provisions for calculating levies on milk and milk products, as amended by Article 2 of Regulation No 467/75 of the Council of 27 February 1975.

2. **Under the special system of Article 8 of Regulation No 823/68 in the version applicable at the time of the facts with which the main action is concerned, the levy must be calculated on the basis of the threshold price fixed pursuant to Regulation No 804/68 without regard to the free-at-frontier price of the products subject to that special system, provided only that the requirement as to minimum prices laid down by Regulation No 823/68 is observed.**

3. **There was no obligation on the competent institutions of the Community at the time of the facts with which the main action is concerned to amend the import system applicable under Article 8 of Regulation No 823/68, as amended by Article 2 of Regulation No 467/75, to products falling within tariff subheadings 04.04 E I (b) (3) and (4).**

Sørensen Pescatore Touffait

Delivered in open court in Luxembourg on 8 November 1977.

A. Van Houtte
Registrar

M. Sørensen
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 6 OCTOBER 1977 [1]

Mr President,
Members of the Court

The reference for a preliminary ruling on which I have to give an opinion today is concerned with the interpretation of provisions on the imposition of levies on the importation of milk products from third countries, in this case the importation of cheese of sheep's milk from Bulgaria.

The principle of the imposition of levies on the importation of milk and milk

1 — Translated from the German.

products is enshrined in Article 14 of Regulation No 804/68 of the Council on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176). Two systems must be distinguished: the general system of levies and the special provisions for the calculation of the levy due on imports of particular products.

The characteristic of the general system is that various products which for trade purposes have sufficiently comparable characteristics are classified into groups (having regard to the diversity of milk products this appears indispensable) and for each group a pilot product is designated which is the most representative of it. This was done by Regulation No 823/68 of the Council of 28 June 1968 (OJ, English Special Edition 1968 (I), p. 199). According to Annex I thereto there are five groups of products for cheese; cheese of sheep's milk (at that time falling within tariff subheading 04.04 E I (3)) comes within Group 11. Under this general system the levy on all the products in a group is calculated according to the threshold price of the pilot product, *less* its free-at-frontier price. The Council fixes annually the threshold prices for the following milk year in accordance with Article 4 of Regulation No 804/68 'so that, account being taken of the protection required for the Community processing industry, the prices of imported milk products shall correspond to the level of the target price for milk'. The free-at-frontier prices are determined according to Article 14 of Regulation No 804/68 'on the basis of the most favourable purchasing opportunities in international trade for the products of the related group', that is, the offer prices applying in respect thereof at a particular time. Implementing provisions were laid down in Regulation No 1073/68 of the Commission of 24 July 1968 (OJ, English Special Edition 1968 (II), p. 359). Under Article 14 of Regulation No 804/68 the Commisson also fixes the levy.

As regards, on the other hand, the special provisions for fixing the levies applicable to individual products, also mentioned in Article 14 of Regulation No 804/68, there are no particular provisions of the Council for determining them. As appears from Regulation No 823/68 and the explanations given by the Council during the proceedings, highly diverse methods apply in respect thereof. In part the levy applicable to the particular pilot product is used as a basic amount which is corrected by other factors; in part the computation of that amount is independent in so far as fixed levy rates are laid down or fixed amounts are deducted from the threshold price of the pilot product. It is pertinent to note as far as the present proceedings are concerned that there were no special provisions for the calculation of the levy on cheese of sheep's milk and kashkaval under Regulation No 823/68. They were first laid down by Regulation No 2307/70 of 10 November 1970 (OJ, English Special Edition 1970 (III), p. 758). The latter provided that the levy per 100 kg should be equal to the threshold price of the pilot product less 85 u. a. if it were shown that the import price was not less than 85 u. a. per 100 kg in the case of kashkaval and 70 u. a. per 100 kg in the case of cheese of sheep's milk. Later, that regulation was repeatedly aligned upon the movement in prices. Thus according to Regulation No 664/74 of the Council (OJ L 85, 1974) the levy was equivalent to the threshold price of the pilot product less 110 u. a. where the import price of kashkaval was not less than 110 u. a. and that of cheese of sheep's milk not less than 95 u. a. Under Regulation No 467/75 of the Council (OJ L 52, 1975) the levy is equal to the threshold price of the pilot product less 130 u. a. where the import price of kashkaval is not less than 130 u. a. and that of cheese of sheep's milk not less than 115 u. a. No alignment was attempted in 1976, however, even though by Regulation No 560/76, (OJ L 67, 1976) the threshold price of the pilot product of Group 11

was increased to 189.25 u. a. with effect from 15 March 1976.

