JUDGMENT OF THE COURT
OF 4 APRIL 1974 [1]

Belgian State and Grand Duchy of Luxembourg v Mertens and others (preliminary ruling requested by the Tribunal de Première Instance de Bruxelles)

'Joinder as "parties civiles" '

Joined Cases 178, 179 and 180/73

Summary

Agriculture — Common organization of the markets — Levies and refunds — Prosecutions and proceedings — Powers of Member States

(Regulation No 729/70 of the Council, Articles 4 and 8; Decision of 21 April 1970, Article 6)

It follows from Articles 4 and 8 of Regulation No 729/70 as well as Article 6 of the Decision of 21 April 1970 that it continues to be the task of Member States to undertake prosecutions and proceedings for the purpose of the system of levies and refunds and to continue to take steps to this end vis-à-vis the parties involved.

It follows from this that the position of the Member States and of their authorities which are parties to the legal proceedings in relation to the reimbursement of Community revenue evaded on sums improperly paid, has not been affected by the consequences of the attribution to the Community of its own resources.

In Joined Cases 178, 179 and 180/73

Reference to the Court of Justice under Article 177 of the EEC Treaty by the Hof van Beroep (Court of Appeal) of Brussels (15th Chamber) for a preliminary ruling in the action pending before that court between

1. THE BELGIAN STATE, acting through the Minister of Economic Affairs

and

2. THE GRAND DUCHY OF LUXEMBOURG, acting through the Ministers of Foreign Affairs, of Foreign Trade, of Agriculture and — to the extent necessary — of Finance,

as 'parties civiles' [2]

1 — Language of the Case: Dutch.

2 — Translator's note: party claiming damages in criminal proceedings.

and

1. PIETER MERTENS and others, including JOSEPH VAN DEN AVENNE and LUCOVICUS JOOSEN (Case 178/73)

2. VICTOR BLOCH (Case 179/73)

3. JOSEPH VAN SLAMBROUCK and others (Case 180/73)

on the interpretation of Regulation No 25 of the Council of 4 April 1962, on the financing of the common agricultural policy (OJ No 30 of 20. 4. 1962, p. 991) and No 729/70 of 21 April 1970, on the financing of the common agricultural policy (OJ L 94, 28. 4. 1970, p. 13) and the Council Decision of 21 April 1970, on the replacement of financial contributions from Member States by the Communities' own resources (OJ L 94, 28. 4. 1970, p. 19),

THE COURT

composed of: R. Lecourt, President, A. M. Donner (Rapporteur) and M. Sørensen, Presidents of Chamber, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh and Lord Mackenzie Stuart, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

I — Facts and procedure

The facts of the case and the written procedure may be summarized as follows:

Upon the application of the public prosecutor and at the request of the Belgian State, represented by the Minister of Finance, the Correctionele Rechtbank of Antwerp, by Judgments

given on 29 June 1970 in Cases joined for reasons of close connection, convicted a number of persons as principals or accomplices on counts of fraudulent exports and imports. The exported products, which in Cases 178 and 179/73 fell under the common organization of the market in cereals, were, under cover of third country certificates and upon payment of third country refunds, in fact transported from Belgium to another Member State of the EEC and thereupon re-imported into Belgium. The Court imposed prison sentences and fines on the accused.

Furthermore, the Court at the request of the Belgian State, represented by the Minister of Economic Affairs, and of the Grand Duchy of Luxembourg, represented by the Ministers of Foreign Affairs, of Foreign Trade, of Agriculture and of Finance (joined as 'parties civiles') under the provisions of Article 3 of the Code d'instruction criminelle (Rules of Criminal Procedure) ordered the parties involved and the bodies who are responsible in civil law, to repay the export refunds illegally obtained and to pay the levies avoided upon importation.

By judgment of 5 October 1972 the Correctionele Rechtbank of Antwerp convicted a number of persons as principals or accomplices on counts of fraudulent imports. The products imported, which in this Case (180/73) came under common organizations of the market, in particular those of beef and pork, were imported into Belgium by means of false declarations with the obvious intention of avoiding the payment of levies. The Court imposed prison sentences and fines on the accused and further ordered them and the corporation responsible in civil law to pay the levies avoided upon importation.

By judgments given on 5 March 1971 (in Case 178/73) and on 28 May 1971, after an application to have the previous judgment set aside, (in Case 179/73), the Hof van Beroep of Brussels, saving certain exceptions, did not find the facts relating to the importations following from these shuttlecock operations proved against the accused.

On 28 February 1973 the Hof Beroep of Brussels confirmed the judgment of 5 October 1972 given by the Correctionele Rechtbank of Antwerp, as regards the criminal aspects (Case 183/73).

As regards the civil actions instituted in these cases, some of the accused *inter alia* opposed the joinder of parties as 'parties civiles' and the legal capacity of parties, on the basis of arguments derived from Community law.

Having regard to these objections, the Hof van Beroep by the same judgments stayed the proceedings in regard to the claim on the part of the 'parties civiles' and referred some questions for a preliminary ruling.

