# OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 20 April 1989 *

*Mr President,*
*Members of the Court,*

1. The present reference for a preliminary ruling is part of the already rather long line of cases concerning the lawfulness of co-responsibility levies. In a series of judgments [1] the Court has in substance confirmed that instruments of that kind and their basic rules of application are compatible with the Community system, although it did criticize them in one respect, as we shall see.

In the present case (which concerns Council Regulation No 1579/86 of 23 May 1986 and the Commission's subsequent implementing regulation, Regulation No 2040/86 of 30 June 1986), Schräder, an undertaking which markets processed cereals, opposes the imposition of the levy and contests its validity before the national court, using arguments which, in my opinion, the Court has to a large extent already considered and rejected in previous judgments.

The validity of the abovementioned regulations is also being contested in another case, Case 195/87 (in which I will present my Opinion today), on the basis of various arguments relating, not to the lawfulness of the levy *per se*, but rather to the validity of the system for collecting the levy.

Despite that different approach, I believe that if the Court decides in the abovementioned case to accept the reply proposed in my Opinion (to which I refer), that reply would also be relevant to the reply to be given to the national court in the present case.

I therefore suggest now that, in the event that the Court considers it appropriate to concur in the Opinion delivered in Case 195/87, the judgment in the present case should contain a reference to the judgment delivered in Case 195/87.

That having been said, the observations which follow will be confined to assessing the grounds of invalidity raised in the context of the present case and set out by the national court in the order making the reference.

## The lack of legal basis for Regulation No 1579/86

The doubts raised by the national court as to the validity of Regulation No 1579/86 concern almost exclusively the alleged absence of a legal basis. I will therefore

* Original language: Italian.

1 — See the judgments in Case 138/78 *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713; Case 179/84 *Bozzetti* v *Invernizzi* [1985] ECR 2301; Case 300/86 *Van Landschoot* v *Mera NV* [1988] ECR 3443 and Case 64/87 *Versele-Laga* v *Robegra NV* [1987] ECR 1961.

concentrate most of my analysis on that point.

The national court, adopting as its own the plaintiff's argument in the main proceedings, considers that the abovementioned regulation ought to have been based not just on Article 43 but also on Article 201 of the Treaty.

There are basically two submissions put forward in support of that view.

First, it is claimed that, contrary to what is stated in Article 1(4), point 4, of Regulation No 1579/86,[2] the co-responsibility levy is, by its very nature, essentially a financial measure, and not an intervention measure of agricultural policy of an economic kind. That is shown not only by the high rate of the levy in question but also, and in particular, by the fact that the levy is actually imposed on processors, who are not those responsible for the surplus production. Thus the charge alleviates the financial difficulties of the sector in question and yet has no objective relationship to, and consequently no real effect on, the economic behaviour of those economic operators (producers) who determine supply and therefore also any surpluses. Accordingly, as the charge in question is a financial one, the Council did not have the power to introduce it on the basis of Article 43 alone.

2 — The paragraph in question provides that 'the levy referred to in this article shall be regarded as one of the intervention measures designed to stabilize agricultural markets and shall be allocated to the financing of costs in the cereals sector'.

The same conclusion is also arrived at by means of a second argument.

The second paragraph of Article 2 of Council Decision 70/243/ECSC, EEC, Euratom of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 224) provides that:

'In addition, revenue accruing from other charges introduced within the framework of a common policy in accordance with the provisions of the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community shall constitute own resources to be entered in the budget of the Communities, subject to the procedure laid down in Article 201 of the Treaty establishing the European Economic Community or in Article 173 of the Treaty establishing the European Atomic Energy Community having been followed'.

Since the co-responsibility levy is precisely a charge introduced within the framework of a common policy, it also follows, according to the plaintiff's interpretation of the provisions cited above, that the Council is required to base its measures on Article 201 and to follow the relevant procedure.

In my opinion, those two arguments cannot be accepted.

First of all, in Case 179/84 (*Bozzetti* v *Invernizzi* [1985] ECR 2301) the Court, referring to the co-responsibility levy in the milk sector, stated that that levy:

'. . . is to be regarded "as forming part of the measures to stabilize agricultural markets". Thus the levy serves essentially an economic purpose, inasmuch as it performs the same function as the other types of intervention provided for within the common organization of the market in milk and milk products. The fact that the co-responsibility levy, which is used directly to cover certain expenses incurred in the context of the common organization of the market in milk, is not included among the Community's "own resources" does not affect the way in which it must be defined in so far as it is designed to contribute to stabilizing the market in question' (paragraph 19 of the decision).