The provisions are relevant to the main action for the following reasons.

On 28 July 1976 the plaintiff obtained customs clearance into free circulation for Bulgarian cheese of sheep's milk (according to the import notice the description of the goods was cheese of sheep's milk, falling, since Regulation No 1578/71 (OJ L 166, 1971), within tariff subheading 04.04 E I (b) (4)). Thereupon a levy was charged on the basis of the threshold price applying at the time to the pilot product of Group 11, less, in accordance with Regulation No 467/75, 130 u. a.

In the plaintiff's view that levy is too high; it therefore brought an action before the Finanzgericht Berlin against the levy notice. It alleged that Bulgaria was the main exporting country for cheese of sheep's milk; cheese of sheep's milk from that country was therefore the representative product on which the free-at-frontier price should have been based. The Community institutions, however, neglected in 1976 to take account of the fact that the offer prices for Bulgarian cheese of sheep's milk had increased and as early as the beginning of 1975 had reached a level of 160 u. a. Further, they were in error not to have taken into account the fact that the threshold price had increased in 1976. Had account been taken of both matters the levy in July 1976 would have had to have been calculated in such a way as to allow an amount of at least 150 u. a. to be deducted from the threshold price. The plaintiff claims to be entitled to an appropriate reduction in the levy.

In view of these matters and the fact that the plaintiff has repeatedly applied to the Commission, namely by letters dated October 1975, April and June 1976, to achieve an adjustment of the minimum price of cheese of sheep's milk, the Finanzgericht to whom the system of levies as applicable in the present case was not completely clear, stayed the proceedings by order dated 10 February 1977 and referred the following questions to the Court for a preliminary ruling under Article 1977 of the EEC Treaty:

1. Has the plaintiff under Community law, in spite of non-alignment of the free-at-frontier offer prices for kashkaval and cheese of sheep's milk for the 1976/77 milk year, a claim that the levy in respect of goods imported by it on 30 July 1976 should be calculated at a rate of DM 126·41 per 100 kg and not as demanded by the defendant at a rate of DM 190·77 per 100 kg?
2. In the event of Question 1 being answered in the negative: Is the fixing of free-at-frontier prices under Article 14 of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176) for products under tariff subheadings 04.04 E I (b) (3) and (4) of the Common Customs Tariff a preference rule within the meaning of Article 14 (6) of the aforesaid regulation or a rule fixing the levy within the meaning of Article 14 of the aforesaid regulation?
3. In the event of its being a normal levy rule:
   Have the Commission and the Council of the European Communities infringed Article 14 of the aforesaid regulation in conjunction with Articles 2 to 7 of Regulation (EEC) No 1073/68 of the Commission of 24 July 1968 laying down detailed rules for determining free-at-frontier prices and for fixing levies in respect of milk and milk products (OJ, English Special Edition 1968 (II), p. 359) in that, although aware of the movement of offer prices for products under tariff subheadings 04.04 E I (b) (3) and (4) of the Common Customs Tariff, when fixing prices for the 1976/77 milk year in amendment of Article 8 of Regulation (EEC) No

823/68 of the Council of 28 June 1968 determining the groups of products and the special provisions for calculating levies on milk and milk products (OJ, English Special Edition 1968 (I), p. 199), they failed to fix the minimum price for the said products at at least 150 and 135 u. a. respectively?

4. If there is held to be a special (preference) rule:
   (a) Are free-at-frontier prices for the said products to be fixed only by agreement with the third countries concerned or has the plaintiff under Article 14 of Regulation (EEC) No 804/68 and the subsequent regulations thereto a right to ask the Commission to align the free-at-frontier prices?
   (b) Does Regulation (EEC) No 1073/68 apply also in fixing free-at-frontier prices under Article 14 (6) of Regulation (EEC) No 804/68 and Article 8 of Regulation (EEC) No 823/68?
   (c) Were the Council and the Commission obliged in fixing prices for the 1976/77 milk year to raise the free-at-frontier prices for products under tariff subheadings 04.04 E I (b) (3) and (4) of the Common Customs Tariff to at least 150/135 u. a.?

