

OPINION OF MR ADVOCATE GENERAL DARMON

delivered on 17 November 1993 *

*Mr President,
Members of the Court,*

1. Does Community law, in particular the rules applicable to the common organization of the market in rice, preclude the levying of an internal tax on all purchases of paddy rice produced in a Member State for the benefit of a National Rice Production Assistance Fund?

2. That is the question, which might have been thought settled since the judgment in the *Geddo* case,¹ that the Court is requested to reconsider in the questions referred by the Vercelli Conciliatura (Lay Magistrate's Court) and the Pretura Circondariale (District Magistrate's Court). Let there be no mistake: the plaintiffs in the main proceedings are seeking here the outright reversal of the case-law.

3. It is the role of the Ente Nazionale Risi (National Rice Authority, hereinafter called 'the Authority'), established by Italian Royal Decree-Law No 1237 of 2 October 1931,² 'to ensure that the interests of national rice production are protected, by facilitating the distribution and consumption of the product and by encouraging any initiative aimed at improving production'.³ The Authority plays an important role in experimental research (it runs the Rice Research Centre) and technical assistance. Furthermore, as an intervention agency, it is responsible for the implementation in Italy of the common organization of the market in rice.⁴ The Authority's operations are wholly financed by a 'contract duty' payable, on delivery of a transfer certificate ('certificato trasferimento risone'), by the purchaser of paddy rice produced in Italy, or if it is not sold, by the producer in the event of processing the rice.⁵

4. It is that 'contract duty' which is at the heart of this matter, as it was earlier in the *Geddo* case.

* Original language: French.

1 — Case 2/73 *Riseria Luigi Geddo v Ente Nazionale Risi* [1973] ECR 865.

2 — GURI (Official Gazette of the Italian Republic) of 12 October 1931, No 236.

3 — Article 1.

4 — On the tasks of the Authority, see its observations at p. 13 et seq. of the French translation.

5 — See Article 9 of Royal Decree-Law No 1183 of 11 August 1933, GURI, No 218 (Annex 8 to the Authority's observations).

5. The Geddo rice mill had bought from an Italian producer paddy rice for processing into an edible product and for export, part within the Community and part to a non-member country.⁶ That purchase had been declared to the Authority which had levied contract duty. The purchaser took legal action for reimbursement, on the ground that Community law precluded such a charge.

6. By means of a reference for a preliminary ruling, the Pretore di Milano (Magistrate for Milan) had asked the Court essentially whether Article 5 and the second subparagraph of Article 40 (3) of the EEC Treaty, and also the provisions of Regulation No 359/67/EEC of the Council of 25 July 1967 on the common organization of the market in rice,⁷ prohibited the levying of such a duty.

7. The Court stated that in the context of the market in rice, Article 40 was implemented by the abovementioned regulation, and considered whether contract duty was compatible with Article 20 (2) and 23 of that text, which prohibits in particular the levying of any customs duty or charge having equivalent effect in intra-Community trade and in trade with a non-member country.⁸

8. The Court pointed out that the 'contract duty' affected 'domestic products alone on completion of a contract covering them' and not 'goods by reason of their crossing the frontier', and classed it as an 'internal tax' not constituting a charge having equivalent effect to a customs duty on exports.⁹

9. The Court also ruled on the question whether contract duty was compatible with the rules governing trade with non-member countries and export refunds, which must, under Article 17 (2) of the abovementioned regulation, be the same for the whole Community.

10. The Court held that 'Such a tax could only be contrary to the provisions of the regulation concerning export refunds if it appeared to be a *method of reducing the amount of such refunds*.'¹⁰

11. Facts similar to those in the *Geddo* case are at the origin of cases C-332/92 (*Enrico Italia Srl*), C-333/92 and C-335/92 (*Viazzo Srl* and *F. & P. SpA*), the rice having been exported to a Member State of the Community in the last two cases and to a non-

6 — See the abovementioned judgment at p. 867.

7 — OJ, English Special Edition 1967, p. 193.

8 — At points 4 and 5.

9 — At points 5 and 6.

