

OPINION OF ADVOCATE GENERAL
TESAURO

delivered on 18 May 1995 *

1. In these requests for preliminary rulings, the Monomeles and the Trimeles Diikitiko Protodikio (Single-Judge and Three-Judge Administrative Courts of First Instance), Rhodes, have raised once again the question of the compatibility with Community law of local taxes charged upon the entry of goods into an isolated part of the territory of a Member State. The financial charge involved in the cases at issue displays considerable similarities to the so-called dock dues applied in the French Overseas Departments which were considered in the cases of *Legros* and *Lancry*, on which the Court ruled on 16 July 1992 ¹ and 9 August 1994, respectively. ²

2. The tax in question in these proceedings, known as the 'dazio di consumo' (consumption duty), was introduced when the Dodecanese was under Italian jurisdiction by two decrees adopted in 1938 and 1939 by the governor of the region. Following the incorporation of the islands into the Hellenic State in 1946, those decrees were maintained in force by successive legislative measures, the most recent of which was the decree of

24 September/20 October 1958, which codified in a single legislative enactment the provisions in force concerning the revenues of the municipalities and local authorities. Under the provisions in force at the material time, the duty was applied, with some few exceptions, to all consumer goods entering or leaving the Dodecanese and calculated on the value of the goods at the time of importation or exportation. The rate of the tax was determined by the municipal councils of the principal cities of the territorial units in question up to a maximum rate — as regards in particular goods entering the islands — of 4% of the value of the goods. In the event of failure to pay the duty, fines imposable on resellers were provided for which might be up to ten times the amount of duty due. The revenue from the duty flowed to the municipalities of the region concerned.

3. It should be mentioned that at a time subsequent to the facts of the main proceedings and hence having no bearing on these proceedings, the legislation on the consumption duty was repealed by Article 62 of Law No 2214 of 27 April 1994, which entered into force on 1 July 1994 and replaced the duty at issue by an additional tax on the profits of undertakings.

* Original language: Italian.

¹ — Case 163/90 *Administration des Douanes et Droits Indirects v Legros and Others* [1992] ECR I-4625.

² — Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93 *Lancry v Direction Générale des Douanes* [1994] ECR I-3957.

4. The key facts, as they emerge from the orders for reference and from the case file, are as follows. During the period 18 November 1991 to 26 February 1992, Maria Simitzi, the applicant in the main proceedings, imported into the island of Kos goods of various origins without paying the duty. Consequently, under the legislation in force, the mayor of Kos entered her name on the municipal register of taxes due as owing DRS 490 000 and DRS 295 000 and fines for failing to fulfil the obligations laid down by the tax legislation of DRS 2 452 000 in one case and DRS 1 497 000 in another. Mrs Simitzi brought two actions in the Monomeles and the Trimeles Diikitiko Protodikio in which she sought the annulment of the measures; the courts in which the actions were brought had doubts as to whether the duty in question was compatible with Community law and referred the following questions to the Court of Justice for a preliminary ruling.

'1. Does an *ad valorem* charge levied by one Member State on goods imported from another Member State on their entry into the territory of the first Member State constitute a charge having equivalent effect to import duties, notwithstanding the fact that that charge is also imposed on goods entering that territory from another part of the same State?

2. Does an *ad valorem* charge levied by one Member State on goods exported to another Member State on their departure from the territory of the first Member State constitute a charge having equivalent effect to export duties, notwithstanding the fact that that charge is also imposed on goods leaving that territory for another part of the same State?

3. Is legislation pursuant to which the two *ad valorem* charges mentioned above continue to be levied compatible with Community law?

4. If the preceding question is answered in the negative and given that the territorial area over which Community law extends includes the sovereign territory of the Member State within a part of which the above-mentioned *ad valorem* charges are levied, and in respect of which no special provision was made in the relevant Community Treaties, is a charge on goods imported specifically into the area in question solely from other areas of the same Member State permissible under Community law, and is a charge on goods exported specifically from that area solely to other areas of the same State permissible under Community law, or do such special charges imposed in the area in question constitute less favourable treatment of goods originating in the other abovementioned areas or destined for them than that accorded to goods from other Member States or destined for them, thus impeding the free movement of goods within the single market?