Subsequently, some of the parties in Cases 178 and 180/73 appealed in cassation against the aforementioned judgments of the Hof van Beroep. After the Hof van Cassatie (Court of Cassation) had by judgments of 19 December 1972 (Case 178/73) and 25 September 1973 (Case 180/73) rejected the appeals in cassation, the Hof van Beroep of Brussels by orders of 26 October 1973 (Cases 178 and 179/73) and 31 October 1973 (Case 180/73), respectively registered at the Court of Justice on 30 October 1973 and 6 November 1973, referred the following questions for a preliminary ruling:

'1. Are the provisions of Regulation No 25, of the Council of the European Communities of 4 April 1962 and the provisions modifying the same or carrying it into effect, and especially Article 2 of the said Regulation, particularly having regard to the method of calculation of the contributions of Member States to

the European Agriculture Guidance and Guarantee Fund defined by Article 7 of the said Regulation, whereby a portion of these contributions arises from charges levied by Member States upon imports from third countries, to be interpreted as meaning that as from the coming into effect of Regulation No 25, the Community, if necessary jointly with the Member State concerned:

(a) was the party directly interested and, if applicable, directly injured in connexion with the payment of expenditure incurred and the collection of revenue arising from the common agricultural policy;

(b) in the event of it not being possible generally to answer the first part of this question in the affirmative, ought not the answer nevertheless to be in the affirmative to the (limited) extent that the net imports of each Member State from third countries and therefore the charges imposed are decisive, under the provisions of Article 7 aforementioned, for the computation of the Member States' contribution towards the European Agricultural Guidance and Guarantee Fund, it thus being clearly shown that the Community from the beginning possessed a certain right, at any rate a partial right, to the levies imposed by Member States.

2. Are the provisions of Regulation No 729/70 of the Council of 21 April 1970 and the Decision of the Council of 21 April 1970 relating to the replacement of financial contributions on the part of Member States from the Community's own resources and the provisions for carrying these into effect to be interpreted as meaning that as from the coming into effect of the said provisions:

(a) all the sovereign powers relating to their own revenue and expenditure concerning the common agricultural policy of the Community were transferred from the Member States to the Community, so that (1) the Community alone is henceforth competent to take legal action in relation to the said revenue and expenditure (2) any authority of Member States to assist the Community in the collection or payment thereof can no longer be considered as the Member States' *own* authority (possibly shared with the Community) but as an authority exercised *for and on behalf of* the Community?

(b) if the answer to question (a) above be in the affirmative, does this not then equally apply by reason of the immediate effect of the transfer of sovereign powers referred to in (a), to demands in legal proceedings made after the date of coming into effect of the said provision or pending at that date in relation to facts occurring or rights coming into existence prior thereto?'

Pursuant to Article 20 of the Statute of the Court of Justice of the European Economic Community, Van den Avenne and Joosen (represented by W. van Gerven) the Government of the Kingdom of Belgium (represented by R. Bütztler and P. Goemans in Cases 178 and 179/73 and by de Bruyn and P. Van Eeckhout in Case 180/73) the Government of the Grand Duchy of Luxembourg, (represented by R. Bütztler) and the Commission of the European Communities submitted their written observations.

The Court, upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, by Order of 13 February 1973 decided to join Cases 178,

179 and 180/73 for the purposes of procedure and judgment.

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

II — Written observations submitted under Article 20 of the Statute

The written observations submitted under Article 20 of the EEC Statute of the Court may be summarized as follows:

1. *Characteristics of the regulations on the financing of the agricultural policy*

Bearing in mind that the questions asked are concerned with the interpretation of the regulations on the financing of the agricultural policy, it is appropriate in the first instance to summarize the characteristics of those regulations as they were set out in the different pleadings. The common agricultural policy has successively known three distinct systems of financing.

(a) First stage

During the period from 1 July 1962 to 30 June 1965, it was Regulation No 25 of the Council of 4 April 1962 (OJ 991/62) which governed the financing. For the period from 1 July 1965 to 30 June 1967, this Regulations was replaced by Articles 2 to 6 of Regulation No 130/66 of the Council of 26 July 1966 (OJ No 2965/66).

During this first stage only part of the expenditure of Member States was eligible for the European Agricultural Guidance and Guarantee Fund (hereinafter called 'the Fund'). Regulation No 25 supplies a limitative enumeration. Secondly, their eligibility is subject to strict conditions. Thus, refunds paid by Member States on exports to third countries are not completely eligible but only on the basis of 'the rate of refund in the Member State whose average refund is the lowest' and 'The Net' quantities of exports, that is to say the difference between third country exports and imports for a particular product (Article 3 (1) (a) of Regulation No 25).

Restricted as the financing of refunds by the Fund thus is, it is further restricted to a part of the eligible expenditure, i.e. one-sixth for 1962/1963, two-sixths for 1963/1964, three-sixths for 1964/1965, six-tenths for 1965/1966 and seven-tenths for 1966/1967 (Article 5 (1) of Regulation No 25 and Article 2 of Regulation No 130/66.

Each year, the Council was to fix, in accordance with the budgetary procedure, the resources from which the Fund must cover this expenditure.

During a first stage from 1962 to mid-1965, the revenue of the Fund was calculated for the first part according to the general scale laid down by Article 200 (1) of the EEC Treaty and for the second part in proportion to the net imports from third countries effected by each Member State (Article 7 of Regulation No 25).

Subsequently, the proportion of the contributions that follows the general scale diminishes (100 % for 1962/1963, 90 % for 1963/1964, and 80 % for 1964/1965) and the proportion of contributions based upon the special scale increases (0 % in 1962/1963, 10 % for 1963/1964 and 20 % for 1964/1965). From the middle of 1965 to the middle of 1967 the contributions of the Member States are calculated on the basis of an *ad hoc* global scale.

