JUDGMENT OF THE COURT OF 21 FEBRUARY 1979 [1]

Hans-Markus Stölting v Hauptzollamt Hamburg-Jonas (preliminary ruling requested by the Finanzgericht Hamburg)

Case 138/78

1. *Agriculture — Common organization of the market — Milk and milk products — Co-responsibility levy — Legality*
   (Council Regulation No 1079/77)

2. *Agriculture — Common agricultural policy — "Green" exchange rates — System — Legality*
   (Council Regulation No 878/77)

1. The validity of Council Regulation No 1079/77 on the charging of a co-responsibility levy in the milk sector cannot be contested in so far as, by seeking to restrain the production of milk in the face of the surpluses observed, the said co-responsibility levy contributes to the attainment of the objective of stabilizing markets and in so far as the level of the rate of levy does not appear to be disproportionate in relation to the facts which led to its adoption.
2. Although in certain transactions the application of the so-called green exchange rates may possibly involve advantages or disadvantages which may appear as discrimination, it none the less remains true that in general such application serves to remedy monetary situations which in the absence of a measure such as Regulation No 878/77 would result in much more serious, obvious and general discrimination. Although it is not without certain drawbacks, the adoption of the system of the so-called green exchange rates is therefore justified by the prohibition on discrimination and the requirements of a common agricultural policy.

In Case 138/78,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court) Hamburg for a preliminary ruling in the action pending before that court between

1 — Language of the case: German.

HANS-MARKUS STÖLTING, Tankenrader Berg

and

HAUPTZOLLAMT (Principal Customs Office) HAMBURG-JONAS

on the validity of Council Regulation No 1079/77 of 17 May 1977 (Official Journal 1977 L 131, p. 6) and Commission Regulation No 1822/77 of 5 August 1977 (Official Journal 1977 L 203, p. 1), on the charging of a co-responsibility levy in the milk sector and on the interpretation of Article 40 (3) of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, Acting President, and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe and G. Bosco, Judges,

Advocate General: H. Mayras
Registrar: J. A. Pompe, Assistant Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

The legislative framework

Council Regulation No 1079/77 of 17 May 1977 (Official Journal 1977 L 131, p. 6) introduced a co-responsibility levy in the sector of milk and milk products. It was adopted having regard to the structural surpluses on the milk products market arising "from an imbalance between supply and demand" and because (second recital in the preamble):

"... a more direct link should be established between production and outlets for milk products in order gradually to restore equilibrium between production and market requirements and to reduce the heavy costs incurred by the Community as a result of the present situation and in particular of the large

surpluses which exist; whereas it is necessary, in view of the major public interest attached, to introduce a uniform co-responsibility levy for several years on all milk delivered to dairies and certain farm sales of milk products."

Article 1 provides:

"1. During the period from 16 September 1977 to the end of the 1979/80 milk year a co-responsibility levy shall be due from all milk producers on milk supplied to an undertaking treating or processing milk and, in the cases defined in Article 3 (2), on milk sold by the producer in the form of other milk products.

2. This levy shall not be applied in the mountain and hill areas listed pursuant to Article 3 (3) of Directive 75/268/EEC."

The proceeds from the levy are used to finance the measures to expand the markets for milk products listed in Article 4.

By Regulation No 1822/77 of 5 August 1977 (Official Journal 1977 L 203, p. 1) the Commission laid down detailed rules for the collection of the levy.

Facts

In September 1977 the plaintiff in the main action delivered 4 204 kg of full cream milk to the Hansa-Milch Ostholstein-Lübeck e. G. Dairy (Buying Department). For this quantity the buying department deducted the co-responsibility levy of DM 37.31 and forwarded this amount to the defendant.

On 23 December 1977, the plaintiff objected to this charging of the co-responsibility levy. By a decision of 23 February 1978, the defendant rejected this objection as unfounded.

On 16 March 1978 the plaintiff brought an action before the Finanzgericht (Finance Court) Hamburg. That court stayed the proceedings and referred the following questions to the Court of Justice:

1. Are Council Regulation (EEC) No 1079/77 of 17 May 1977 and Commission Regulation No 1822/77 of 5 August 1977 on a co-responsibility levy on milk invalid because the EEC Treaty contains no power under which the said regulations could be adopted?