5. In the event that the abovementioned *ad valorem* charges might be considered to constitute internal taxation, do those charges constitute financial charges in the nature of turnover taxes and is their imposition concurrently with value added tax prohibited under Article 33 of Council Directive 77/388/EEC.'

5. It should be observed *in limine* that serious doubts may be had as to the relevance of some of the national courts' questions. As emerges from the documents in the case, in particular from the orders for reference themselves, and as the applicant in the main proceedings and the Greek Government acknowledged at the hearing, the disputes which gave rise to these proceedings are concerned exclusively with the duty imposed when goods enter the Dodecanese, whether genuine imports from other Member States are involved or goods originating elsewhere in Greece. Consequently, it cannot be seen in what way answering their questions concerning the duty imposed when goods are exported may be of use to the national courts in deciding the cases before them.

In that connection, I would point out that, on the basis of Article 177 and according to that which the Court has consistently held,³ the procedure provided for in Article 177 of the Treaty is an instrument for cooperation between the Court of Justice and the national courts, whereby the Court of Justice

provides the national courts with the criteria for the interpretation of Community law which they need in order to dispose of the disputes which they are called upon to resolve. In the context of that cooperation, the national court, which is alone in having a direct knowledge of the facts of the case, is in the best position to appreciate the necessity for a preliminary ruling so as to enable it to give judgment. However, precisely in the light of the function entrusted to the Court, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions, the Court has invariably refused to give a ruling on questions from national courts where it is evident that the provision of Community law of which an interpretation is sought could not be applied.

6. It seems only too obvious to me that, even if the Court were to hold that the Greek legislation introducing the duty on goods exported from the Dodecanese was incompatible with Article 16 of the Treaty, such a ruling would be of no assistance in resolving the cases pending before the national courts, which are concerned with the imposition of a duty on goods entering that region.

It follows that, in my view, the Court should not answer those questions but, at the most, assess whether the fact that goods leaving the region in question also have duty imposed on them has any bearing on the categorization of the specific duty with which the proceedings are concerned.

³ — See, in this connection, also for a detailed review of the relevant case-law, the judgment in Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraphs 11 to 23.

7. In the light of the above considerations, I consider that the only questions requiring an answer are (a) whether the duty in question may be considered a charge having effect equivalent to a customs duty on imports prohibited by Articles 9 and 13 of the Treaty even though it is also imposed on goods originating in other parts of Greece; (b) whether its nature does not change in so far as it is imposed on domestic goods, and (c) whether, in the event, on the other hand, that it constitutes domestic taxation, the duty is compatible with Article 95 of the Treaty and with Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes.

the crossing of a state frontier but passage from one region to another. Since 'the justification for the prohibition of any customs duty applicable to goods moving between Member States is that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier impedes the movement of such goods', it was held that 'a charge levied at a regional frontier by reason of the introduction of products into a region of a Member State constitutes an obstacle to the free movement of goods which is at least as serious as a charge levied at the national frontier by reason of the introduction of the products into the whole territory of a Member State'.⁶

8. As far as the first question is concerned, I would recall that the Court has already given a ruling in this connection in *Legros*, to which I have already referred.⁴ On that occasion, it categorized as a charge having an effect equivalent to a customs duty on imports a charge proportional to the customs value of goods, levied by a Member State on goods imported from another Member State by reason of their entry into a region of the territory of the former Member State, notwithstanding the fact that the charge was also imposed on goods entering that region from another part of the same State.⁵ In that connection, it was held to be irrelevant that the event which triggered the duty was not

9. On the other hand, the Court held that the due in question in that case did not constitute internal taxation within the meaning of Article 95, since, according to that which the Court has consistently held,⁷ it did not relate to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the product, but applied only to goods entering a particular region of a Member State, whereas all products originating from that region were systematically exempt precisely on account of their regional origin.

⁴ — Judgment cited in footnote 1.

⁵ — Paragraph 18.

⁶ — Paragraph 16.