(b) Second stage, from 1 July 1967 to 31 December 1970

During this period the expenses of Member States eligible for the Fund were calculated on the basis of the *gross* exports to 'third countries' for individual products (Article 8 (1) of Regulation No

130/66). All the refunds paid by the Member States are therefore eligible (Article 7 of the Regulation).

During this period, the contributions of Member States to the Fund were calculated in proportion to the levies by each Member State upon imports from third countries and, if necessary, according to a fixed scale.

(c) Third stage, commencing 1 January 1970

The system now in force involves the direct financing of the agricultural policy by the Community itself (Regulation of the Council of 21 April 1970, (OJ L 94/13) and Council Decision of 21 April 1970 on the replacement of the financial contributions from Member States by the Communities' own resources (OJ No L 94/19). The Community makes the necessary resources available to Member States *a priori* and no longer *a posteriori,* as was the case during the two preceding stages. Besides, the revenue of the Fund is no longer made up by the financial contributions of Member States but by the Communities' own resources arising from *inter alia* agricultural levies. These are collected by the Member States on behalf of the Community, in accordance with national provisions imposed by law, regulations or administration action. (Article 6 of the Council Decision of 21 April 1970).

2. Observations on the first question

(a) The parties *Van Den Avenne* and *Joosen* point out that the acts forming the subject matter of the national proceedings were committed during the years 1965 and 1966, i.e. during the first stage. Nevertheless the national court in its questions rightly included the subsequent stages.

Article 2 of Regulation No 25, referred to in the first question of the reference, already explicitly refers to the definitive stage in these terms: 'Revenues from levies on imports from third countries shall accrue to the Community and shall be used for Community expenditure so that the budget resources of the Community comprise those revenues together with all revenues decided in accordance with the rules of the Treaty . . .'

The programme laid down by this provision was carried out gradually during the transitional period. Thus Article 7 of Regulation No 25 already envisages for the first stage the partial transfer to the Community of levies raised, since the variable contributions are tied to the amounts of the levies raised.

Accordingly one might express the first question as follows: Was the Community during the first stage directly interested in the collection of the levies to an extent where it was a party directly affected in the event of the charges being evaded? If it is difficult to be quite definite on this point, ought one then to consider the Community as a party directly affected to the extent that the net imports to the Member States concerned effectively determined the variable proportion of the contributions to the Fund and hence the transfer of the levies to the Community?

According to the parties Van Den Avenne and Joosen this question ought to be answered in the affirmative. They develop their argument as follows:

(a) It is clear both from the wording and from the position of Article 2 of Regulation No 25 that the Council from the beginning placed the financing of the agricultural policy within a Community perspective. Accordingly one must interpret the following provisions within this context, i.e. that of the Communities' own responsibility for the revenue and expenditure of the Fund;

(b) Such an interpretation is the only one compatible with the agricultural policy as it is envisaged in the Treaty. Even during the transitional period one cannot dissociate the

financing of the common agricultural policy from the aims pursued by means of this policy. Completely to dissociate the system of refunds and levies — financed during the first stage by the Member States — from the agricultural policy would have endangered the Community solution intended to surmount the sharp contrast between the Community interest (the elimination of surpluses of certain products by a system of levies and refunds) and the individual interest of Member States (the reduction of the cost of the agricultural policy) where a common agricultural policy rendered this Community solution necessary. From the beginning of the common agricultural policy the financing of this policy therefore constitutes an important element.

(c) The interest of the Community in charges levied by Member States during the transitional period was so obvious that in reports to the European Parliament doubts were expressed as to the validity of Regulation No 130/66, on the grounds that these charges already constituted the Communities' own resources within the meaning of Article 201 of the Treaty, without the procedure laid down having been followed.

The parties Van Den Avenne and Joosen suggest that the following reply be given to the first question:

'The provisions of Regulation No 25 of the Council of 4 April 1962 on the financing of the common agricultural policy must be interpreted as meaning that as from the coming into effect of the said Regulation the Community was capable of being a party directly injured as regards the recovery of revenue resulting from the common agricultural policy.'

The *Government of the Kingdom of Belgium* and the *Government of the Grand Duchy of Luxembourg* point out that Regulation No 25, and in particular its Articles 2 and 7, do not confer upon the Community any legal interest in regard to the collection of levies during the transitional period. The proportion of levies that is paid by the Member State to the Community is in the nature of a simple contribution — the Member State's own obligation towards the Community. This characteristic was preserved at the time when the ordinary scale laid down by Article 200 of the Treaty was (partially) replaced by a coefficient better adapted to the specific factors of the common agricultural policy. During the period of transition the Fund fulfilled the function of an institution for the purposes of division and clearing. It fulfilled this task by receiving and again distributing the Member States' contributions in accordance with the rules of Regulations Nos 25 and 130/66.

The levies collected during the transitional period could in any case have been transformed into the Communities' own resources — assuming that this transformation gives rise to a right to claim on the part of the Community only if the conditions provided by Article 201 (3) of the Treaty had first been complied with: i.e. a proposal by the Council, acting unanimously, consultation of the Assembly, adoption by the Member States.

