

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 February 2004¹

I — Introduction

II — Relevant legislation

A — *Community law*

1. These essentially identical references by the Diikitiko Efetio Piraeus (Administrative Appeal Court, Piraeus) for a preliminary ruling focus on whether Directive 76/308/EEC² ('Directive 76/308') is applicable in the context of the mutual recognition and enforcement in Greece of Italian customs claims which arose before the directive was adopted and entered into force in Greece. The recognition and enforcement in Greece of an Italian customs claim arising in 1968 against Mr Tsapalos (Case C-361/02) and Mr Diamantakis (Case C-362/02) are at issue in the main proceedings.

2. Directive 76/308 provides for the recognition and enforcement of certain public-law claims which arise in another Member State. In its original version, it applied to claims resulting from operations under the common agricultural policy and to customs duties. In the version applicable as from 2001, its scope is extended to cover not only claims resulting from operations under the common agricultural policy but also all import and export duties as well as tax claims, in particular those in respect of value added tax,³ excise duty⁴ and taxes on income, capital and insurance premiums.⁵

1 — Original language: German.

2 — Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties, and in respect of value added tax and certain excise duties (OJ 1976 L 73, p. 18), as most recently amended by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17).

3 — Council Directive 79/1071/EEC of 6 December 1979 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing of the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties, and in respect of value added tax and certain excise duties (OJ 1979 L 331, p. 10).

4 — Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EEC of 14 December 1992 (OJ 1992 L 390, p. 124).

5 — Directive 2001/44, cited in footnote 2.

3. The first paragraph of Article 8 forms the cornerstone of Directive 76/308. Under that provision, Member States are required to recognise any instrument whose enforcement is requested by the authority of another Member State and to enforce it in the same way as a national instrument. Under the second paragraph of Article 8, the requested authority can either recognise and enforce the instrument as it stands or supplement or replace it with an instrument authorising enforcement in the territory of the Member State concerned. The directive also contains provisions concerning the form which requests for enforcement must take and the means by which enforcement is to be effected.

B — *National law*

4. The provisions of Directive 76/308 were transposed into Greek law by Articles 86 to 98 (Chapter XI — ‘Mutual Assistance for the Recovery of Claims’) of Law No 1402/1983 on adjusting customs legislation to the law of the European Communities⁶ and by Order T. 1243/319 adopted by the Finance Minister on 26 March 1984 on the basis of that law.⁷ Article 86 of Law No 1402/1983, which applies with retroactive effect as from 1 January 1981 pursuant to Article 103 thereof, provides that the provisions of Chapter XI are to apply *inter alia* to claims for recovery of customs duties owed on goods imported from non-member countries into the EEC, unless otherwise provided for in that law.

III — Facts and question referred

5. By (undated) letter the Italian Ministry of Finance sent a request for enforcement dated 23 November 1992 pursuant to Directive 76/308 to the Greek Ministry of Finance; the request was received by the Greek Ministry on 14 December 1992. That request concerned a claim against Mr Tsapalos and Mr Diamantakis, the respondents in the main proceedings (hereinafter: ‘the respondents’), for recovery of customs duties in the total amount of ITL 1 787 485 050 including interest and additional charges.⁸ Attached to the letter was a judgment from the Corte d’appello Catania (Court of Appeal, Catania (Italy)) of 8 October 1970 by which the respondents had been sentenced to terms of imprisonment and ordered to pay the relevant customs duties and other charges for having illegally imported tobacco products into Italy in March 1968. By judgment of 31 January 1972, the Corte di cassazione (Court of Cassation) had subsequently dismissed the appeal brought against that decision.

6. By decision of 6 February 1996, the competent Greek authority recognised the enforceability of the instrument in Greece. In a subsequent action brought by the respondents, the court adjudicating at first instance set aside that decision on the ground that mutual assistance between Greece and the other Member States of the EC was available only in respect of claims arising after the

⁶ — Greek Official Gazette 167, Part I (1).

⁷ — Greek Official Gazette 179, Part I.

⁸ — Based on the euro conversion rate, this amount corresponds to EUR 923 159.

entry into force of Law No 1402/1983, that is to say, after its publication in the Greek Official Gazette on 1 January 1983. The contested claim, however, arose in 1968 and was confirmed by the judgments of 1970 and 1972.