⁷ — See, for example, the judgment in Case 90/79 *Commission v France* [1981] ECR 283, paragraph 14.

However, it is precisely in this respect — the Greek Government argues — that the consumption duty applied until 1 July 1994 in the Dodecanese differs from the due at issue in *Legros*. The consumption duty was levied also on goods leaving the Dodecanese, including locally produced products. In the Greek Government's view, that difference in the system shows that the duty constituted a system of internal dues applied to all products without distinction which was intended to provide the local administrations with the financial means necessary for them to perform their institutional activities. Moreover, the very fact that the duty was imposed on all goods precluded it from being protectionist and/or likely to distort competition.

10. Those arguments cannot be upheld. Apart from the fact — shown by the case file — that the rates of duty imposed on outgoing goods were, in any event, lower than those imposed on goods entering the region, the fundamental fact remains that the taxable event was, in any case, the crossing of a frontier, in the strict sense where the products were exported to other countries or in a looser sense where they were intended for other parts of Greece. It follows that products produced in the Dodecanese and directly released for consumption were in no case subject to the payment of the duty and that only such products qualified for that more favourable tax treatment.

Therefore, it does not seem to me that the imposition by the legislation at issue of a

pecuniary charge also on goods leaving the region — which was largely similar to that imposed on imports — could prompt a different conclusion as to the nature of the consumption tax, that is to say, rendering it a charge applied to specific products in accordance with objective criteria irrespective of the origin of the product.

As for the argument based on the non-protectionist nature of the duty, I think it sufficient to point out that, as it has been held since the judgment of 1 July 1969 in *Sociaal Fonds Diamantarbeiders*,⁸ any pecuniary charge which is imposed unilaterally on foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9 and 12 of the Treaty, even if it is not discriminatory or protective in effect, or the product on which it is imposed is not in competition with any domestic product.

11. The national courts further ask whether the duty imposed on goods entering the Dodecanese constitutes a charge having effect equivalent to a customs duty on imports even in so far as it applied to goods originating in another region of Greece.

8 — Joined Cases 2/69 and 3/69 *Sociaal Fonds Diamantarbeiders* [1969] ECR 211, in particular paragraphs 11 and 12.

12. In that connection, I would recall that in the recent judgment in *Lancry*, which was also concerned with the dock due applied in the French Overseas Departments, the Court stated that 'Since the very principle of a customs union covers all trade in goods, as provided for by Article 9 of the Treaty, it requires the free movement of goods generally, as opposed to inter-State trade alone, to be ensured within the union. Although Article 9 et seq. makes express reference only to trade between Member States, that was because it was assumed that there were no charges exhibiting the features of a customs duty in existence within the Member States. Since the absence of such charges is an essential precondition for the attainment of a customs union covering all trade in goods, it follows that they are likewise prohibited by Article 9 et seq.'⁹

Seen from that perspective, therefore, the prejudice caused by the introduction of a regional customs frontier to the single nature of the Community customs territory is the same, in the Court's view, whether a tax is imposed on domestic products or whether it is imposed on products from other Member States by reason of the fact that they cross that frontier.

13. In my Opinion in that case, I took the opposite view to that eventually taken by the Court, in that I considered that, when a product originating in one Member State moves from one region to another in a given

Member State, the fundamental, essential precondition for the application of Article 9 et seq. of the Treaty is missing, that is to say, crossing the frontier between one Member State and another. I observed therefore that the idea of the single customs territory could not be divorced from the rules contained in the Treaty on the customs union which aim to eliminate barriers to trade between Member States and not also barriers to trade between regions and municipalities within a given Member State. In the light of those considerations, I concluded that to consider that Article 12 presupposed the abolition of duties as between regions and municipalities not only did not have an adequate basis in the rules of the Treaty but would also mean calling in question case-law of many years' standing on purely domestic situations as regards the customs union and free movement of goods and also as regards services and the movement of persons.

