5. Article 7 of the Treaty prohibiting discrimination on grounds of nationality does not apply to national rules which are not applicable on the basis of the nationality of the traders concerned and which take into consideration solely the location of the commercial activities.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 30 November 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 26 OCTOBER 1978 [1]

Mr President,
Members of the Court,

The proceedings for a preliminary ruling in which I am today delivering my opinion relate to the common organization of the market in eggs and the Community law and Italian implementing provisions adopted thereunder.

The aforesaid organization of the market is at present regulated by Regulation No 2771/75 of the Council of 29 October 1975 as amended by Regulation No 368/76. There is no need for me here to set out all its details. For the present proceedings it is enough to know that, as regards intra-Community trade, the organization of the market contains no system of price regulation or intervention. It is rather characterized by certain marketing standards which are intended to ensure that only eggs of a certain quality are marketed and which, in this way, are intended to promote sales. Implementing provisions are contained in Regulation No 2772/75 of the Council of 29 October 1975 and in Regulation No 95/69 of the Commission of 17 January 1969 which was adopted in implementation of the predecessor to Regulation No 2771/75. Under those provisions certain quality and weight classes are laid down; rules for the packaging of the eggs must also be complied with. Eggs can only be classified according to Community criteria by certain packing centres which must be authorized by the national authorities. They must affix certain details to

1 — Translated from the German

the packs. Compliance with the whole system is supervised by the competent authorities of the Member States.

Of the relevant provisions I would cite only the following:

Article 26 of Regulation No 2772/75 provides that:

"Compliance with this regulation shall be supervised by agencies appointed for the purpose in each Member State . . .

The products covered by this regulation shall be checked by means of random sampling at all stages of marketing as well as during carriage . . ."

Article 17 of the same regulation provides that:

"Large packs even when they contain eggs in small packs shall be provided with a band or label which cannot be re-used after the pack has been opened and which shall be issued by or under the supervision of the official agencies mentioned in Article 26".

Paragraph (2) of that article further provides what information, in particular with regard to quality and weight-grading, must be borne on the bands or labels.

It should finally also be mentioned that Article 5 of Regulation No 95/69 of the Commission contains provisions as to the form of the bands or labels stating that they must bear an official marking laid down by the competent authority of each Member State.

Pursuant to these provisions Law No 419 of 3 May 1971 was adopted in Italy. It repeats the substantive content of the Community regulations and in addition provides that the preparation of the aforementioned bands is reserved to the Ministry for Agriculture, that the bands are to be issued for a fee and that the revenue therefrom is to serve to finance the checks provided for in the Community rules. In addition a ministerial decree of 19 October 1971 laid down a model for the bands and the prices to be paid for them by users.

Pursuant to those provisions in October 1977 the applicant in the main proceedings, who runs an authorized egg-packing centre within the meaning of Community law, had to pay Lit 180 000 for bands and labels to the Ministry for Agriculture. He commenced proceedings against the Ministry for Agriculture for reimbursement of that sum on the grounds that it was contrary to Community law for various reasons which will be examined subsequently.

In view of the problems of Community law raised by the dispute the Pretore before whom the matter was brought, by order of 7 March 1978, stayed proceedings and pursuant to Article 177 of the EEC Treaty asked for a preliminary ruling on the following questions:

"A. Must Regulation (EEC) No 1619/68 of the Council (as last amended by Regulation (EEC) No 2772/75 (Official Journal L 282 of 1 November 1975) and Regulation (EEC) 95/69 of the Commission be interpreted to mean that they empower the Member States to reserve exclusively to their public authorities the preparation and distribution of bands and labels and in particular must the provision in Article 5 of Regulation No 95/69 in accordance with which such bands and labels 'shall bear an official marking laid down by the competent authority' be interpreted to mean that this provision implies that the public authorities have an exclusive right to affix the official marking and to prepare and distribute the labels?

B. Must the said regulations be interpreted to mean that the Member States may make the issue of bands and labels conditional on payment of a consideration far in excess of the cost of such bands and labels?