2. In the event of Question 1 being answered in the negative: Does the charging of the co-responsibility levy on milk producers infringe the prohibition on discrimination in Article 40 (3) of the EEC Treaty in that the levy is laid down in units of account and the conversion of the levy rates expressed in units of account into national currencies according to the so-called green exchange rates — provided for in the present case in Council Regulation (EEC) No 878/77 of 26 April 1977 — can lead to unequal burdens in relation to the actual monetary situations of the Member States at any given time?

3. In the event of Question 2 being answered in the affirmative, what consequences arise as regards the application of the said regulations?

Although the Finanzgericht itself did not have any doubt as to the validity of the regulations at issue, it none the less referred this question to the Court of

Justice, because it considered that it was necessary to resolve as soon as possible by way of the procedure under Article 177 of the EEC Treaty the doubts that a co-responsibility levy on milk appeared to raise throughout the Federal Republic of Germany.

As to the second question, the Finanzgericht considered that the application of the so-called green exchange rates by Regulation No 878/77 to the co-responsibility levy without the application of monetary compensatory amounts or monetary compensatory coefficients could possibly lead to different burdens in the Member States. In fact, in the present case trade rules are not in question: the monetary question arises in another form, namely that of the principle of equality of burdens.

It considered that the question is whether heavier taxation, having regard to the actual monetary situations in the different Member States, on milk producers in the Member States with stronger currencies in relation to the taxation imposed on milk producers in the Member States with weaker currencies is permissible on the ground that the different burdens are possibly compensated for by advantageous measures having a converse effect — even though this occurs partially at other stages of processing.

The order making the reference dated 2 June 1978 was lodged at the Court Registry on 14 June 1978.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Mr Stölting, represented by Walter Bergmann, Advocate of Lübeck, by the German Government, by the Council of the European Communities, represented by Bernhard Schloh, Adviser in the Legal Department of the Council, and by the Commission of the European Communities, represented by Peter Gilsdorf, Legal Adviser to the Commission, assisted by Bjarne Hoff-Nielsen, a member of the Commission's Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

1. Question 1

Mr *Stölting* observes that Council Regulation No 1079/77 of 17 May 1977 and Commission Regulation No 1822/77 of 5 August 1977, in the form in which they were adopted, lack a legal basis.

The levy is a charge which can be imposed only in accordance with Article 201 of the EEC Treaty.

Unlike levies of a fiscal nature, it cannot be considered as a guidance measure authorized as such by Article 43 of the EEC Treaty. It would be otherwise only if the entire measure — the system and implementation of the co-responsibility levy — had been adopted as a measure for the guidance of the market within the framework of a regulation.

No allocation of the resources deriving from the co-responsibility levy is made in the milk sector, so that all the resources could be expended in any other area, as with a fiscal levy of a general nature, and this is not prohibited by the regulations. This opinion is shared by the Commission (see reply to written question No 752/77 of Mr Klinker, Official Journal 1978 C 52, p. 18).

The *German Government* argues that the Community measures are covered by Article 43 of the EEC Treaty if they serve to attain one of the aims of the agricultural policy — which are expressly set out in Article 39 of the Treaty — and are implemented by the means provided for that purpose in particular by Article 40 of the Treaty.

Since the purpose of the measures at issue is to stabilize the milk market, those measures fulfil those conditions. In assessing their effects regard must be had both to their direct economic consequences and to their psychological impact, which is to exert an influence on the imbalance between supply and demand.

The levy system also constitutes a lawful means with regard to the rules of the EEC Treaty on agriculture. In the German Government's submission, under Article 40 (3) of the EEC Treaty the Community legislature may adopt all measures required to apply Article 39, including levies and refunds as well as other individual measures provided for in certain regulations.

The co-responsibility levy forms an integral part of the common organization of the market in milk. As a charge on production it comes within the framework of the wide choice of guidance and intervention measures, and it is within this framework that Article 39 of the Treaty defines the common agricultural policy (judgment of 5 July 1977 in Case 114/76 [1977] ECR 1211, at p. 1221).