The *Government of the French Republic,* maintains that the question of division of authority as between the Community and the Member States in regard to the recovery of amounts which are the subject of fraud in the field of levies or refunds, cannot be resolved on the basis of Article 2 of Regulation No 25. This provision only provides a simple declaration of intent, at that period devoid of any legal consequence.
On the other hand it appears from Article 7 of Regulation No 25 and 11 of Regulation No 130/66 that the revenue of the Fund consists 'of *financial contributions from Member States,*

calculated for the first part according to the scale laid down in Article 200 of the Treaty and for the second part in proportion to net imports from third countries effected by each Member State'.

During this period the charges ought therefore, notwithstanding the fact that their amount was fixed at Community level, to be considered as *national revenue,* the amount of which is taken into consideration on the basis of proportions which varied thereafter, for the purpose of calculations the financial contribution due from each Member State to the Community. The mechanism installed by Regulation No 25 and more generally by all provisions up to 1970 in the field of financing of the common agricultural policy, in the absence of any contrary provisions, left to the States the duty of taking all measures necessary for ensuring that the Community rules were carried out.

As regards the transitional period, one cannot therefore, either from the legal nature of the revenue or from any provision that, in relation to the problem before the Court, affected the sovereign powers of Member States, conclude that only the Community was responsible for putting into operation the procedures for the recovery of amounts that were the subject of fraud in the field of levies.

The *Commission* concludes, from its description of the functioning of the system of financing of the common agricultural policy during the period from 1962 to 1967, that the 'third country levies' collected by each Member State constituted during the period in question the financial resources of Member States. Article 2 of Regulation No 25 ought to be interpreted as referring solely to the 'single market stage'.

The principle enshrined in this Article had to be put into operation in accordance with a procedure laid down by Article 201 of the Treaty and this only happened in 1970 by the Council Decision on the Communities' own resources of 21 April 1970.

To enable one to reply to the question whether frauds in relation to levies had consequences upon the Member States' contributions to the Fund, the different accounting periods involved in the national proceedings must be distinguished. It is obvious that the collection of levies had no consequences upon the functioning of the Fund when a fixed global scale of division was applicable for the purpose of calculating the different Member States' contributions (from mid 1962 to mid 1967).

The special scale of division based upon net imports, which was applied during the accounting periods 1963/1964 and 1964/1965, had neither the result nor the intention of transferring third country levies, collected by Member States having net imports, to the Fund. There was no correlation between the levies collected and the net imports that permitted the assessment of the incidence of the levies collected on the contributions calculated on the basis of the amount of the net imports. Under the regulations in force during the first stage, the third country levies further differed depending on the Member State concerned, to such an extent that any comparison between contributions due from the different Member States is useless.

Accordingly, the levies avoided could only be of interest during the second stage, a period when the contributions of Member States were calculated as to one part in proportion to the levies collected by each Member State upon imports from third countries, and if necessary, as to another part, according to a fixed scale.

As regards the refunds improperly paid during the first period, the Commission points out that in the event the Fund did not suffer any damage, since Belgium and the Grand Duchy of Luxembourg had no net export in the sectors in question. As this expenditure of the Member States was not eligible for a

claim against the Fund, it could not result in expenditure on the part of the Fund.

The Commission underlines that in the final result the frauds committed had consequences that were disadvantageous for the other Member States whose contributions were fixed at too high a level, since the determination of the net quantities imported by Belgium and Luxembourg — a partial basis for the calculation of contributions to the Fund — was not correct.

The same conclusion applies to the second stage: the frauds committed at the time of collection of the levies or of the payment of the refunds did not as a consequence involve any damage to the Fund itself, but rather the Member States the contributions of which had to be reduced in proportion to the levies subsequently to be claimed by the Member States involved.

Nevertheless these inaccuracies are covered by the balancing of accounts of the Fund, brought about by the Commission's Decisions as to the participation of the Fund during the accounting periods in question and for the subsequent notification to Member States of the balance of their account (Article 10 of the Financial Regulation on the European Agricultural Guidance and Guarantee Fund of 5 February 1964 (OJ No 599/64)). This balancing of accounts must be considered final (cf. *Federal German Republic v Commission,* Case 2/71, Rec. 1971, pp. 669 to 677). Besides, Article 12 of Regulation No 283/71 of the Council of 7 February 1972 (OJ L 36/1) expressly provides that Member States are not bound to repay to the Community sums wrongly paid as a result of irregularities or negligence relating to the accounting periods from 1962/1963 to 1966/1967. This situation only results in legal effects at the level of the relationship between the Community and the Member States.

As regards the legal relationship between Member States and the parties involved, the above-mentioned provision contains the following limitation: 'without prejudice to the Member States' obligation to recover sums wrongly paid ...'

According to the Commission the answer to the first question ought to be as follows:

Even in the case where under the provisions of Regulations No 25 and 130/66 on the financing of the common agricultural policy the levies evaded and the refunds wrongly granted may have financial consequences to the prejudice of the Community, the recovery of the levies evaded and the repayment of the refunds wrongly paid are matters for the Member States.

3. On the second question

(a) The parties *Van Den Avenne* and *Joosen* point out that as from 1 January 1971 the total revenue from agricultural levies is entered in the budget of the Communities. It follows from Article 3 (1), third paragraph, of the Council Decision of 21 April 1970 that these levies are from the time of their collection definitely appropriated to the Communities. Although these Community resources are collected by Member States in accordance with national provisions imposed by law, regulation or administrative action, this amounts to no more than 'an authority to collect', as is shown by the last sentence of Article 6 (1) of the above-mentioned Decision.