Those observations can be applied to the levy in the cereals sector, which is entirely comparable to the levy in the milk sector, both structurally — as will be seen below — and, more importantly, functionally.

It has already been mentioned that Article 1(4), point 4, of Regulation No 1579/86 provides that the levy in question 'shall be regarded as one of the intervention measures designed to stabilize agricultural markets'. Moreover, as is evident from the preamble to the regulation itself (second recital), that regulation, which is part of the broader strategy for stabilizing the market, also serves the specific purpose of giving producers an indication of the situation in the sector concerned. As the Commission and the Council have stated, the levy operates in the same way, albeit with greater flexibility, as a reduction, of the same proportion, in the intervention price. It is therefore a concrete signal intended for producers which, without calling into question the sector support mechanisms, seeks to restore the natural balance between supply and demand.

However, if that, very briefly, is the function of the regulation, I cannot see how it can reasonably be disputed that it is essentially economic, as, moreover, the Court has explicitly acknowledged in its judgments concerning the milk sector.

Contrary to the plaintiff's assertion, the economic nature of the levy is not belied either by the way in which it is collected (from processors rather than producers) or by the amount of the levy.

I will have occasion to return to those points later, but for the moment it is sufficient to state that the arguments in question are based on false premises.

With regard to the way in which the levy is collected, it is not accurate to state that the burden of the levy falls on processors. At least in principle, the opposite is true. Even though processors pay the levy, it is compulsorily passed on — by means of a deduction from the purchase price — as far as the producer. Thus it is the producer who is in fact the person who pays the charge, whereas the processor intervenes only in the guise of a representative. The economic measure is always addressed to the producer since it is precisely his choices which are to be conditioned by the existence and the amount of the levy. The collection mechanism is therefore consistent with the levy's distinctive purpose of giving

producers a concrete indication of the market situation.

With regard to the amount of the charge, fixed at 3% for the first two years, it does not seem excessive as a means of intervening in a market which has a structural surplus by reducing, or at any event containing, demand-side prices.

Moreover, even if the amount of the levy is determined by factors of a financial nature (budgetary charges connected with support of surplus production), it is also always linked to the fundamental economic rationale of the measure, which is — as has already been stated — to 'give the producers an indication of the market situation' in order to 'achieve, with the utmost urgency, an improved balance' in the market in question and 'to control growth' (the second recital in the preamble to Regulation No 1579/86).

In my opinion, therefore, it must be pointed out that even though the levy unquestionably appears to be financial in nature, helping to contain the cost of operating the mechanisms in the cereals sector, nevertheless in fact it is an intervention measure intended to stabilize the market and is therefore essentially economic in nature. That is not a sufficient basis for the submission that the contested regulation should also be based on Article 201 of the Treaty.

Nor, in fact, does an obligation of that kind flow from the second paragraph of Article 2 of the Council decision on own resources cited above. As the Council has rightly emphasized, whereas the first paragraph of Article 2 is imperative in so far as it makes provision for revenue which necessarily constitutes own resources, the following paragraph is simply indicative, referring to revenue which, depending on circumstances, may be included in own resources or may not. In the situation covered by the second paragraph, whenever it is decided to enter a particular item in the budget as own resources, and only in that case, use of the procedure laid down in Article 201 becomes a necessary condition. On the other hand, whenever it is decided that a particular item must not be ascribed to own resources and therefore entered in the general budget of the Communities, the procedure laid down by Article 201 is clearly superfluous and, indeed, arbitrary.

That is precisely the case with the co-responsibility levy. The Court has, moreover, already reached that conclusion in its judgment in Case 138/78 *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713. On that occasion, the plaintiff in the main proceedings argued that Article 43 could not authorize the Community institutions to charge a levy on milk production, since the levy was a charge which could be imposed only under Article 201. However, after having discussed the function of the levy, the Court held that the Council had the power to adopt the levy on the basis of Article 43. In doing so the Court followed Advocate General Mayras who had made the following observation:

'Article 201 thus constitutes the basis of revenue which, without any distinction, is intended to cover the whole of the expenditure provided for in the budget.

However, that article in no way deprives the Council of the power, within the framework of specific rules, and particularly in common agricultural policy matters, to generate revenue which by its direct link with measures affecting expenditure in the sector at issue reduces the impact thereof'.