10 — *Ibid.*, my italics.

member country — making refunds payable — in the *Eurico Italia* case. Moreover, the Community regulation applicable here is Council Regulation (EEC) No 1418/76 of 21 June 1976 on the common organization of the market in rice,¹¹ which contains a provision identical to that in Article 17 (2) of the abovementioned Regulation No 359/67, now repealed.¹²

14. In Cases C-333/92 and C-335/92, the Conciliatura and the Pretura Circondariale for Vercelli have referred to the Court for a preliminary ruling two questions, in identical terms, on whether non-reimbursement, in the event of export to another Member State, infringes (1) the general prohibition of discrimination in Community law and, in particular, of the second subparagraph of Article 40 (3) and Article 5 of the EEC Treaty, or (2) the general principle according to which exported products are to be taxed where they are consumed.

12. Nearly 20 years after the *Geddo* judgment, is it not the fear of a substantial increase in contract duty, together with threats to the competitiveness of Italian rice, which have led the rice mills, plaintiffs in the main proceedings, to challenge afresh the compatibility of the duty with Community law?¹³

15. In addition to the question whether contract duty is compatible with the general principle of non-discrimination, the Conciliatura of Vercelli, in Case C-332/92, asks whether non-reimbursement of the contract duty, in the event of export to a non-member country, contravenes Article 17 (2) of the abovementioned Council Regulation (EEC) No 1418/76: refunds made to purchasers of Italian rice have contract duty deducted from them and are, therefore, less than those paid to other Community traders.

13. It must be said right away that some of the arguments put forward by the plaintiffs in the main proceedings are absolutely identical to those which the Court has answered already in the *Geddo* judgment. The others do not appear to me to require a reversal of the case-law.

16. For that reason I shall examine the question of non-reimbursement of the contract duty with respect to the general prohibition of discrimination, the principle of taxation of

11 — OJ 1976 L 166, p. 1.

12 — Article 30 (1) of Regulation No 1418/76/EEC.

13 — See the observations of the companies, plaintiffs in the main proceedings, at p. 15 of the French translation.

exported products at the place of consumption and, finally, Article 17 (2) of Council Regulation No 1418/76/EEC, in that order.

17. Let me, however, clear up some preliminary points.

18. In the first place, the Authority¹⁴ and the Italian Government¹⁵ pointed out that the questions submitted had been asked within the context of a summary procedure called 'di ingiunzione' (order) purely on the basis of claims made by the plaintiff companies, without any hearing *inter partes*.

19. In the *Politi*¹⁶ case, in which the President of the Tribunale di Torino (District Court of Turin), in a similar procedure, referred several questions to the Court, the lack of an *inter partes* hearing was held by the Court not to preclude the reference in so far as:

'(...) the President of the Tribunale di Torino is performing a judicial function within the meaning of Article 177 and (...) he consid-

ered an interpretation of Community law to be necessary to enable him to reach a decision, there being therefore no need for the Court to consider the stage of the proceedings at which the questions were referred'.¹⁷

20. The Court has not departed from that approach in subsequent cases.¹⁸

21. Secondly, the Authority raises several procedural objections: (i) the court making the reference does not have jurisdiction to decide on the substance of the claim for a refund of the contract duty, (ii) it failed to take the Court's decisions into consideration, in particular the *Geddo* judgment, (iii) the questions referred are mere 'pretexts', having regard both to the insignificant amount of the sums claimed and also to the economic weight of the traders concerned.

22. The Court has already answered the first point in the *Debus* judgment¹⁹ in these terms:

'As far as the doubts raised by the Commission as to the admissibility of the reference

¹⁴ — Observations, pp. 2 and 3 of the French translation.

¹⁵ — Observations, p. 1 of the French translation.

¹⁶ — Judgment in Case 43/71 *Politi* [1971] ECR 1039.

¹⁷ — Point 5.

¹⁸ — See also the judgment in Case 338/85 *Pardini* [1988] ECR 2041 at paragraph 8. See also my Opinion in Case C-24/92 *Corbiau* [1993] ECR I-1277, at I-1287, paragraphs 8 to 10, and in Case C-277/91, C-318/91 and C-319/91 *Ligur Carni* [1993] ECR I-6621, at I-6632, at paragraph 14.

¹⁹ — Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, at paragraph 8.

for a preliminary ruling on interpretation are concerned (...) on the ground that it comes from a court which, under the national law of criminal procedure, has no jurisdiction to hear the matter in the main proceedings, it is sufficient to point out that as a rule and where there are no exceptional circumstances, it is not for the Court to check whether national courts have jurisdiction with regard to national rules of procedure.'