The German Government proposes that Question 1 should be answered in the following terms:

"Council Regulation No 1079/77 of 17 May 1977 and Commission Regulation No 1822/77 of 5 August 1977 on the charging of a co-responsibility levy on milk are not invalid for lack of an enabling provision in the EEC Treaty."

The *Council* first gives a chronological account of the co-responsibility levy.

As to the legal basis, the Council considers that Article 43 of the EEC Treaty represents a sufficient legal basis for Regulation No 1079/77 in view of the purpose of the measure in question, namely to stabilize markets (Article 39 (1) (c) of the Treaty). It refers to the judgment of the Court of 13 December 1967 (Case 17/76 *Neumann* [1967] ECR 441, at p. 453 *et seq.*) in which the Court held that "the levy . . . therefore appears as a charge regulating external trade connected with a common price policy, whatever similarities it may have to a tax or a customs duty".

The Council and the Commission are constantly criticized for adopting agricultural policy measures which are confined overmuch to the market and price aspects and which do not have sufficient effect on agricultural structures. However, if the preamble to Regulation No 1079/77 is examined, it will be found that the present case concerns a measure which is directed at a long term and partially structural effect from the point of view of its content.

The co-responsibility levy exerts upon producers an economic and psychological effect of such a kind as to slow down the production of milk. According to the Council, the same objective could not have been attained by a lowering of or a smaller increase in the target price. In fact the charging of the co-responsibility levy on milk allows of

exceptions which would have been impossible in the other case.

The *Commission* observes that the co-responsibility levy introduced by Regulations Nos 1079/77 and 1822/77 does not exceed the limits laid down in Articles 39 and 40 of the EEC Treaty.

In establishing the different measures intended to ensure the stabilization of markets, the Council is not obliged to restrict itself to the established forms such as purchases by intervention agencies, aids and import levies. An exceptional situation on the market may require the adoption of exceptional measures.

Unlike the rules on the compulsory purchase of skimmed-milk powder introduced by Regulation No 563/76, the co-responsibility levy is a preventive measure having long term effects which applies to the very sector which produces the surpluses.

The judgment in Case 17/67 (cited above) implies that the measures provided for in Article 40 (3) of the EEC Treaty may also comprise a system of charges in so far as they relate to the regulation of the market for the purpose of attaining the objectives defined in Article 39.

The levy in question is very closely connected with price policy in the milk sector, and serves as a means of regulating the internal market both at the stage of production and at that of sale. The Commission cites the charges imposed on sugar producers as a similar case.

In spite of its having an effect comparable to that of a mere price measure, the co-responsibility levy system proves to be the most efficient and flexible instrument. Whereas the fixing of guaranteed prices at a lower level influences producer prices only indirectly since it affects only products qualifying for intervention, the levy directly affects the producer since it is borne by all milk production.

The levy also allows provision to be made for certain differentiations and exceptions or for adjustment spread over a period of time.

Although it is true that the institutions of the Community wished for budgetary reasons to avoid creating a legally binding connexion between the levy and the specific measures, nevertheless that connexion exists in practice. Financially the scale of the specific measures is limited in practice by the resources yielded by the levy.

2. Questions 2 and 3

Mr *Stölting* refers in this connexion to the arguments set out in the order making the reference (see under heading I above).

According to the *German Government*, the method of calculation laid down for the co-responsibility levy does not infringe the prohibition on discrimination laid down in Article 40 (3) of the EEC Treaty. That provision imposes upon the Community legislature the obligation to use a fair criterion for the calculation of the burden, that is to say a criterion which is neither subjective nor arbitrary.

Even having regard to the general situation of the respective exchange rates, unequal treatment of producers in the Member States is impossible. A "higher" burden of levy in a country with a strong currency is accompanied by a correspondingly higher price paid for milk, since the conversion into national currency of the target price for milk fixed in units of account is also

carried out on the basis of the green rates. For a country with a weak currency, the lower price for milk is accompanied by a lesser charge to tax.

Therefore the third question does not require an answer.