7. By judgment of 5 June 2002, the Diikitiko Efetio Piraeus adjudicating on the appeal brought by the Greek State referred the following question to the Court of Justice for a preliminary ruling pursuant to Article 234 EC:

'Is Article 1 of Council Directive 76/308/EEC ... to be interpreted as meaning that the provisions of the directive also cover claims which arose in a Member State before entry into force of the directive under a document whose issuance by the competent authorities of that State also predated entry into force of the directive, such as the document issued by the Italian authorities in the present case, and that, accordingly, following the entry into force of the directive, the end of the relevant transitional period and compliance by the other Member States with the duty to enact the provisions required for application of the directive, those pending claims for which recovery had not hitherto been available in the other Member State may henceforth be recovered, on request to the "requested authority" by the "applicant authority" as mentioned in Article 3 of the Directive?'

IV — Arguments of the parties

8. The respondents submit that the judgment delivered by the Corte d'appello Catania in 1970 is a judgment delivered by default of which they had no knowledge until the enforcement request was notified to them on 6 September 1996 (to Mr Diamantakis) and 31 December 1996 (to Mr Tsapalos). They take the view that it is apparent from the wording of the directive and from Law No 1402/1983 that the rules apply only to claims arising after those rules have entered into force. Applying the provisions to claims arising previously would offend against the principle of legal certainty.

9. The Greek Government and the Commission share the view that Directive 76/308 contains only procedural rules. Procedural rules, unlike substantive provisions, could also be applied to circumstances arising in the past. Applying the directive to claims which had already arisen upon its entry into force met the objective of ensuring the comprehensive and uniform application of the Community rules and of preventing fraudulent operations.

10. The Commission also maintains that the directive is consistent with Community

customs law. Under Article 2 of the Customs Code,⁹ Community customs rules are to apply uniformly throughout the customs territory of the Community. Customs debts are incurred in the same amount and subject to the same conditions, irrespective of the importing State. In laying down rules on mutual assistance for the enforcement of customs claims, the directive complements that regime.

11. Directive 76/308 is to apply, in accordance with Article 1 thereof, to all claims referred to in Article 2 which *arise* in another Member State. With the exception of the English version — the Commission adds — all the language versions used the past tense at that point, which would suggest that the directive applied to claims arising before it entered into force. The legislative history did not shed any light on that point. However, the Commission had explained in a working document of 22 December 1980 that the directive applied to all enforcement requests submitted after 1 January 1978, irrespective of the date of accrual of the claim to be enforced. Furthermore, the Community legislature had not restricted the temporal scope by introducing appropriate transitional provisions, as it had done in other cases.¹⁰

V — Legal assessment

A — Applicable version of Directive 76/308

12. The referring court is seeking an interpretation of Directive 76/308 with a view to applying the national implementing provisions in accordance with the directive. Without wishing to pre-empt the question of how far the directive calls for recognition and enforcement of claims arising prior to its entry into force, it is necessary to establish which version of the directive is relevant in the main proceedings.

13. The subject-matter of these proceedings is the decision of the Greek customs authorities of 6 February 1996 relating to the recognition and enforcement of the Italian instrument. Thus, only the version of the directive which was in force at that time¹¹ can be taken as the basis for assessing whether the contested decision is lawful. Therefore, the amendments to Directive 76/308 in pursuance of Directive 2001/44¹² are not taken into account.

9 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

10 — The Commission refers in particular to Article 66 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

11 — Namely the version as amended by Directive 92/12 (cited in footnote 4) and by the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 274 and OJ 1995 L 1 p. 1).

12 — Cited in footnote 2.

B — *Applicability of Directive 76/308 to claims arising before entry into force of the directive*

case-law that in the event of divergence between the language versions, the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms part.¹⁴

14. The rules of Directive 76/308, in accordance with Article 1 thereof, relate to the claims referred to in Article 2 which arise in another Member State. It cannot be inferred from the wording of those provisions that the directive applies only to claims arising after its adoption. The directive does not in particular contain any transitional provision restricting its scope to that effect. Furthermore, the Act concerning the conditions of accession of the Hellenic Republic¹³ does not lay down any special provision as regards the entry into force or the scope of Directive 76/308 in Greece. On the contrary, the general rule laid down in Article 2 of the Act of Accession applies, under which Community acts are to apply in Greece as from the date of its accession, namely 1 January 1981.