The Advocate General also pointed out that within the framework of measures designed to regularize agricultural markets, there already existed certain items of revenue which did not constitute own resources, the creation of which would imply use of the procedure under Article 201 (for example, securities and guarantees which are forfeit to the Community), and he concluded therefore that Article 201 was not applicable to the co-responsibility levy. [3]

However, it must also be emphasized that, in the case of the levy in question, recourse to Article 201 appears not only superfluous but also inappropriate. Although the levy is designed to remedy structural imbalances, it nevertheless constitutes a measure which is intended for particular sectors; the levy is closely adapted to the specific requirements of those sectors and is virtually contingent upon them, since it remains in force only if the sector continues to be in a state of imbalance. As the Council has stated, it seems more correct to exclude in principle from the category of own resources any charges which are not of general application or not permanent.

3 — These observations too, made in the context of the levy in the milk sector, may obviously be applied to the levy introduced in the cereals sector. Besides the fact that, as already mentioned, they serve a similar purpose, it should be mentioned that structurally both are calculated on the basis of a single rate (1.5 to 3% for milk; 3% in the first two years for cereals) for a uniform basic taxable amount (the target price for milk; the intervention price for cereals). Moreover, in both cases, as has been seen, the burden of the levy falls on the agricultural producer.

Finally, consistent with that approach is the provision that the revenue from the levy is not intended to be used 'without distinction to finance all expenditure' of the Community, as is required for own resources (Article 5 of the Council Decision of 21 April 1970, cited above) in accordance with the principle that the budget is indivisible, but is to be allocated (under Article 1(4) of Regulation No 1579/86) exclusively 'to the financing of costs in the cereals sector'.

Therefore, in my opinion, Regulation No 1597/86 could have been adopted on the basis of Article 43 of the Treaty alone and it is consequently not vitiated by a defect in the legal basis.

**Suitability of the levy for achieving its intended purpose**

The plaintiff in the main proceedings claims that the levy in question is inappropriate for achieving the objective of stabilizing the market, referred to in Article 39 of the Treaty, and is therefore unlawful under Article 40(3).

The levy is said to be inappropriate for two reasons:

(a) the proportion of agricultural production affected by the levy (less than 50%) is too small;

(b) the levy can cause a rise in the price of, and thus a contraction in demand for, processed cereals.

Therefore, for the purpose of re-establishing a balance between supply and demand on the market in question, the levy is *ab initio* ineffective, if not directly counterproductive.

It must be pointed out, however, that when the Council adopts measures of that kind, and consequenty when it decides how appropriate they are, it possesses a wide power of discretion which corresponds to the political responsibilities which Articles 40 and 43 impose on it (see the judgment in *Stölting*, cited above, at paragraph 8 of the decision).

The selection from the various possibilities open of the one which seems most appropriate for the aim pursued comes within the scope of the exercise of that power of discretion (see the judgment in *Bozzetti*, cited above, at paragraph 30).

It follows, in that particular regard, that the judicial review of legality may be exercised in a limited way, only in the event of a manifest error, a misuse of powers or when the institution manifestly exceeds the limits of its discretionary power.

Thus, in the judgment in *Biovilac*,[4] the Court held that the legality of a measure can be adversely affected only if the measure is manifestly unsuitable for achieving the aim referred to in Article 39.

4 — *Biovilac* v *EEC* [1984] ECR 4057, paragraph 17.

The Court gave a similar ruling in the judgment in *Stölting* where a measure's patent unsuitability to the objective which the competent institution seeks to pursue was postulated as a possible ground for invalidity.

On the other hand, the mere fact that a measure is ineffective does not *per se* make that measure invalid and it is relevant only in the context of an assessment of the measure's appropriateness, which lies outside the Court's jurisdiction (see the judgment in *Biovilac*, cited above).

However, in the present case it is clear that the institution has not manifestly exceeded its discretionary powers, at least in relation to those aspects which have been raised in the present proceedings.

In fact, in so far as the levy in question seeks to contain supply by exercising real pressure on producers, it is consistent, in principle, with the objective of stabilizing the market, laid down in Article 39.

As regards its actual effect, too, it is not disputed that the introduction of the levy brought about a reduction, at all levels, in the support price for cereals and improved the sector's financial situation, freeing the resources which were essential to initiate a strategy for developing new outlets.

The allegations made by the plaintiff in the main proceedings regarding the effects of the levy on prices and on demand seem therefore not only insufficient to support a

finding of invalidity but also to have no basis in fact.