Under the provisions of Regulation No 729/70, the Community shall henceforth immediately, that is to say as from 1 January 1971 through the agency of the Fund, finance refunds on exports to third countries (Article 1 (2) and Article 2). Whilst no doubt the Member States designate the authorities and bodies which they empower to effect payment of the expenses referred to (Article 4 (1) this amounts to no more than an 'authority to pay' as is shown by Articles 4 (2) and 5 (2).

One must therefore answer the question on the transfer on 1 January 1971 of

sovereign powers in the affirmative, on the basis of Article 201 of the EEC and upon the case law of the Court of Justice.

Article 201 of the Treaty provides a special procedure in order to assure national parliaments of a right to participate in decisions, since a decision in relation to the replacement of the financial contributions of Member States by the Community's own resources would result in taking away from national parliaments their budgetary powers in this respect. As from 1 January 1971, the agricultural levies are entered in the budget of the Communities, instead of those of the Member States and the credits necessary for paying the refunds are levied on the Communities' own resources and put at the disposal of Member States.

The power of obtaining its own resources and of financing by means of these its own expenditure is one of the oldest prerogatives of a sovereign state. The act of renouncing this power in favour of the Community, albeit within certain limits, amounts to a real and important transfer of sovereign powers. The possibility for Member States of transferring their sovereign powers to the Community has been repeatedly confirmed by the Court of Justice, particularly in the judgments in *Van Gend & Loos* of 5 February 1963, Case 26/62, Rec. 1963, p. 1, *Costa v Enel* of 15 July 1964, Case 6/64, Rec. 1964, p. 1141 and *Commission v Council* of 31 March 1971, Case 22/70, Rec. 1971, p. 263.

Having regard to the foregoing it is obvious that the residual power of Member States to assist the Community in collection or payment, no longer constitutes a power held in their own right but an authority exercised *on behalf* of the Community. In the event, it amounts to a delegation of authority, rendered necessary by the fact that the Community has at its disposal only an 'initiating administration' and not an 'enforcement administration', so that it is obviously obliged to call upon national administrations for the purpose of putting into effect the common policy and Community law. On this basis these administrations act as executive organs of the Community.

As regard the question whether it follows from the transfer of powers to the Community that only the Community henceforth has the power of taking action, the parties Van Den Avenne and Joosen refer to Regulation No 283/72 of the Council of 7 February 1972, concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy as well as the setting up of an information system in this field (OJ L 36/1). This Regulation was made under the provisions of Article 8 of Regulation No 729/70. Under this provision the Member States must take the necessary steps in order to prevent and deal with irregularities in connexion with the grant of refunds and must recover sums lost as a result of irregularities or negligence.

Under Articles 5 (1) and 6 (3) of Regulation No 283/72 the institution of judicial or administrative procedures to establish formally that there have been irregularities or negligence, is a matter for the Member States. It is thus clear that it is the Member States which institute the judicial proceedings in connexion with the refunds wrongly paid. Nevertheless, one must bear in mind that the power of instituting proceedings conferred upon the Member States constitutes a power exercised on behalf of the Community, a power complementary to the 'authority to pay' provided by Regulation No 729/70. It is pointed out that the exercise of this right to take proceedings is of a special kind, since it is no longer exercised by virtue of a sovereign power belonging to the Member States, but by virtue of a purely administrative power, conferred upon national administrations as executive organs of the Community. The parties Van Den Avenne and Joosen ask that

the point of view that has been developed might be brought to the notice of the national Court.

As regards the recovery of the levies avoided, the same solution is appropriate. Although Regulation No 2/71 of the Council of 2 January 1971, implementing the Decision of 21 April 1970 on the replacement of the financial contributions of the Member States by the Community's own resources (OJ L 3/1) does not confer upon Member States any power to institute proceedings, it is included in the 'general power to obtain repayment' conferred on Member States by the Council Decision of 21 April 1970.

According to the parties Van Den Avenne and Joosen the said transfer of sovereign powers and the change in legal basis on which Member States are able to institute judicial proceedings in connexion with refunds wrongly paid or of levies evaded, took effect on 1 January 1971, even in relation to proceedings pending at that date and relating to facts that occurred or rights that arose prior thereto.

The result of the transfer of sovereign powers of Member States to the Community was that as from the transfer the exercise of all rights and duties relating to the powers in question vis-à-vis the citizens belongs solely to the Community. Thus the right to collect taxes (levies) and the right to grant aids (refunds) are powers which since 1 January 1971 belong to the Community, insofar as the recovery of levies due and the recovery of refunds wrongly paid prior thereto are concerned. The transfer of sovereign powers, resulting in a complete break with the past, means in the present case that the legal proceedings instituted by Member States before 1 January 1971 in connexion with levies or refunds must be amended or alternatively, if this is provided by national law, that they must henceforth be pursued by the Community even if the latter acts through the agency of the same Member States. The latter would however, in this case, intervene on a different basis from that on which they instituted proceedings before 1 January 1971.