23. On the second point, I shall note that the national court alone has jurisdiction to decide whether the information supplied in previous case-law is sufficient to enable it to decide whether a reference for a preliminary ruling is necessary. In the first place, 'Article 177 always allows a national court, if it considers it desirable, to refer questions of interpretation to the Court again',²⁰ even if they have already formed the subject of a preliminary ruling in a similar case. Secondly, the questions are not identical to those raised in the *Geddo* case, the judgment which was given more than 20 years ago. In the case in point, therefore, there are no grounds for applying Article 104 (3) of the Rules of Procedure.

24. As to the third point, the case-law is consistent: Article 177, based on a clear separation of the duties belonging respectively to national courts and the Court, does not allow the latter to assess the relevance of the

questions submitted. Indeed, the Court has stated that:

'(...) the Court has consistently held (...) that it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court'.²¹

25. Finally, the Authority has objected that in the circumstances, the questions submitted seek in essence to have the Court declare that national rules are incompatible with Community law, something which does not fall within its jurisdiction.²²

26. In that connection, it is sufficient to recall the Court's statement of principle on the subject:

'Although the Court, when giving a ruling under Article 177, has no jurisdiction to

²⁰ — Judgment in Joined Cases 28/62, 29/62 and 30/62 *Da Costa* [1963] ECR 31, at p. 38.

²¹ — Judgment in Case C-186/90 *Durighello* [1991] ECR I-5773, at paragraph 8.

²² — Observations of the defendant in the main proceedings, p. 12 of the French translation.

apply the Community rule to a specific case or, consequently, to pronounce upon a provision of national law, it may however provide the national court with the factors of interpretation depending on Community law which might be useful to it in evaluating the effects of such provision.’²³

27. Let me, therefore, now turn to the first question.

28. Under Article 9 of Decree-Law No 1237 of 2 October 1931, a purchaser is to pay contract duty to the Authority on every contract for the sale of Italian paddy rice.

29. Where an agricultural product is covered by a common organization of the market, and in particular where that organization is based, as in the present case, on a common price system, Member States can no longer take action, through unilateral measures, affecting the machinery of price formation established by the organization.²⁴

23 — Judgment in Case 112/75 *Hirardin* [1976] ECR 553, at paragraph 8.

24 — See paragraph 16 of the judgment in Case C-281/87 *Commission v Hellenic Republic* [1989] ECR 4015.

30. Is contract duty, therefore, compatible with the second subparagraph of Article 40 (3) of the Treaty, which prohibits discrimination between producers and consumers within the Community?

31. In his Opinion for the *Geddo* judgment, Mr Advocate General Trabucchi had reformulated in these terms the discrimination alleged by the purchasers of rice: ‘the Italian business which buys paddy rice in Italy is being discriminated against in comparison with its competitors in the Community, because the latter obtain their supplies on the world market without having to pay the contract duty, and (...) this interferes with the proper working of the mechanisms used to implement the common policy on prices’.²⁵ The rice producer who buys Italian paddy rice thus bears an extra cost from which the purchaser of rice produced in another Member State is exempt.

32. As to the conditions for the application of the second subparagraph of Article 40 (3) of the Treaty, the Court’s decisions have never varied:

‘(...) the Court has consistently held that the principle of non-discrimination between producers or consumers in the Community, laid down in the second subparagraph of

25 — *Geddo*, at p. 888.

Article 40 (3) of the Treaty, means that *comparable situations* are not to be treated differently and that different situations are not to be treated alike unless such treatment is objectively justified'.²⁶

33. The Authority points out that there is a counterpart to the contract duty: the service provided by that body, whether in improving production, encouraging consumption of rice or protecting national rice production. It is payable only by Italian purchasers of rice.²⁷

34. The situation of such purchasers cannot be compared with that of purchasers of paddy rice produced in another Member State who are not subject to the payment of the duty but who do not have access either to the services of a body such as the Authority.

35. It follows that the terms of the comparison do not in the present case permit the application of the second subparagraph of Article 40 (3) of the Treaty and that, without its even being necessary to consider the

direct effect of that provision, it cannot be used as the basis of a claim for reimbursement of the contract duty.

36. Note that, as in the *Geddo* case, the national court seeks a ruling on the application of Article 5 of the Treaty in conjunction with Article 40 (3).