C. Must the said regulations be interpreted to mean that their direct applicability must not be jeopardized by the adoption of national provisions which, whilst purporting to implement the regulations in question, introduce additional conditions, such as those reserving to the public authorities the right to prepare and distribute bands and labels and making the issue of such bands and labels subject to the payment of a pecuniary consideration?

D. Does reservation to the public authorities of the right to prepare and distribute labels, and making the issue thereof subject to the payment of a sum in excess of their cost, result in discrimination on grounds of nationality which is prohibited in accordance with Article 7 of the EEC Treaty?

E. In any case must Regulation No 2771/75 of the Council, in particular Article 2 thereof, and Regulations Nos 2772/75 of the Council and 95/69 of the Commission be interpreted to mean that a national provision laying down additional and special conditions as compared with those conditions contained in the said regulations may disturb the proper functioning of the arrangements of the organization of the market in eggs and in particular the proper observance, and accordingly the correct application and operation, of marketing standards?

My opinion on this matter is as follows:

1. The question should first be examined whether the Community regulations permit Member States to reserve to the public administration the production and issue of the bands and labels which are necessary for the organization of the market in eggs.

As regards the last part of that question, relating to Article 5 of Regulation No 95/69, which states that the bands and labels must bear an official marking laid down by the competent authority it may be said immediately that that does not confer an exclusive right on the public administration to affix the official marking and to produce and issue the bands and labels. It is clear from the wording of the provision alone that its scope does not extend so far since, clearly, the laying down of the official marking by the competent national authority does not necessarily signify that it can be affixed only by that authority or even that the authority alone has the right to produce bands and labels at all.

In so far as the question then inquires whether the Community regulation *permit* the Member States to reserve to their public authorities the preparation and distribution of bands and labels, in my opinion, two observations will suffice.

First, the Commission has correctly referred to Article 26 of Regulation No 2772/75 whereby compliance with the regulation is to be supervised by agencies appointed for the purpose in each Member State. From this it is clearly evident that the Community rules are not comprehensive, as the applicant in the main proceedings contends, but that the Member States must adopt administrative measures in implementation of the regulations. Accordingly, in my view, it is undeniable that with regard to the organization and details of the supervision provision is made for the Member States to have a relatively wide discretion which is certainly not restricted to checking whether the quality of the product accords with the details given on the pack. It can, therefore, certainly not be said that the form of supervisory measures as adopted in Italy is outside the framework laid down by the Community rules. In particular the view is unfounded that the

supply of the labels and bands is unrelated to the national supervisory measures as, if it is undertaken by the public authorities, it saves the need for supervision to ensure that the bands accord with the specimens to be provided by the Member States pursuant to Article 5 of Regulation No 95/69. In addition in general terms it must be accepted that the checks provided for by Community law will certainly be facilitated and made more effective if they are carried out in the manner provided for in Italy, where, as we know, the bands and labels issued by the administration are numbered consecutively.

Secondly, reference may also be made to Article 17, cited above, of Regulation No 2772/75 wherein it is stated that the bands and labels shall be issued by or under the supervision of the agencies mentioned in Article 26. If under those provisions issue by the public authorities is possible that certainly includes the possibility of production by the authorities of the Member States. In addition no reasonable grounds are evident why this possibility which is expressly mentioned with regard to large packs should be excluded for small packs. On the contrary in this respect analogous application of the provision in question would appear to be indicated.

In respect of the first question therefore it may be stated only that an exclusive right of the administration to produce and distribute the bands and labels which are essential for the organization of the market in eggs is without doubt compatible with Community law. This is not affected by the fact that a different procedure is adopted in other Member States and that there the production and distribution of the bands is partly left to private undertakings or bodies acting on behalf of the State. Moreover, the allegation which, incidentally, is strongly denied by the Italian Government, that the procedure for obtaining bands in Italy is extremely involved and lengthy does not lead to any other conclusion since such a consequence is not logically necessarily related to the fact that the State itself is responsible for the production and issue of the bands. Thus, if such a situation were in fact found to exist in a Member State it would not lead to the abolition of the system as a whole but it would be sufficient to proceed against the practical application with proceedings for a finding that the Treaty was thereby infringed.