As against the theory thus developed, one might quote Article 12 of Regulation No 283/72 pursuant to which irregularities and negligence relating to the accounting periods from 1962/1963 to 1966/1967 shall not entail repayment by Member States to the Community. This provision, dealing only with the destination of sums recovered, in no way affects the general principle relating to the respective legal powers of Member States and of the Community in questions of recovery.

Finally, one ought not to attach much importance to the apparent derogation from the abovementioned principle in Judgment 22/70. This derogation only refers to negotiations with third countries: when these third countries with good reason rely upon the rules of competence in force, one cannot then confront them with a new system of competence, set up during the negotiations, without running the risk of these negotiations collapsing. In this case there are on the contrary no third parties within the meaning of the aforementioned judgment whose legitimate reliance upon prior rules of competence ought, as in the aforementioned judgment, to be guaranteed.

Having regard to the foregoing, the parties Van Den Avenne and Joosen suggest that the following reply be given to the second question:

(a) The provisions of the Council Decision of 21 April 1970 and those of Regulation No 729/70, as well as the provisions for carrying these into effect, must be interpreted as meaning that as from the coming into effect of the said Decision and the said Regulation, that is to say as from 1 January 1971, all sovereign powers in the matter of collection of agricultural levies and the financing of agricultural refunds were

transferred by each Member State to the Community. It follows from this that the rights granted to Member States in the matter of recovery of levies and the grant of refunds are as from 1 January 1971 no longer their own, but delegated powers exercised for and on behalf of the Community.

The same applies in regard to the ability to bring proceedings for the recovery of refunds improperly paid, a power recognized by Regulation No 283/72 as belonging to Member States. This power is likewise a delegated power exercised by Member States for and on account of the Community.

(b) By reason of the immediate and absolute effect of the transfer of sovereign powers, this transfer and the legal consequences enumerated above which flow from it, also affect legal proceedings instituted by Member States before the transfer of sovereign powers that are still pending at the moment of this transfer. It is a matter for the national court to draw therefrom all appropriate conclusions for resolving the dispute.

(b) The *Government of the Belgian State* and the *Government of the Grand Duchy of Luxembourg* maintain in the first place that the Council Decision of 21 April 1970 and Regulation No 729/70 do not involve a transfer of sovereign powers, even for the recovery of levies and the grant of refunds. Although this Regulation and this Decision impose a duty upon Member States to take certain steps, taking these is a matter for them in their own right, so that there is no direct legal link between the Community and the parties before the court. This interpretation is supported by the Council's opposition to the proposal for a Regulation for financing the common agricultural policy, which was submitted by the Commission to the Council on 16 July 1969 (OJ C 123/66, p. 27). Article 4 of this draft Regulation provided that the authorities or bodies to be designated by the Member States should effect the payments on behalf of the Community.

At the present time it is in the name of the Member State that refunds are paid and, by analogy, levies are collected.

One cannot accept a thesis that the delegation by the Community to the Member State has created a direct legal link between the Community and the parties before the court.

Assuming such a delegation were legally possible, it would have to be the result of a Community legal provision and practical measures would have to be enacted for carrying it into effect. Nothing has been done in this respect. Nor do the legal provisions provide for a legal transfer, either generally or *ad hoc*, of an existing creditor's right. The power of enforcement against individuals still belongs entirely to the Member States, even though the latter are bound to account in this respect to the Community. Moreover, if there was a delegation, the legal protection of the individual would no longer be completely assured: the refusal by national authorities to pay a refund would, *qua* Community legal act, lie outside the jurisdiction of the national administrative judge. Yet, an action by an individual before the Court of Justice seems, in the absence of a decision by the Council or the Commission, to be out of the question.

The fact that 10 % of the levies are granted to the Member State does not allow us to consider the system in force any differently in law; in practice this measure amounts to an appropriate compensation to the Member State in respect of its intervention in the matter. It is thus clear that even at the final stage, the Council did not accept that there was a direct financial responsibility on the part of the Community.

Assuming that the system set up by the Decision of 21 April 1970 and by

Regulation No 729/70 creates a direct legal link between the Community and the nationals of the Member States, these provisions have no retrospective effect in regard to an existing legal situation which arises exclusively from facts that occurred well before the coming into force of the new legislative provisions. Actions arising from an unjustified payment of refunds and from default in payment of levies evaded during the first two stages, when the Fund was financed by purely state contributions, must not be pursued in accordance with the rules applicable to the final stage. The retrospective application of Article 201 would be contrary to the procedure which provides for the transition to the own-resources system and consequently infringes this Article. This results in an infringement of legal certainty, a rule of law that must be respected in applying the Treaty.

Besides, by virtue of Regulation No 25, Member States are entitled to treat levies and refunds effected during the first three years of the transitional period as belonging to them, bearing in mind that this Regulation draws an explicit distinction between the period of transition and the final stage. Now, the retrospective application of Regulation No 729/70 would deprive the Member States involved of the right to pursue actions arising during the preceding period, a right which was definitely recognized as theirs by Regulation No 25.

The Belgian and Luxembourg Governments suggest the following answer to the second question:

Regulation No 729/70 and the Council Decision of the same date compulsorily lay down the nature of the steps to the taken by Member States, which however, even at the final stage of the financing of the common agricultural policy, are carried out by means of acts on the part of the Member States that are of a kind not creating any direct legal link between the Community and the parties; the legal protection of the individual, just like the exercise of the power of enforcement, continue to be governed by the legislation of the Member States.

