; Case 94/74 *IGAV* [1975] ECR 699 and Case 77/76 *Cucchi* [1977] ECR 987; more recently, see Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest* [1992] ECR I-1847.

8 — Case C-72/92 *Herbert Scharbatke* v *Germany* [1993] ECR I-5509, paragraph 10.

9 — See, for example, *Compagnie Commerciale de l'Ouest*, cited in footnote 7, paragraph 28, and Case C-17/91 *Lornoy* [1992] ECR I-6523, paragraph 22.

10 — See *Cucchi*, cited in footnote 7, and Case 105/76 *Interzuccheri* [1977] ECR 1029.

for the benefit of a variety of products. In such circumstances, it is clear that the question of offsetting does not arise at all where a charge, levied for example on the marketing of meat, is then used to finance incentives only for other sectors, for example the production of milk and milk products.

12. The judgment in *CELBI* affords useful guidance as to the criteria which the national court should employ in order to determine whether the offsetting in favour of the domestic product is total or partial. In this connection, the Court held that it is necessary to determine, by reference to a particular period of time, whether there was financial equivalence of the total amounts levied on domestic products in connection with the charge and the advantages afforded exclusively to those products. Any other parameter, such as the nature, scope or indispensable character of those advantages would not provide a sufficiently objective basis on which to determine whether a domestic fiscal measure is compatible with the provisions of the Treaty. [11]

13. As for the consequences which the national court should draw from the categorization of the charge under one or the other class of provisions, they are clear from the judgment in *IGAV*: if the advantages for the domestic product fully offset (or indeed exceed) the burden borne by them, the charge must be regarded as completely unlawful as a charge having effect equivalent to a customs duty; if, in contrast, the advantages only partly offset the burden borne by the domestic product, the charge borne by the imported product, which is lawful in principle, must be simply reduced proportionately. [12]

14. To return to the cases before the Court, it will therefore be for the national court, applying the principles set out above, to determine whether taxed imported products also actually derived an advantage from the various activities carried out institutionally by the bodies which (from time to time) received the charges, and if so to what extent.

Having said this, I do not consider, however, that the national court could determine the disputes pending before it simply on the basis of an answer from the Court which merely reiterated the principles emerging from its case-law. If that were so, the national court would not have stayed proceedings and asked the Court to shed light on this point. [13] Indeed, in my view, the very fact that the national court has raised the questions now being considered reflects the undeniable difficulties in applying the — albeit essentially clear — case-law to individual cases of this kind.

11 — Judgment in *CELBI*, cited in footnote 6, paragraph 18.

12 — Judgment in *IGAV*, cited in footnote 7, paragraph 13; see more recently the judgment in *Compagnie Commerciale de l'Ouest*, also cited in footnote 7, paragraph 27.

13 — It should, moreover, be borne in mind that the court which raised the questions is the same one which made the reference to the Court in the *CELBI* case, in which it sought an interpretation of the same provisions. It manifestly follows that that court is well aware of the principles set out in the Court's case-law.

15. I shall therefore endeavour to set forth a number of additional observations on the charges at issue with a view to providing the national court with the maximum guidance possible for determining how to categorize them in legal terms. Of course, I shall do so within the confines of the information in the case-file (as supplemented by the particulars provided by the parties), while respecting the jurisdiction of the national court, which, I reiterate, has to make the definitive determination.

As I have observed, the charges at issue are imposed without distinction on domestic and imported products, from the point of view of both the applicable rates and the manner in which they are collected. [14] At the material time, the revenue from the charges was distributed, in different percentages, amongst three public agencies, one of which (DGMAIAA) had statutory responsibility for organizing and coordinating the market in agricultural products and livestock as described above. [15]

16. It is precisely as a result of analysing the tasks entrusted to those agencies that the appellant, and also the Portuguese Government and the Commission, while acknowledging that the national court has the definitive competence to settle the point, argue that the charges in question seem to constitute neither charges having effect equivalent to customs duties nor discriminatory taxation within the meaning of the Court's case-law. This is essentially because the agencies to which the revenue from the charges is intended to accrue carry out (or carried out) market management and coordination activities for the benefit of all traders in the sector, be they national or foreign.

However, those arguments are not decisive in themselves. They do not mean that, apart from the formal irrelevance of the difference between domestic products and imported products, domestic products may not ultimately derive, *de facto*, an exclusive or predominant benefit from the services provided by those agencies or that the burden borne by domestic products is not completely (or partially) offset by that benefit.

17. Take, for instance, the charges specifically intend to combat diseases of ruminants and swine fever. It is clear that the revenue from those charges, which is earmarked to

14 — In this connection, I would observe, however, that it is still not clear what event actually gave rise at the material time to the charges at issue. Whilst it appears from the case-file that the charges were imposed at the time when the relevant products were marketed, certain statements made at the hearing by the Portuguese Government's Agent suggest that in the case of imported products the charges were collected at the time when they were imported. Consequently, the national court will have to make the requisite determinations in regard to this point, too, and draw the necessary conclusions therefrom.