1. When I now consider these questions in the light of the written and oral observations which the plaintiff in the main action, the Council and the Commission have made I will deal first with the second question since it does not require lengthy consideration.

According to the description of the levy system for milk and milk products which I gave at the outset it is clear that the rules applying to products of tariff subheadings 04.04 E I (b) (3) and (4) at the time of importation (basically, the main proceedings are concerned, as the Council has rightly stressed, only with tariff subheading 04.04 E I (b) (4) as it applies following Regulation No 1578/71) do not come under the general levy system but are special rules within the meaning of Article 14 (3) and (6) of Regulation No 804/68. According to the general levy system, the criteria for which are the pilot product of a group (here Group 11) and the threshold and free-at-frontier prices thereof, at the time of importation a levy of 116 u.a. would have been due. On the other hand, on imports of Bulgarian cheese of sheep's milk, provided that on importation the abovementioned minimum prices obtained, a fixed amount was deducted from the threshold price of the pilot product, so that there was a levy of only 59 u. a. Considered in that light there can be said to have been a preferential system, since there was a considerable reduction in the general levy.

In addition it should be mentioned in this connexion, since Question 2 contains a suggestion to this effect, that it is not correct to speak of the fixing of free-at-frontier prices for products of tariff subheading 04.04 E I (b) (4). Such free-at-frontier prices are relevant only in the context of the general levy system. In connexion with the special levy rules for cheese of sheep's milk it is on the other hand a question of a particular minimum price being maintained on import and then a particular amount (the Council spoke of a 'subtrahend') being deducted from the threshold price. If Question 2 refers to these values it should be noted that they and the fixing of them represent an element of the *special* levy system. In this respect the same minimum amount applies to cheese of sheep's milk and to kashkaval, as was made clear in the proceedings. It cannot however be said that it is equal to the minimum price of kashkaval; rather, as the Council stressed, it is merely based thereon.

2. This in my view is sufficient answer to the second question, but at the same time it has become clear that the third question contained in the order seeking a preliminary ruling does not need to be

discussed since it expressly relates to the normal levy system alone.

3. I now turn first to Question 4 (b), which also calls for little comment. This is the question whether Regulation No 1073/68 of the Commission applies also in fixing free-at-frontier prices under Article 14 (6) of Regulation No 804/68 and Article 8 of Regulation No 823/68. On this point it is sufficient to say that it is not free-at-frontier prices but minimum prices and amounts to be deducted which are relevant in the context of special levy rules. For this reason alone the regulation of the Commission laying down implementing provisions for determining free-at-frontier prices cannot be relevant in this connexion. Moreover, it is significant that the special levy system is laid down by the Council and that there are no substantive conditions in relation thereto in the basic regulation, likewise laid down by the Council. If this is borne in mind then it would be highly unusual that the Council, as the main authority responsible for the market organization, could be bound by provisions which have been adopted by the Commission, to which it has delegated the necessary powers.

4. The problems raised by Questions 1 and 4 (a) and (c) must be regarded as the central issues of the proceedings. They require consideration of whether the rate of levy applied to the importation in question in the main action is correct or, as the plaintiff thinks, too high. This involves considering the question whether there was an obligation on the Community institutions to increase the minimum prices of products falling within tariff subheadings 04.04 E I (b) (3) and (4) to at least 150 and 135 u.a. respectively and accordingly to increase the amount to be deducted to 150 u.a. for the 1976/77 milk year. It must also be decided whether the plaintiff is entitled to claim such an alignment or whether the latter occurs only in agreement with interested third countries. Finally, it must be considered whether, although minimum prices and the amount to be deducted were not aligned on the actual free-at-frontier offer prices, the plaintiff is entitled to claim that the levy demanded of it be calculated on the basis of the threshold price less an amount of 150 u. a.