As a subsidiary point

Assuming that Regulation No 729/70 and the Council Decision of 21 April 1970 involve a transfer of sovereign powers to the Community that creates a direct legal link between the Community and importers or exporters insofar as the recovery of levies and the payment of refunds are concerned, this transfer does not apply to the exercise — subsequent to the coming into force of the aforementioned Regulation — of rights to recover debts that arose prior thereto, that is to say during the course of the transitional period of the common agricultural policy. On the one hand Article 201 of the EEC Treaty does not allow the Community to act in disposing of own resources until approval has been given, in accordance with the constitutional requirements of each Member State, to the replacement of contributions by such resources, and on the other hand legal certainty would be placed in jeopardy if the Community exercised rights of recovery definitely vested in the States, for the Community would in that case be collecting sums which, on the basis of rules relating to the transitional period and its financing, belong to the States.

The *French Government* maintains that it follows from the combined provisions of the Council Decision of 21 April 1970 and of Regulation No 2/71 that actions relating to the imposition upon individuals of the aforementioned taxes and levies must be decided, applying Community law, by the national authorities and in manner provided by the law of the Member States.

In the case of frauds involving agricultural levies, the judicial procedures for the purpose of effecting a new 'determination' of these resources and to collect the duties evaded can therefore, on the basis of the aforementioned

principles, only be undertaken by the Member States.

As regards the recovery of refunds improperly granted the French Government, basing itself upon the provisions of Article 8 (1) of Regulation No 729/70 and Article 6 (3) of Regulation No 283/72, asserts that only the Member States have the power of taking the necessary steps for recovering from individuals the sums fraudulently obtained. The obligation upon Member States to recover refunds improperly granted is furthermore reinforced on the one hand by the financial responsibility of the State at fault (Article 8 (2) of Regulation No 729/70) and on the other hand by the procedure provided under Article 169 of the EEC Treaty.

The *Commission* is of the opinion that equally under the own-resources system, i.e. after 1 January 1971, it is in the first place a matter for the Member States themselves to take legal steps for the recovery of the amounts involved.

In support of its theory, the Commission relies upon the system instituted by the Council Decision of 21 April 1970 and the wording of the provisions relating thereto. Generally speaking, the collection of own resources does not give rise to direct legal links between the Community and private individuals: under Article 6 (1) of the aforementioned Decision the Community resources are to be collected by the Member States in accordance with national provisions imposed by law, regulation or administrative action. This general principle was put into operation by Regulation No 2/71 and in particular Articles 1 and 2 (1) thereof. Besides, the Court has already confirmed it by its judgment of 25 October 1972, *Haegeman v Commission*, Case 96/71, Rec. 1972, p. 1005.

What applies to resources, applies equally to expenditure of the Community, such as refunds within the framework of the agricultural policy. The Member States designate the authorities and bodies which they empower to effect the expenditure referred to in Articles 2 and 3 of Regulation No 729/70 and, in accordance with national provisions laid down by law, regulation or administrative action, take the necessary steps to . . . recover sums lost as a result of irregularities or negligence (Regulation No 729/70, Articles 4 (1), 7 and 8 (1)).

Even if the EEC Treaty had afforded a sufficient legal basis one would nevertheless in the first place have refrained from entrusting to the Community the duty of taking legal proceedings against individuals for the purpose of recovering Community resources and amounts improperly paid. For one thing, the staff at present available to the Community is too limited to shoulder so complicated and extensive and administrative task and besides, Member States are in this respect in a better position to take steps againts individuals.

Furthermore, this solution also corresponds to the way in which within the Community framework the tasks have been generally divided up to now, the Community institutions acting as 'initiating administrations' and the bodies and authorities of the Member States as 'enforcement administrations'. In many cases the concrete application of Community Regulations is entrusted to the Member States which then become the organs of 'indirect Community administration' without there being any need for making a distinction when, as in the present case, financial obligations of individuals are involved.

The Commission considers that the institutional problems raised by the questions of the Court of Appeal do not require a specific answer to enable the national proceedings to be resolved: whether one finds in favour of the thesis of delegation rather than that of division of powers, in favour of joint action rather than in favour of intervention on

behalf of or in the interest of the Community, is of minor importance in this respect. At any rate, the wording of the applicable Community provisions involves with sufficient clarity an obligation for Member States to take legal action and furthermore provides them with the legal basis for so doing.

In the Commission's view one might reply to the second question as follows:

Articles 1, 2 and 13 of Regulation No 2/71 of the Council, implementing the Decision of 21 April 1970, imply that in the first place it is for the competent authorities and bodies of the Member States to take legal action in order to recover levies evaded.

Under Article 8 of Regulation No 729/70 of the Council on the financing of the common agricultural policy it is in the first place for the competent authorities and bodies of the Member States to take legal action for the purpose of recovering export refunds improperly paid.

The oral observations of the parties Van Den Avenne and Joosen, of the Governments of Belgium and the Grand Duchy of Luxembourg and of the Commission were made at the hearing of 7 March 1974.

The Advocate-General delivered his opinion on 2 April 1974.