The *Council* considers that Question 2 must be answered in the negative, and that Question 3 is therefore purposeless.

All intervention measures, of which the co-responsibility levy forms an integral part, are subject to the system of the so-called green exchange rates. That system is applicable to agriculture *generally*. To apply another system of conversion to the co-responsibility levy would represent a discrimination.

The *Commission* observes that the level of the guaranteed prices, which is variable owing to the application of the so-called green exchange rates laid down in Regulation No 878/77 (Official Journal 1977 L 106, p. 27), affects the income of producers in the Member States. This is especially true in sectors such as that of milk in particular, in which due to the existence of a surplus the market level is determined to a large extent by the guaranteed prices.

In such a situation it would be economically paradoxical to allow producers in countries with strong currencies to benefit from the advantages of the favourable rate of exchange by the expedients of guaranteed prices, aids and refunds, whilst on the other hand taking the day-to-day rates as the basis for the fixing of the negative component of prices, namely the co-responsibility levy. The converse is true of producers in Member States with weak currencies.

The Commission considers that in the present case there is equality of treatment for practical purposes. Indeed formal equality of treatment applied to variable situations of fact would constitute inequality of treatment, and would consequently have to be deemed discriminatory (Case 13/63 [1963] ECR 165, at pp. 177/178).

There is no longer any need to answer Question 3.

III — Oral procedure

The plaintiff in the main action, the Council of the European Communities and the Commission of the European Communities presented oral argument at the hearing on 23 November 1978.

The Advocate General delivered his opinion at the hearing on 25 January 1979.

Decision

1 By an order of 2 June 1978, which was received at the Court on 14 June 1978, the Finanzgericht Hamburg referred to the Court pursuant to Article 177 of the EEC Treaty three questions concerning the validity of Council Regulation No 1079/77 of 17 May 1977 on a co-responsibility levy and on measures for expanding the markets in milk and milk products (Official Journal 1977 L 131, p. 6) and Commission Regulation No 1822/77 of 5 August 1977 laying down detailed rules for the collection of the co-responsibility levy introduced in respect of milk and milk products (Official Journal 1977 L 203, p. 1).

2 These questions are raised in the context of an action in which the plaintiff challenges the legality of the deduction of DM 37.31 carried out pursuant to the said regulations in respect of a delivery of milk to the buying department of a dairy.

3 The first question asks whether the regulations are invalid because the EEC Treaty contains no power under which they could be adopted. Regulation No 1079/77 is based on Article 43 of the Treaty, but the plaintiff in the main action denies that that provision authorizes the Community institutions to charge a levy on the production of milk. In the order making the reference the national court states that it regards the regulations in question as being valid but that to cover all eventualities any doubts in this connexion should be removed as soon as possible.

4 Article 43 of the Treaty must be interpreted in the light of Article 39, which sets out the objectives of the common agricultural policy, and Article 40, which regulates its implementation by providing *inter alia* that in order to attain the objectives set out in Article 39 a common organization of agricultural markets shall be established and that this organization may include all measures required to attain the said objectives. In this connexion Article

40 (3) mentions in particular "regulation of prices, aids for the production and marketing of the various products, storage and carry-over arrangements and common machinery for stabilizing imports or exports".

5 The reasons which led the Council to introduce the levy in question are set out as follows in the preamble to Regulation No 1079/77:

"Whereas the Community market in milk products is marked by structural surpluses arising from an imbalance between supply and demand in [those] products . . .;

Whereas a more direct link should be established between production and outlets for milk products in order gradually to restore equilibrium between production and market requirements and to reduce the heavy costs incurred by the Community as a result of the present situation and in particular of the large surpluses which exist; whereas it is necessary, in view of the major public interest attached, to introduce a uniform co-responsibility levy for several years on all milk delivered to dairies and certain farm sales of milk products;

. . . . . .

Whereas provision should be made for specific measures linked to the levy to encourage the expansion of markets and the disposal of surpluses on the Community and world markets;

Whereas all the measures provided for in this Regulation are designed to stabilize the market in milk products and thus to supplement the existing intervention system; whereas care should therefore be taken to ensure that the arrangements for financing the common agricultural policy take account of the levies and expenditure entailed in the specific measures."