In the plaintiff's view, even in the context of the special rules of Article 8 of Regulation No 823/68, the basic principle of every levy system applies, namely that alignment of prices may be undertaken only at the level which is considered necessary for the protection of Community production. This, however, namely an approximation to the level of the threshold price, was not reflected in the levy rate fixed in 1976 for Bulgarian cheese of sheep's milk. It was in truth so calculated that, if the additional burden as a result of monetary compensation, to which the minimum prices are also relevant, is borne in mind, there is an excessive protection of Community production, which in any case is not considerable. This and the decline in imports associated with it is, moreover, not in accordance with the principle of the furtherance of trade contained in Article 110 of the Treaty, which also has to be respected in the context of the common organization of the market in milk and milk products, as appears from Article 33 of Regulation No 804/68. More correctly, the Community institutions should have had regard to actual movements in offer prices on the representative markets, that is, as regards cheese of sheep's milk, to the offer prices of Bulgarian cheese of sheep's milk. Such offer prices were at the time in question 160 u.a. and even 200 u. a. for kashkaval. If it is borne in mind that according to the system referred to the minimum prices applying to kashkaval are relevant also to cheese of sheep's milk, the basic amount for the levy regulation should certainly have been at least 150 u.a. instead of only 130 u. a. In the plaintiff's view, not the least significant element in this connexion was the movement in the threshold

prices. The standing practice since 1970 had been to align the minimum prices on those prices, and this was last done in 1975 by an increase of 20 u. a. Moreover, according to the levy system, no agreement with the relevant exporting country was necessary for such an alignment. Since as regards its right of proposal the Commission is bound by Regulation No 1073/68 and accordingly must have regard to all information available, it ought, as ought also finally the Council, to have reacted to comments and representations such as the plaintiff had made in October 1975 and April and June 1976 to the Commission.

The Council and the Commission emphatically reject this. They point out in particular that the basic regulation contains no substantive conditions for the special levy rules and that according to Article 8 of Regulation No 823/68 the offer prices are irrelevant in this connexion, even though the fixed amount to be deducted is based on the minimum prices for kashkaval. In actual fact, the Council has a wide discretion in this sphere, the exercise of which is governed by the general objectives pursued by the basic regulation, the Treaty provisions and considerations of trade policy. It cannot be shown that that discretion was not correctly exercised in the present case. *Inter alia,* it is significant in this respect that previously also the levy applying to cheese of sheep's milk has not automatically been aligned with the amended price rules and that there have been sound considerations of trade policy for not maintaining the preferential *status quo* of 1975 in relation to cheese of sheep's milk. In any case it is not possible to deduce from the relevant provisions that the Community institutions were required to fix the levy for cheese of sheep's milk at the amount claimed by the plaintiff.

In my view this dispute calls for the following observations.

The Community institutions have rightly pointed out that in the basic regulations by which the market organization for milk and milk products was created there is only quite general mention made of special provisions on the levy, without any criteria being laid down therefor.

From this it follows that there is no duty to *create* such special rules but that the Council has a discretion in this respect. If special rules are introduced they represent unilateral independent concessions. In particular, in so far as their extent is concerned there is no provision for consultation with third countries; in any case, as far as Bulgarian cheese of sheep's milk is concerned there is no trade agreement which could require particular preferential rules to be adopted and appropriate adjustments made. In the same way, interested economic sectors have no right of claim, but that certainly does not mean that they cannot submit important economic data to the Commission in an endeavour to influence the structure of the special levy.

As far as special levy rules are concerned, it follows further from the way in which the basic regulation is drafted that in *calculating* that levy, that is, its divergence from the general levy, there is a very much wider discretion because substantive conditions have not been laid down. As the Council has rightly stressed, the guidelines here are the principles of the organization of the market in milk and the objectives of the Treaty and perhaps also considerations of trade policy.

If in the light of this basic factor we consider whether the validity of the levy in question in the main action may be criticized on the ground that the discretion was wrongfully exercised and, further, whether it may be said precisely which levy rate reflects a correct exercise of that discretion, the answer, in a word, can scarcely accord with the views of the plaintiff.

In so far as the plaintiff casts doubt on the need to protect Community production on the ground that there is no such production worth mentioning, answer may be made to this and to the related argument that the rate of levy applied is too high that in this connexion the figures supplied by the plaintiff with regard to imports of cheese of sheep's milk from Italy into the Federal Republic of Germany do not carry conviction. Moreover, reference may be made to corresponding statements by the Community institutions in previous cases (they are in part reflected in the judgment of 22 January 1976 in Case 55/75, *Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1976] ECR 19), to their observations regarding the increase in Community production and also to the fact that the scope of the protection must naturally relate to the production of comparable kinds of cheese in the Common Market.