16. The objective of the directive, as set out in the second recital in the preamble thereto, is to remove the obstacles to the functioning of the common market resulting from the problems encountered in enforcing certain public-law claims beyond the national territories. It is also intended to ensure the comprehensive and uniform application of Community legislation throughout the Community. The directive ensures in particular that debtors cannot evade the obligation imposed on them to pay the charges coming under the directive by moving their domicile or place of residence to another Member State. It thereby ensures that the rights to free movement enshrined in the Treaty can be invoked without prejudicing the recovery of claims.

15. Only the English version of Article 1 of Directive 76/308 ('claims ... which arise in another Member State') might suggest an alternative conclusion. In view of the fact that all other language versions use the past tense at the point in question, the divergence in the English text could be the result of inaccurate translation. Moreover, it is settled

17. The directive fulfils that objective specifically where it guarantees the recovery as far as possible of all claims which have not as yet become time-barred, therefore including claims which arose even before the directive entered into force. In that manner the directive also ensures that Community customs law is implemented uniformly and effectively.

13 — Act concerning the conditions of accession of the Hellenic Republic and the adjustments to the Treaties (OJ 1979 L 291, p. 17).

14 — Case C-372/88 *Cricket St. Thomas Estate* [1990] ECR I-1345, paragraph 19, and Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 42.

18. Furthermore, the directive must be interpreted in the light of the duty imposed by Article 10 EC¹⁵ on the Member States to cooperate in good faith with the Community and each other.¹⁶ Under that principle, the directive must be interpreted broadly, thereby guaranteeing that the authorities of the requested State carry out the requests of the applicant State as far as possible. Where the matter concerns the recovery of charges which form part of the Community's own resources, such as customs duties, cooperation between the Member States also serves the financial interest of the Community.

19. Since its accession, Greece has likewise been bound by the duty to cooperate in good faith with the other Member States. Such cooperation may — in so far as it is necessary to implement Community law — pertain to circumstances which arose prior to Greece's accession to the Community.

20. However, it is doubtful whether Directive 76/308/EEC can be applied to claims arising before its entry into force because

such application would be contrary to the principle of non-retroactivity.

21. It has been consistently held that, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them.¹⁷ As the Commission and the Greek Government have correctly pointed out, that principle does not apply, however, to procedural rules.¹⁸

22. Substantive rules govern the existence and content of rights, whereas procedural rules primarily concern the organisation of the procedure for enforcing rights. Directive 76/308 does not contain provisions on the accrual of claims or on their content. In that respect only the provisions of national law of the applicant State or the substantive Community rules which are directly applicable in the Member States in that regard, the customs code for example, are relevant. The directive governs no more than the

15 — Legal commentators even consider that an obligation to recognise the administrative measures of other Member States might be directly inferred from Article 10 EC (cf. von Bogdandy in: Grabitz/Hill, *Das Recht der Europäischen Union*, Article 10, paragraph 52, with reference to the judgment in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357).

16 — Cf. on the duty of cooperation between Member States: Cases 42/82 *Commission v France* [1983] ECR 1013, paragraph 36, and C-251/89 *Athanasopoulos and Others* [1991] ECR I-2797, paragraph 57.

17 — Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 119, and Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147, paragraph 22.

18 — Case C-61/98 *De Haan Beheer* [1999] ECR I-5003, paragraphs 13 and 14, and Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 9.

recognition and enforcement of public claims arising in another Member State. Therefore, its rules must be regarded as procedural rules which can also be applied to claims arising before its entry into force without offending against the principles of legal certainty and the protection of legitimate expectations.

that, save in the case of Article 12, which concerns the suspension of enforcement measures in the event of a challenge, the requested authority may refrain from implementing enforcement measures only pursuant to Article 14, which provision is irrelevant in this case.

C — Whether there is a claim as defined in Article 2(c) of Directive 76/308

23. Reliance on Directive 76/308 presupposes that the claims at issue are claims falling within the scope of the directive. However, it cannot be ascertained from the directive whether the requested authority actually enjoys any discretion in that context or whether it is bound by the applicant authority's classification of the claim, the latter authority alone knowing the underlying circumstances of the claim and the national law applicable.

24. Article 6(2) of Directive 76/308, which provides that, for the purpose of enforcement, 'any claim in respect of which a request for recovery has been made shall be treated as a claim of the Member State in which the requested authority is situated, except where Article 12 applies' could support the argument that the requested authority is accordingly bound. Furthermore, it would appear

25. However, in line with the principle of the rule of law, the requested authority in any event can or even must refrain from meeting the requirements of recognition and enforcement if, according to the information provided, the claim concerned clearly falls outside the scope of Directive 76/308. Indeed, in that case the legal basis necessary for the requested authority to take action might not exist, unless the national implementing provisions extend beyond the scope of the directive.