2. A second line of questions relates to the fact that in Italy the issue of the bands and labels is conditional on payment. It is necessary to examine from various aspects whether that is permissible under Community law.

(a) With regard to the fundamental question it may be stated that the Community regulations contain no provision directly concerning the cost. It is not possible to deduce from them any obligation for the Member States to issue the bands and labels free of charge nor is there to be found therein any provision regarding payment by the packing centres for the acquisition of the bands and labels. In any event I myself find unconvincing the view of the Italian Government that the wording of Article 17 of Regulation No 2772/75, in particular in the light of a comparison with similar provisions (Article 17 of Regulation No 1619/68), supports the assumption that provision is made for payment for the issue of the bands and labels by the public authorities.

In my view in this respect as well the Commission has given the correct basis for a solution in its reference to the fact that under the Community regulations the arrangements to be made for the necessary supervision of their application are left to the Member States. From this it follows indeed that the Member States can also regulate the question of financing. For that reason I regard the fact that in Italy provision is made for the issue of the bands against payment as

not being incompatible with Community law in particular as it is clear that the price does not only relate to the cost of production and distribution of the bands but — as is clear from Article 4 of Law No 419 — it also relates to financing the checks, the cost of which can naturally not be imposed only on those in whose case they are effected more or less by chance on the basis of random sampling.

On the other hand I do not think it is necessary in justifying the payment to rely on considerations established in the decided cases in another context, in particular in examining import charges, whereby the question hinges on whether a pecuniary payment to the administration is in return for a special service provided by the administration for the person paying the charge. In my view therefore, it is not necessary to examine whether supervision of compliance with marketing standards which, according to the preambles to the Community regulations, may serve to facilitate the sale of the product, can be regarded as a special service by the administration such as to justify a financial charge or whether, as the applicant contends, that is not the case as the service by the State (issue of the bands) is obligatory because the undertakings are in any event obliged to comply with the marketing standards and because the supervision is not carried out at the time of issuing the labels, so that the affixing of the bands is not carried out under administrative supervision but the checks are rather carried out by way of random sampling after labelling and serve only to determine whether the goods correspond to the labels.

(b) In my opinion this fundamental statement is not affected by the principle of the direct applicability of Community regulations to which reference was also made in the questions. It is true that it has been established in the decided cases that by virtue of this principle national implementing provisions must not reproduce the content of the relevant Community regulations as has apparently been done in the said Italian Law No 419. However it is equally clear that *that* part of the Italian Law is not relevant in the main proceedings. In so far however as the Italian provisions regulate the production and issue of the bands for payment, the Italian Government acted correctly in the context of powers which are conferred by Community rules on the Member States with regard to the arrangements for and financing of the supervision required for the common organization of the egg market.

(c) In any event however an important part of this fundamental finding is that the payment charged must not be higher than is necessary to finance, on the one hand, the production and distribution of the bands and, on the other, the necessary supervision. Only to that extent is the charge justified from the point of view of Community law.

As we heard in the course of the proceedings this matter has already given rise to an exchange of letters between the Commission and the Italian Government in 1977. I would also call attention to the statements of the Italian Government in the present proceedings with particular regard to the costs of producing the bands and the extent of the costs incurred with regard to the supervision in respect of which outside staff are also relied on. From them the impression may be gained that the charges, which have remained unchanged since the entry into force of the Italian rules, were possibly too high at the beginning. This can hardly be the case for 1976, when revenue of Lit 508 million compares with costs of Lit 570 million, or for 1977 when, according to the statements of the Italian Government, revenue from the sale of bands amounted to Lit 521 million while the costs incurred with regard to the supervision amounted to Lit 660 million.

Admittedly this matter cannot in the last resort be resolved in proceedings for a preliminary ruling. In its ruling the Court of Justice must restrict itself to the aforementioned finding of principle and leave the question whether national practice is in accordance with it to the court in the main proceedings.

(d) We also have to consider whether the Italian rules conflict with the prohibition on discrimination contained in Article 7 of the EEC Treaty or in quite general terms against the principle of equality of treatment. These matters are referred to by the applicant in the main proceedings who points out that in other Member States the production and distribution of the bands is not carried out by State agencies in return for payment but is left to the persons marketing the goods.