When the plaintiff complains that no regard was had to the increase in the free-at-frontier offer prices for Bulgarian cheese of sheep's milk, then (apart from the fact that offer prices are irrelevant to the system of special levy rules, for which reason Regulation No 1073/68 of the Commission may be disregarded) it must not be overlooked that in state-trading countries such information is of little importance from the outset. In addition, it must not be forgotten that an additional preferential factor arises in respect of cheese of sheep's milk in that the amount which has to be deducted is related to the (higher) minimum price for kashkaval. Moreover, and this is certainly of special importance in the present connexion, we were assured during the proceedings, and this was uncontested, that Bulgaria has shown no interest in a reduction in the levy on cheese of sheep's milk since 1975 (when the last steps were apparently taken).

With regard to the plaintiff's contention that no account was taken of the increase in threshold prices which took place in 1976, it is significant that in previous years also there had been no automatic adjustment of the amounts to be deducted which are relevant to the special levy. There is therefore certainly no such standard practice. On the other hand, it has also been shown that as far as the margin with relation to the normal levy is concerned there was no change in 1976 and that that margin has greatly increased since 1971.

Further, no criticism appears to me to be appropriate in connexion with considerations of trade policy, in which the area of discretion is possibly even more extensive. In my view, sound considerations were revealed on this point, even if it is true as the plaintiff has alleged that its imports have declined by some 30 % as a result of the amount of levy. The Commission has stated that the situation on the market in milk products has not improved; increasing restrictions are being met with on the markets of third countries and, on the other hand, keener competition with Bulgarian cheese of sheep's milk in particular is discernible here. This could well be borne in mind in considering whether the entry into the Common Market of Bulgarian cheese of sheep's milk should be facilitated. Further, it also seems to me appropriate to have regard to the fact that Bulgaria refuses to recognize the Community in terms of commercial policy. This can certainly be significant in considering whether the commercial interests of the Community in granting concessions to a country have become greater or smaller and whether the preferential *status quo* of 1975 should be maintained.

Finally, nothing can be made of the plaintiff's argument referring to statements made by the Commission in a previous case concerning the rules governing monetary compensatory amounts for Bulgarian cheese of sheep's milk. The case in question was Case 55/75, in which in justification of the

monetary compensation the Commission referred to the rules concerning minimum prices contained in Article 16 of Regulation No 1463/73 and explained that whenever a claim was justified an adjustment was made to the minimum prices. The plaintiff deduces from this that the Commission is accordingly obliged to ensure that the minimum prices accord approximately with the offer prices. To this it was rightly countered that the said statement reflected only the practice current until that time, and that there could be no question of the recognition of a corresponding legal obligation. Further, it is not now necessary to discuss whether the failure to align minimum prices upon the actual movement in prices is of any consequence with regard to monetary compensatory amounts.

With regard to the central issue of the action it can thus be said that no errors are apparent in the fixing of the special rate of levy applicable to cheese of sheep's milk and that it certainly cannot be said that because the plaintiff could show that offer prices were higher it therefore has a claim under the basic rules governing the levy to a reduction in the levy to the extent demanded by it.

5. I therefore propose the following answers to the questions put by the Finanzgericht Berlin:

(a) The imposition of the levy on the importation of Bulgarian cheese of sheep's milk was governed in July 1976 by Regulation No 467/75. Nothing has been revealed during the proceedings to cast doubt on the validity of that regulation. The levy cannot therefore be calculated otherwise than as laid down therein.

(b) Regulation No 467/75, applicable to the levy on the importation of Bulgarian cheese of sheep's milk in July 1976, with its various elements (maintenance of a particular minimum price and deduction of a particular amount from the threshold price), represents a special provision within the meaning of Article 14 (6) of Regulation No 804/68 for which the fixing of free-at-frontier prices was irrelevant.

(c) The fixing of the levy under Regulation No 467/75 applicable to the importation of cheese of sheep's milk constituted an independent concession on the part of the Community in relation to which there is no provision for consultation with interested third countries, any more than for a claim by interested economic sectors for adjustment of the relevant values.

In fixing the relevant values under Regulation No 467/75 Regulation No 1073/68 of the Commission was irrelevant.

There was no obligation on the Council and Commission under the levy system which applied to imports of cheese of sheep's milk in July 1976 to fix minimum prices other than in accordance with Regulation No 467/75.