14. But this was the choice made by the Court. Although I do not consider that I should alter my views set out in *Lancry*, I take note of that case-law, in the light of which, therefore, the issue before the Court today should be resolved by stating that a duty imposed by a Member State when any goods leave a region of its territory constitutes a charge having effect equivalent to a customs duty on imports even where it is imposed on goods originating in another region of that State.

⁹ — Judgment cited in footnote 2, paragraph 29.

15. In view of the conclusion which I have reached as regards the nature of the duty in question — that is to say, that it is a charge having effect equivalent to a customs duty — I do not consider it necessary to answer the question concerning the compatibility of the duty with Article 95 of the Treaty and with Directive 77/388/EEC in so far as, as the Court has consistently held,¹⁰ the same charge cannot, under the system of the Treaty, be at the same time both a charge having equivalent effect within the meaning of Articles 9, 12 and 13 of the Treaty and internal taxation within the meaning of Article 95.

16. The Greek Government has asked the Court, in the event that it should declare a charge such as the consumption duty unlawful, to limit the temporal effectiveness of the judgment, on the ground of, on the one hand, the serious financial consequences for the local administrations of a judgment declaring the duty incompatible with Community law and, on the other hand, the uncertainties about the actual scope of the prohibition of charges having equivalent effect until the judgments in *Legros* and *Lancry*.

In this connection, it should be recalled that, as is well known, the interpretation which the Court provides of a provision of Community law pursuant to its jurisdiction under Article 177 clarifies and specifies the

meaning of the provision itself as it should be or should have been construed and applied from the time when it entered into force. It follows that, in principle, the provision as it has been interpreted by the Court should be applied by the courts even to legal relationships which came into being before the interpretative judgment, provided that their effects have not been exhausted (because they have lapsed through effluxion of time, are time-barred, etc.), but the pre-conditions exist for bringing proceedings relating to the application of the provision in question before the competent court.

17. It is only exceptionally, the Court has held, that it may, in application of the general principle of legal certainty, be moved to restrict for any person concerned the opportunity of relying upon the provisions thus interpreted with a view to calling in question legal relationships established in good faith.¹¹ In taking such a decision, the Court has consistently applied two principles. First, it weighs the possible practical consequences of its judgments in the absence of any temporal limitation, while pointing out that this 'cannot go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from a judicial decision'.¹² Secondly, the Court considers whether there were any objective uncertainties as to the

10 — See, for example, the judgment in Case 193/85 *Co-Frutta* [1987] ECR 2085, paragraphs 8 to 11.

11 — See, in particular, the judgments in Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 71 to 75, Case 24/86 *Blaizot* [1988] ECR 379, paragraphs 27 to 33, Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 41 to 45, and Case C-163/90 *Legros*, cited in footnote 1, paragraphs 30 to 36.

12 — *Legros*, cited in footnote 1, paragraph 30.

scope of the provisions of Community law which are the subject of the interpretative judgment and to what extent the actual conduct of the Community institutions might have nurtured those uncertainties.¹³

that any act of the Community institutions created legitimate doubts as to the compatibility of the financial charge in question with Community law, which also makes this case different from that of the dock due applied in the French Overseas Departments.

18. In applying the criteria laid down by the Court's case-law to this case, it is necessary to distinguish the case in which the consumption duty was applied to goods imported into the Dodecanese from Member States of the Community from the case in which it was applied to goods originating elsewhere in Greece.

In the first case, there does not seem to me to be any reason for limiting the temporal effects of the judgment. Article 29 of the act concerning the conditions of accession of the Hellenic Republic to the Community,¹⁴ contained in Part Four, Transitional Measures, provided that charges having equivalent effect to customs duties on imports were to be progressively abolished in successive stages by 1 January 1986. No exception was provided for in this connection and no other provision of the act of accession subjected the application of Community law to the Dodecanese to particular conditions, unlike in the case of the French Overseas Departments. Furthermore, it does not appear, nor was it argued by the Greek Government,

19. In contrast, the situation in which the duty in question was applied to goods originating, not in another Member State, but in another region of Greece is quite different. In this connection, it must be observed that, until the judgment in *Lancry*, the Court had consistently held that the provisions of the Treaty were inapplicable to purely domestic situations and ruled out the declared incompatibility of a national provision in so far as it was applied to goods imported from another Member State necessarily entailing the impossibility of its applying also to domestic goods.¹⁵ The judgment in *Lancry*

13 — Ibid., paragraphs 31 and 32.