26. The scope of Directive 76/308, in the version relevant here,¹⁹ covers — in accordance with Article 2(c) thereof — claims relating to customs duties within the meaning of Article 2(b) of Council Decision 70/243/ECSC, EEC, Euratom of 21 April 1970 on the replacement of financial contributions from Member States by the

¹⁹ — The matter under discussion here would not be raised if Directive 76/308 applied as amended by Directive 2001/44. After all, this most recent version applies very generally to import duties (Article 2(c) thereof), which are defined in Article 3 as 'customs duties and charges having equivalent effect on imports, and import charges laid down within the framework of the common agricultural policy or in that of specific arrangements applicable to certain goods resulting from the processing of agricultural products'.

Communities' own resources (hereinafter: 'Decision 70/243').²⁰ It must be examined whether the customs duties at issue constitute a claim for the purposes of the above-mentioned decision, even though the claim arose as early as March 1968.

27. Customs duties and, by extension, the Community's own resources within the meaning of Article 2(b) of Decision 70/243 are the common customs tariff duties and other duties established by the institutions of the Communities in respect of trade with non-member countries. Although the customs union was not completed until 1 July 1968,²¹ the common customs tariff had already been progressively introduced under Article 19 et seq. of the EEC Treaty. Consequently, even claims arising before 1 July 1968 may constitute common customs tariff duties, to which Directive 76/308 applies.

28. The fact that the system of Community own resources did not as yet exist at that time and was introduced only with the adoption of Decision 70/243 does not disprove the conclusion drawn above. Perhaps the original intention of the Community

legislature in adopting the directive was to facilitate only the mutual recognition and enforcement between the Member States of claims accruing to the Community as own resources. The reference in Article 2 of Directive 76/308 to Decision 70/243 indicates that this was the intention. However, on subsequent amendment, the scope was extended to cover other charges coming predominantly or exclusively under the national budget, such as value added tax and excise duties.

29. Thus, customs claims arising in March 1968 in a Member State of the Community also fall within the scope of Directive 76/308 and can be enforced in another Member State in accordance with the national provisions transposing the directive.

30. It might, none the less, be necessary to examine whether enforcing the contested claim in this case involves infringing general legal principles which must be observed when implementing all measures under Community law, in particular the principles of fair legal process,²² good administration²³ and the rule of law.

20 — OJ, English Special Edition 1970 (I), p. 224.

21 — See in that regard Council Decision 66/532/EEC of 26 July 1966 on the abolition of customs duties and the prohibition of quantitative restrictions between Member States and on the application of common customs tariff duties to products not listed in Annex II to the Treaty (JO 1966 L 165, p. 2971, not available in English) and Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the common customs tariff (OJ, English Special Edition 1968 (I), p. 275).

22 — Cf. to that effect inter alia Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 21, and Case C-299/95 *Krenzov* [1997] ECR I-2629, paragraph 14, and Opinion 2/94 [1996] ECR I-1759, paragraph 33.

23 — Cf. Article 41(1) of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) and the Opinion of Advocate General Jacobs in Case C-270/99 P *Z v Parlament* [2001] ECR I-9197, paragraph 40.

31. In that connection it is first of all uncertain whether the debtors were notified of the customs debt imposed on them in such a manner that they could appeal against it. In that respect the respondents have argued in the proceedings before the Court of Justice that they had no knowledge of any Italian instrument until 6 September 1996 and 31 December 1996, the respective dates on which the decision issued by the Greek authorities with regard to the recognition and enforcement of the Italian instrument was notified to them.

32. Secondly, the question arises as to whether the procedure commencing with

the accrual of the customs debt in 1968 and continuing up to the institution of enforcement proceedings in Greece in 1996 has been of disproportionate duration and as to who, if anybody, should be held responsible for that lengthy duration. However, relying in that regard on the limitation period should not in itself undermine the lawfulness of the enforcement.

33. It is for the referring court to look into the facts in greater detail and to assess them, where necessary, in the light of the principles mentioned above.

VI — Conclusion

34. In the light of the foregoing considerations, I propose that the Court should answer the question referred to it by the Diikitiko Efetio Piraeus as follows:

Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties, and in respect of value added tax and certain excise duties, as amended on 6 February 1996, applies to customs claims which arose in a Member State of the Community before entry into force of the directive, under an instrument whose adoption by the Member State concerned also predates entry into force of the directive.