It emerges from this that the regulation is intended to contribute to the stabilization of the markets in question, and therefore remains within the limits laid down by Articles 39 and 40. Consequently, in adopting it the Council was entitled to base itself on Article 43 of the Treaty.

6 However, the plaintiff in the main action denies that the adoption of a co-responsibility levy has the effect of reducing the production of milk and thus stabilizing the market, since in his submission the charging of such a levy has the effect not of reducing production and supply but on the contrary of encouraging their growth. These assertions are challenged by the Council and the Commission, which have stated that the levy will have the same effect as a reduction of prices but unlike such reduction allows certain areas of production requiring special protection to be excluded from its application and hence from its effects.

7 This difference of opinion concerns in particular the expediency and effectiveness of the measure adopted in the regulations in question. If a measure is patently unsuited to the objective which the competent institution seeks to pursue this may affect its legality, but on the other hand the Council must be recognized as having a discretionary power in this area which corresponds to the political responsibilities which Articles 40 and 43 impose upon it. As it is directed towards restraining production in the face of the surpluses observed, the co-responsibility levy contributes to the attainment of the objective of stabilizing markets. Nor does the level of the rate of levy appear to be disproportionate in relation to the facts referred to by the Council. Therefore the answer should be that consideration of the question has disclosed no factor of such a kind as to affect the validity of Regulation No 1079/77.

8 Since Regulation No 1822/77 is unquestionably a measure for the implementation of the said Regulation No 1079/77 it follows from the foregoing that the same conclusion must apply to it.

9 Question 2 asks whether the charging of the co-responsibility levy on milk producers infringes the prohibition on discrimination contained in Article 40 (3) of the Treaty in that the levy is laid down in units of account and its conversion into national currencies according to the so-called green exchange rates — provided for in Council Regulation No 878/77 of 26 April

1977 on the exchange rates to be applied in agriculture (Official Journal 1977 L 106, p. 27) — can lead to unequal burdens in relation to the monetary situations of the Member States at any given time.

10 Regulation No 878/77 provides for the exchange rates which it lays down to be used in "transactions to be carried out in pursuance of instruments relating to the common agricultural policy". Consequently those exchange rates apply whenever it is necessary to convert into national currencies the amounts expressed in units of account laid down in the provisions on guide prices, intervention prices and other prices provided for in a common organization of the market, such as that established for milk and milk products. Although in certain transactions the application of these exchange rates may possibly involve advantages or disadvantages which may appear as discrimination, it none the less remains true that in general such application serves to remedy monetary situations which in the absence of a measure such as Regulation No 878/77 would result in much more serious, obvious and general discrimination. Although it is not without certain drawbacks, the adoption of the system of the so-called green exchange rates is therefore justified by the prohibition on discrimination and the requirements of a common agricultural policy.

11 In these circumstances it would be discriminatory to exempt from the application of Regulation No 878/77 the charging of the co-responsibility levy the amount of which is a function of the prices of the milk concerned, when those prices are themselves formed under the influence of the price provisions mentioned above. Moreover, such an exemption would render inoperative Article 2 (3) of Regulation No 1079/77, which lays down the minimum and maximum rates of the levy in terms "of the milk target price valid for the milk year in question". Consideration of Question 2 has also disclosed no factor of such a kind as to affect the validity of the regulations in question.

12 Since Question 3 is asked only in the event of Question 2 being answered in the affirmative, it is not necessary to consider it.

13 Therefore the answer to be given to the national court must be that consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Regulations Nos 1079/77 and 1822/77.

Costs

14 The costs incurred by the Commission of the European Communities, the Council of the European Communities and the Government of the Federal Republic of Germany, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Finanzgericht Hamburg by order of 2 June 1978, hereby rules:

Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Regulations Nos 1079/77 and 1822/77.

Mertens de Wilmars Mackenzie Stuart Donner

Pescatore Sørensen O'Keeffe Bosco

Delivered in open court in Luxembourg on 21 February 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
(President of the First Chamber)
Acting President