37. The Court ruled in that case that:

'(...) In providing that Member States shall take all appropriate measures to ensure that their obligations are carried out and shall abstain from any measure liable to jeopardize the attainment of the objectives of the Treaty, Article 5 imposes a general obligation on Member States, the actual significance of which depends, in each particular case, on the provisions of the Treaty or on the rules laid down within its general framework'.²⁸

38. It follows that if the national rules do not conflict with the second subparagraph of Article 40 (3) of the Treaty, they are not, here, incompatible with Article 5 either.

26 — See judgment in Case 203/86 *Spain v Council* [1988] ECR 4563, at paragraph 25, my italics.

27 — On this point, see the Opinion of Mr Advocate General Trabucchi in Case 2/73 *Geddo* [1973] ECR 881, in particular at p. 890.

28 — Point 4.

39. If the introduction of contract duty does not conflict with the second subparagraph of Article 40 (3) of the Treaty, is it compatible with the price fixing mechanism provided for by the common organization of the market in rice? Does it interfere with the working of that common organization? That is the claim of the plaintiffs in the main proceedings who, drawing attention to the requirements of the third subparagraph of Article 40 (3) of the Treaty, point out that rice '(...) is subject to a common price policy which is based on common criteria and uniform methods of calculation'.²⁹

40. There are two aspects to the Community rules on rice prices: (i) a *single price* system, fixed annually, enabling a fair standard of living for the producers to be ensured,³⁰ (ii) a flexible system of *adjustments* taking account of the situation of the market and various costs.³¹ Contract duty is not, however, taken into account in determining the intervention price, the target price and the threshold price.³²

41. As the Court stated in the judgment in *Irish Creamery Milk Suppliers Association*,³³

on the subject of a temporary national duty imposed by Ireland on live domestic bovine animals at the time of their delivery (with the exception of imported bovine animals):

'The essential aim of the machinery of the common organizations in question is to achieve price levels at the production and wholesale stages which take into account both the interests of Community production as a whole in the relevant sector and those of consumers, and which guarantee market supplies without encouraging over-production. Those aims might be jeopardized by national measures adopted unilaterally, which have an appreciable influence, even if unintentionally, on price levels on the market.'³⁴

29 — Observations of the plaintiffs in the main proceedings, p. 13 of the French translation. See also p. 22 et seq.

30 — See the third and fourth recitals to and the first title of Council Regulation (EEC) No 1418/76.

31 — See the seventh recital to Council Regulation (EEC) No 1418/76: 'Whereas the target price, intervention prices and threshold prices should, in the course of the marketing year, be subject to a certain number of monthly increases in order to take account, *inter alia*, of storage costs and interest charges for storing rice in the Community and of the need to ensure that the disposal of stocks conforms to marketing requirements'.

32 — See the Commission's reply to the first question asked by the Court.

33 — Joined Cases 36 and 71/80 *Irish Creamery Milk Suppliers Association* [1981] ECR 735.

34 — Paragraph 20.

account its rate and duration and also the situation on the market in question, and more particularly the number of products to which it applied.³⁵ The Court observed that:

which ‘any charge imposed on a domestic product is as a rule reimbursed when the product is exported to other countries’.³⁷

‘A short-term duty on a large number of products may be neutral in the sense that it does not alter the structure of agricultural production. On the other hand, if the duty encourages producers to replace some of the production of the goods subject to the duty by production of goods not subject thereto, the duty is liable to create distortion on a number of markets.’³⁶

45. As the Commission rightly points out,³⁸ this duty is not a tax on consumption but a parafiscal charge. Moreover, the Court defined it in 1973 as ‘an internal tax affecting domestic products alone on completion of a contract covering them and designed to build up a fund to promote national production’.³⁹

43. It is, consequently, for the national court to decide whether, and if so to what extent, contract duty has the effect of impeding the proper functioning of the price mechanisms established by the common organization of the market in rice.

46. Since it is not levied on the crossing of a frontier, it does not fall within the ambit of Articles 9 and 12 of the Treaty⁴⁰ and it has the character of an internal tax.

44. The courts making the reference ask secondly whether non-reimbursement of the contract duty is compatible with ‘the most basic principles of taxation on the movement of goods’, in particular the rule according to

47. Let me note that Article 95 cannot apply here since the charge falls only on purchases

³⁵ — Ibid. and paragraph 19.

³⁶ — Paragraph 20. On the subject of a parafiscal storage charge levied also on imported goods, see the judgment in Case C-235/90 *Aliments Morvan* [1991] ECR I-5419.