With regard to the measure's limited scope as a result of the wide range of exemptions provided for, it must be pointed out, first, that such a limitation may reduce but cannot compromise the effectiveness of the measure, as I have just shown. Secondly, the extension of the exemptions provided for is objectively justified for economic reasons, as the Court confirmed in its judgment in Case 300/86 *Van Landschoot* v *Mera NV* [1988] ECR 3443. Finally, it must be emphasized that, in any event, in a context such as the one outlined here, the choice between a greater or lesser substantive scope for the levy is within the limits of the institution's discretionary power and cannot give rise to doubts as to its lawfulness.

In my view, therefore, the argument that the levy is unlawful in so far as it is unsuited for achieving its intended purpose is groundless.

**Breach of fundamental rights**

According to the plaintiff's submissions in the main proceedings, the breach in question lies essentially in the fact that the burden of the levy falls on a category of persons (processors) which is not responsible for the surpluses.

The charge is, therefore, according to the plaintiff, unjustified and consequently infringes the principles which regulate economic activity, including such activity within the Community system.

As I have pointed out, that reasoning is based on an inaccurate premise. The burden of the levy paid by the processors is compulsorily passed on to the producers. That is laid down by Article 1(4), point 6, of Regulation No 1579/86 ('the levy shall be passed on to the producer'), and is supported by the sixth recital in the preamble to, and Article 5(1) of, the Commission's implementing regulation, Regulation No 2040/86. [5]

The person who is liable for the charge is therefore the producer. The processor, who acts as substitute, bears only a modest administrative and accounting charge which may be considered proportionate, and therefore justified, in view of the fact that that category of economic operators, even though not directly responsible for the surpluses, is an integral part of the market in question and certainly also has an interest in its stability. Consequently, the burden of the levy is passed on in order to prevent the imposition, in principle, of an undue charge on the processor, in breach of fundamental rights. That does not mean that the manner in which the transfer is effected is necessarily perfect. That is, however, a different

5 — The sixth recital in the preamble to Regulation No 2040/86 provides that:
'... one of the objectives of the co-responsibility levy system is to make producers more aware of the realities of the market; ... to that end, the burden of the levy should be passed on to them; ... an invoicing system which takes account of that requirement should accordingly be introduced; ... the principle whereby the levy is to be passed on is to apply notwithstanding any contractual clause to the contrary'.
Article 5(1) of the regulation provides that:
'Operators who carry out the operations referred to in Article 1(1) shall pass on the co-responsibility levy to their suppliers. The levy shall also be passed on at each transaction prior thereto, as far as supply by the producer.
Supporting documents for each of the transactions referred to in the first subparagraph shall indicate separately the amount of the levy deducted'.

problem — one which is the subject-matter of Case 195/87 — which must be examined in the light of very specific considerations (concerning the effect of agricultural conversion rates in transactions between States) which are wholly unrelated to the present case.

Without its being necessary to consider individually each of the examples of discrimination cited, it is sufficient to point out that they all stem, in the plaintiff's opinion, from the wide exemption laid down in the second subparagraph of Article 1(2) of Regulation No 2040/86 for cereals intended for use as animal feed on the holding on which they were produced.

With regard to the actual amount of the levy (3% in the first two years of application), it has already been stated that the charge is not disproportionate in a market in which supply structurally exceeds demand. Moreover, the guiding principle for calculating the levy is laid down in the third recital of the preamble to Regulation No 1579/86. The institution's discretion in that particular regard is therefore restricted, at least partly. It follows that, except when that criterion is manifestly disregarded, the rate of levy adopted cannot be considered to be disproportionate.

I believe it is sufficient to point out that that question has already been resolved in the judgment in *Van Landschoot*. The Court held that such an exemption is, in principle, justified since cereals consumed by the producer are not placed on the market and thus do not contribute to the creation of surpluses (see in particular paragraph 11 of the decision).

Consequently, I do not believe that it is possible to argue that there has been a breach of fundamental rights in the present case.

Indeed, having accepted the rationale of the exemption, the Court subsequently extended its scope since it considered it discriminatory that the exemption should apply only to holdings which consume their own cereals processed using their own plant and not to holdings which also consume cereals from their own production but whose cereals were processed by other undertakings.

**The discriminatory nature of the levy scheme**

In the proceedings before the national court the plaintiff claimed that the system for collecting the levy laid down in Regulations Nos 1579/86 and 2040/86 was discriminatory.

In the light of the Court's ruling in *Van Landschoot*, it is not possible in my opinion to share the doubts raised in the present case relating to the discriminatory nature of the levy exemption scheme.

Consequently, I propose that the Court should reply to the national court as follows:

'Consideration of the question referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of Council Regulation No 1579/86 of 23 May 1986 or Commission Regulation No 2040/86 of 30 June 1986.'