In this respect the decisive factor is not so much that apparently, contrary to the applicant's assumption, in France and in the Federal Republic of Germany the cost of the bands at least must be paid. Nor is it necessary now to go further into the question whether Article 7 of the EEC Treaty, which is the primary relevant provision and according to which discrimination on grounds of nationality is prohibited, is applicable even where a Member State treats its own nationals less favourably. The decisive factor is in fact that the application of the Italian provisions does not depend on nationality but only on the place where operations are carried on. If, however, the Member States adopt differing provisions in implementation of the Community rules — as is at present not excluded — the fact that their application is in each case restricted to the territory of the relevant Member State, viewed correctly, does not constitute a situation covered by Article 7 of the EEC Treaty; in this respect it is rather the Community which must if necessary strive to achieve harmonization.

Furthermore with regard to the view that the general principle of equality of treatment, as laid down with regard to the agricultural rules in Article 40 (3) of the EEC Treaty, is infringed because higher production costs are incurred by the Italian producers by virtue of the Italian rules, this consideration also cannot lead to any different conclusion. In this respect it is sufficient to refer to the fact that under the structure of the organization of the market in eggs the Member States have a margin of discretion in the formulation of their implementing provisions. In addition, as the Commission has correctly pointed out, the fact should not be overlooked that production costs are in any event influenced by other non-uniform factors.

Therefore in respect of this question it may be stated with certainty that differing costs of supervision and differences in the relevant rules can hardly be brought within the scope of the prohibitions on discrimination set out in the Treaty.

(e) There remains finally only to examine the applicant's contention that national measures, as has been held in numerous decided cases, must not run contrary to the objects and functioning of a common organization of the market. It is alleged that such a detrimental effect exists in the present case. The organization of the market in eggs is characterized by marketing standards, that is, common rules relating to competition. They alone are applicable to marketing and therefore a raising of the threshold of profitability by means of additional conditions is not permissible. Yet the Italian measures, in reality, he states, constitute such a raising of the threshold. Seen in their true light the charges for the bands in the applicant's view alter the common marketing standards and have the ultimate consequence that more restrictive marketing standards are applicable in Italy.

In the light of what has been stated above it is not possible to accept this view either. In this respect it is sufficient to reflect that under the structure of the organization of the market in eggs the nature and manner of supervision of its practical application is left to the Member States. Financial charges resulting therefrom cannot therefore be regarded as additional conditions which are not permissible under the organization of the market in eggs, subject, of course, to the condition that they serve only to cover the costs. In this connexion as well, reference may be made once again to the fact that in any event production costs in the Member States are not equal and that the organization of the market in eggs, which did not adopt price rules, does not seek uniformity in this regard. Finally in this connexion it is also relevant — even taking into account the corrections made by the applicant in the oral proceedings — to consider the statements of the Italian Government in its detailed calculations with regard to the influence of the cost of the bands on production costs with regard, in particular, to the large packs, which are most commonly used, and what the Italian Government has shown with regard to the trend of exports from Italy in recent years.

Accordingly it is also impossible to claim that the objects of the common organization of the market in eggs are infringed or that its functioning is detrimentally affected by the Italian rules relating to the costs of the bands.

3. In my opinion the questions raised by the Pretore in Venasca should be answered as follows:

(a) Regulation No 2772/75 empowers Member States to reserve to the public authorities the production and distribution of bands and labels within the meaning of Article 17 of that regulation.

(b) In accordance with the structure of the common organization of the market in eggs the Member States may make the issue of bands and labels conditional on payment of a fee. The charges, however, must be no higher than is necessary to defray the costs of production and distribution of the bands and to cover the costs which arise by virtue of the checks to be carried out pursuant to the organization of the market.

The fact that the production and distribution of the bands and labels is not carried out by public authorities in all Member States and is not always made conditional on payment of a fee does not necessarily lead to the conclusion that Member States which do adopt that course infringe the prohibition on discrimination.