³⁷ — Decision of the court making the reference, in Joined Cases C-333/92 and C-335/92, at p. 3 of the French translation.

³⁸ — Observations of the Commission, at p. 7 of the French translation.

³⁹ — *Geddo* judgment, point 6.

⁴⁰ — Ibid., points 5 and 6.

of paddy rice produced in Italy and does not affect 'the products of other Member States'.

48. Indeed,

'(...) although Article 95 prohibits any Member State from imposing internal taxation on products imported from other Member States in excess of that on national products, it does not prohibit the imposition on national products of internal taxation in excess of that on imported products.

Disparities of this kind do not come within the scope of Article 95 (...)' ⁴¹

49. In this case, the national legislation does not prejudice the principle that internal taxation should be neutral with respect to competition between domestic products and imported products. The levy related to encouraging national production does not affect the production of the other Member States.

⁴¹ — Judgment in Case 86/78 *Peureux* [1979] ECR 897, at paragraphs 32 and 33.

50. For the sake of thoroughness, let us consider Article 96 of the Treaty. Where products are exported to the territory of any Member State, it precludes any repayment of internal taxation in excess of the internal taxation imposed on them whether directly or indirectly. That would be so if, as distinct from the case in point, the purchasers of Italian paddy rice received as a reimbursement of contract duty a sum larger than that which they had actually paid. ⁴²

51. I turn, finally, to the third question: is the non-reimbursement of contract duty compatible with the rule laid down by Article 17 (2) of Council Regulation (EEC) No 1418/76 by virtue of which the refund on export is to be the same for the whole Community? Is there an infringement of that provision if the exporter must pay a contract duty which reduces the amount of the refunds granted by the Community?

52. The Court has already considered that question in *Geddo*. ⁴³ Mr Advocate General Trabucchi raised the point then, in his Opinion, that:

'The contract duty is applied to rice produced in Italy, regardless of whether it is

⁴² — See, on this point, the Opinion of Mr Advocate General Mischo for the *Morvan* judgment cited above, at paragraph 51.

⁴³ — The second paragraph of point 6, and paragraph 2 of the operative part.

exported or consumed within the State. Consequently, the application of the duty depends on the territorial origin of rice which is subject to a change of ownership or industrial processing; it does not depend on the fact that it has crossed the State frontier.’⁴⁴

refunds’.⁴⁷ That was the only reservation made by the Court.

53. It follows that ‘contract duty (...) is not connected in structure or function to export refunds’.⁴⁵

55. Such is not the purpose of the contract duty,⁴⁸ which, as we have seen, is payable even when the product in question is not exported.

56. The plaintiffs in the main proceedings, claiming that the judgment in *Geddo*⁴⁹ is obscure, or even incomplete, consider that non-reimbursement of the contract duty paid on an export operation giving rise to Community refunds has the effect of reducing those refunds.

54. The Court declared that it was that lack of any connection to ‘crossing a frontier’ which precluded the duty from being regarded as having equivalent effect to a customs duty,⁴⁶ and noted that the tax ‘could not be contrary to the provisions of the regulation providing for export refunds unless it appeared to be a method of reducing such

57. Let me emphasize again here the complete lack of any connection between the contract duty and the export refunds. Must it be repeated? The former is payable regardless of the destination of the product. It is not therefore deducted from the refund.

⁴⁴ — *Geddo*, at p. 891.

⁴⁵ — Observations of the Italian Government, p. 4 of the French translation.

⁴⁶ — See *Geddo* judgment, last paragraph of point 5.

⁴⁷ — *Ibid.*, point 6.

⁴⁸ — Which, moreover, was already in existence when the export refunds were established.

⁴⁹ — Observations, pp. 8 and 17 of the French translation.

58. I therefore propose that the Court rule as follows:

- (1) Articles 5 and 40 (3) of the EEC Treaty do not in principle preclude non-reimbursement of an internal tax levied on contracts for the purchase of paddy rice produced in a Member State and designed to build up a fund to assist national production.
- (2) It is, however, for the national court to decide whether, and if so to what extent, such a duty has the effect of impeding the proper functioning of the price mechanisms established by the common organization of the market in rice.
- (3) Such a duty is contrary to Article 17 (2) of Council Regulation (EEC) No 1418/76 of 21 June 1976 only if it appears to be a method of reducing the amount of the export refunds.