15 — See points 3, 4 and 5 above.

finance measures designed to prevent and cure diseases affecting livestock, were probably liable to benefit livestock raised on the national territory to a greater, if not exclusive, extent. [16]

But account should also be taken of the role played by IROMA (now by DGMAIAA) in governing and regulating *foreign trade* in agricultural products and livestock. [17] Manifestly, if the expression 'foreign trade' refers not only to trade in the products concerned with non-member countries, but also to intra-Community trade, it follows that only domestic producers (and hence domestic products) were intended in all probability to benefit by that particular activity.

18. From the opposite perspective, the Portuguese Government claims that further proof of the compatibility of the charges in question with the relevant Community provisions is provided by the fact that, at the material time in both cases, only DGMAIAA had organizational powers in the sector in question, whilst although INGA and IROMA continued to receive a substantial fraction of the revenue from the charges (approximately 85%), they no longer played any significant role in the sector. The Government argues that this precludes, a priori, any possibility of the burden borne by domestic products being offset by advantages deriving from the activities of the latter bodies.

I confess that I do not find this argument convincing either. Indeed, to my mind, it raises the opposite question: it remains to be determined, and the Court does not have any precise information on this point, what type of activity IROMA and INGA carried out; after they were 'stripped' of their responsibilities for market organization, which were transferred to DGMAIAA, they continued to receive a substantial percentage of the proceeds of the contested charges. It also still has to be determined what effect those activities had on any offsetting of the burden borne by domestic products and/or imported products.

19. The Commission observes for its part that a further condition laid down by the Court's case-law which has to be satisfied in order for account to be taken of any offsetting of the burden is missing, that is to say, the fact that the taxed product and the product which may be favoured should be the same. This is because the bodies in receipt of the charges had blanket powers to organize the whole of the market in agricultural products and livestock, whereas the charges in question were levied solely on particular products.

That argument, however, is based on an inaccurate interpretation of the Court's case-law. As I observed in point 11 of this Opinion,

16 — This was broadly conceded by the Portuguese Government at the hearing.

17 — See point 3 above.

the case-law should be properly understood as meaning that the question of offsetting does not arise where a tax charged on a particular product is subsequently used to finance incentives which benefit other products *only*; neither does it arise where such a charge is used to finance the activities of an entire organization of the market, which covers by definition *also* the product in question.

20. In the final analysis, in view of the manifest difficulties experienced by the national court in applying the principles set forth in the Court's case-law, the Court should provide it with the maximum useful guidance for resolving the dispute; this would scale down the risk, to which, moreover, I drew attention in the *Lornoy* case, that the various courts which may be called upon to rule on a given charge may take divergent approaches. [18]

Third question

21. A few very brief observations will suffice to answer the national court's third question on the compatibility of the charges in question with Article 33 of the Sixth VAT Directive. That provision, as we know, debars Member States from introducing or maintaining in force any taxes, duties or charges which can be characterized as turnover taxes.

After considering the charges in question, it seems to be absolutely clear that their characteristics are different from the characteristics of VAT, as they have been precisely defined in the Court's case-law. [19] Unlike VAT, the charges at issue do not apply generally, but are levied only on certain products; they are not (or at least do not appear to be) proportional to the price of the products themselves; they are not imposed at each stage of the production and distribution process, but only at the marketing stage; lastly, they are not imposed on the added value of the products and hence the tax paid on previous transactions is not deducted.

Consequently, it does not seem to me that any question arises as to the compatibility of the charges in question with Article 33 of the Sixth Directive.

18 — Opinion of 25 June 1992 in *Lornoy* (cited in footnote 9), at (a).

19 — See, for example, Case C-200/90 *Dansk Denkavit* [1992] ECR I-2217, paragraph 11.

22. In the light of the foregoing considerations, I therefore propose that the Court should answer the questions referred by the Supremo Tribunal Administrativo in the following terms:

(1) A charge imposed on the same terms on domestic products and imported products, the proceeds of which are intended to finance activities by which only domestic products benefit in such a way that the resulting advantages wholly offset the burden imposed on those products, constitutes a charge having effect equivalent to a customs duty contrary to Articles 9 and 12 of the Treaty. By contrast, in the event that those advantages offset only part of the burden borne by domestic products, the charge constitutes discriminatory internal taxation contrary to Article 95 of the Treaty.

It is for the national court to determine whether the total amount of the charge imposed on domestic products and the advantages which only those products enjoy are financially equivalent. In effecting that determination the national court will have to take account of the fact that the proceeds of the charge are specifically intended to combat diseases of livestock raised on the national territory and/or to regulate trade with other Member States in products on which the charge is imposed.

(2) Article 33 of the Sixth VAT Directive (77/388/EEC) does not preclude Member States from introducing or maintaining in force charges which are not in the nature of turnover taxes: a tax which is imposed only on particular products which is not proportional to the price of those products and is not imposed at every stage of the production and distribution process or on the added value of the products does not have the characteristics of a turnover tax.