14 — OJ 1979 L 291, p. 17.

15 — For an appraisal of the case-law, I would refer to my Opinion in *Lancry* [1994] ECR I-3960, paragraphs 19 to 24. I shall therefore confine myself here to referring to the judgment in Case 407/85 *3 Glocken* [1988] ECR 4233, in which the Court held incompatible with Articles 30 and 36 of the Treaty the extension to imported products of a prohibition on the sale of pasta made from common wheat or a mixture of common wheat and durum wheat. In response to the Italian Government's argument in defence of the national law on pasta products that that law was necessary in order to ensure an outlet for growers of durum wheat, the Court held that 'it is the extension of the law ... to imported products which is at issue, and ... Community law does not require the legislature to repeal the law as far as pasta producers established on Italian territory are concerned' (my emphasis).

therefore constituted a radical reversal of the approach which had previously been taken by the Court.¹⁶ It follows that, until the date of that judgment, the Hellenic Republic and the local authorities in the Dodecanese had been reasonably entitled to assume that the national legislation on the consumption duty did not raise problems as regards its compatibility with Community law, or at least not in so far as it was applied to products originating within Greece.

20. In the light of those circumstances and having regard in particular to the respect due

to the requirements of legal certainty, I propose that the Court should rule that the incompatibility with the Treaty of a charge such as the consumption duty cannot be asserted in so far as it was applied to products originating in the Hellenic Republic with regard to legal relationships whose effects were exhausted before 9 August 1994, the date on which judgment was given in *Lancry*. Consequently, in view of the fact that the legislation in question was repealed as from 1 July 1994, the incompatibility may be relied on in support of applications for the reimbursement of the duty only by persons who brought proceedings or otherwise contested the imposition of that duty by some equivalent appeal before that date.

21. I therefore propose that the Court should answer the national courts' questions as follows:

- (1) The provisions of the EEC Treaty relating to charges having effect equivalent to customs duties on imports should be interpreted as prohibiting an *ad*

16 — This has been noted in academic writings. See the commentary on the judgment by A. Rigaux and D. Simon in *Europe*, 1994, Act. No 361, p. 10, who take the view that the judgment involves a radical change in the approach developed with regard to the rationale of the prohibitions laid down by Article 9 et seq. of the Treaty and even of the concepts of imports and exports used therein, and refer in this connection to a 'judicial wonder'; see also the commentary of J. P. Keppenne and P. van Ypersele, 'Vers une application du droit communautaire à des obstacles à la libre circulation des marchandises à l'intérieur d'un Etat membre', in *Journal des tribunaux/droit européen*, 1994, p. 179, in which they applaud the new approach of the case-law and observe, as regards the consequences of the judgment for the Belgian legal system, that, whereas previously the national arbitration court had exclusive jurisdiction to entertain cases concerning the compatibility with principles of the free movement of goods of any obstacles created by the various regions and communities making up the Kingdom of Belgium, henceforward the Court of Justice will also be competent to adjudicate any disputes arising in this connection.

valorem charge imposed by a Member State on goods imported from another Member State by reason of their entry into a region of the territory of the former Member State, notwithstanding the fact that the charge is also imposed on goods entering that region from another part of the territory of the Member State concerned.

- (2) The provisions of the EEC Treaty relating to charges having effect equivalent to customs duties on imports should be interpreted as prohibiting an *ad valorem* charge imposed by a Member State on all goods entering a region of that Member State even when it is imposed on goods from other parts of that same Member State.
- (3) The provisions of the EEC Treaty relating to charges having effect equivalent to customs duties on imports may not be relied upon in support of applications for the reimbursement of a charge such as the consumption duty which was paid on goods from other parts of the same State before 9 August 1994, except in the case of applicants who brought judicial proceedings or otherwise contested the imposition of that duty by some equivalent appeal before that date.