Grounds of judgment

1 By orders of 26 October 1973 (Cases 178/73 and 179/73) and 31 October 1973 (Case 180/73), respectively filed with the Registry on 30 October and 6 November 1973, the Hof van Beroep of Brussels referred under Article 177 of the Treaty two identical questions to the Court, concerning the interpretation of the provisions of Regulation No 25 of the Council of 4 April 1962 on the financing of the common agricultural policy (OJ No 30/62, p. 991) and the provisions of Regulation No EEC 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ L 94/13) and the Council Decision of the same date, on the replacement of the financial contributions of Member States by the Communities' own resources (OJ L 94/19);

2 It is clear from the Court record that the questions are submitted in the context of criminal proceedings based on fraud in connection with the exportation and importation of products falling within the common organizations of the market, in which the Belgian State and the Grand Duchy of Luxembourg applied to be joined as 'parties civiles' for the purpose of asking the Court to order the parties involved and the bodies responsible in civil law, to reimburse the export refunds illegaly obtained and to pay the import levies avoided;

3 Some of the accused having alleged that by reason of the establishment of a common agricultural policy and in particular the adoption of rules for its

financing, it is no longer the Member States but the European Economic Community which is involved in the collection of the levies and the grant of refunds, the national court considered a decision on this point to be necessary to enable it to give judgment.

4 The three series of questions being identical it is appropriate to reply thereto by a single judgment;

5 Since the purpose of these questions is to clarify the possible procedural consequences of the attribution to the Community of its own resources — the first one relating to the position of Community law during the transitional period, the second to that in force during the single market stage — it is right to examine first this latter question;

6 This question asks whether Regulation No 729/70 and the Council Decision of the same date, as well as the provisions for carrying these into effect, must be understood as meaning that as from their coming into force all sovereign powers bearing upon own revenue and expenditure relating to the common agricultural policy were transferred to the Member States of the Community, so that (1) the Community alone is henceforth able to take legal proceedings in relation to this revenue and expenditure and (2) any power of Member States to assist the Community in collection or payment must henceforth be considered as no longer a power belonging to the Member State (possibly shared with the Community) but as an authority exercised on behalf of the Community;

7 In the event of an affirmative answer being given to this question, it is further asked whether such a reply equally applies, by reason of the direct effect of the transfer of sovereign powers, as regards proceedings instituted after the coming into force of the aforementioned provisions or pending at that date in relation to facts that occurred or rights that originated prior thereto;

8 Article 2 of Regulation No 25/62 provides that at the final stage of the single market the revenue arising from levies collected on imports of agricultural products from third countries 'shall accrue to the Community and shall be used for Community expenditure', the Council being obliged at the appropriate time to initiate the procedure laid down in Article 201 of the Treaty in order to implement these provisions;

9 Likewise, this Article 2 provides that at the single market stage the refunds on exports of agricultural products to third countries shall be financed by the European Agricultural Guidance and Guarantee Fund.

10 In carrying out both this provision and Articles 201 to 209 of the Treaty, Regulation No 729/70 and the Decision of 21 April 1970 provided rules for the financing of export refunds by the Fund, and for the total revenue from agricultural levies being entered in the budget of the Communities.

11 Whilst the provisions referred to provide for this entry in the budget of the Communities of the proceeds of the agricultural levies and of the financing of export refunds to third countries as own resources and expenditure, they do not say anything precise as to any powers of the Community authorities to proceed to the collection of these levies and to the grant or payment of these refunds.

12 Article 4 of Regulation No 729/70 provides that Member States shall designate the authorities and bodies which they shall empower to effect the expenditure in question and shall communicate to the Commission particularly 'the administrative and accounting conditions in accordance with which payments are made relating to the implementation of Community rules within the framework of the common organization of agricultural markets'.

13 This Article further provides that the Commission shall make available to Member States the necessary credits so that the designated authorities and bodies may, 'in accordance with Community rules and national legislation' make the payments referred to.

14 Article 8 of the Regulation provides that the Member States 'in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to ... prevent and deal with irregularities; recover sums lost as a result of irregularities or negligence' and that 'in the absence of total recovery, the financial consequences ... shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States'.

15 For its part, the Decision of 21 April 1970 provides by Article 6 thereof that the Community resources in question shall be collected by the Member States 'in accordance with national provisions imposed by law, regulation or administrative action, which shall, where necessary, be amended for that purpose', Member States making these resources available to the Commission.

16 It follows from these provisions that it continues to be the task of the Member States to undertake prosecutions and proceedings for the purpose of the system of levies and refunds and to continue to take steps to this end vis-à-vis the parties involved.

17 It follows from this that the position of the Member States and of their authorities which are parties to the legal proceedings in relation to the reimbursement of Community revenue evaded sums improperly paid, has not been affected by the consequences of the attribution to the Community of its own resources.

18 Part (b) of the question, having been asked only in the event of an affirmative answer to part (a), has therefore become pointless.

19 The first question has likewise become pointless since a negative answer given to the second question necessarily involves a similar answer being given to the first.

Costs

20 The costs incurred by the Commission of the European Communities and by the French Government, which have submitted observations to the Court, are not recoverable and as these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the Hof van Beroep of Brussels, the decision as to costs is a matter for that Court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hof van Beroep of Brussels, by orders of 26 October 1973 and 31 October 1973, hereby rules:

The position of the Member States and of their national authorities which are parties to litigation in relation to the reimbursement of Community revenue avoided or of sums improperly paid has not been affected by the consequences of the attribution to the Community of own resources.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 4 April 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 2 APRIL 1974 [1]

Mr President,
Members of the Court,

I can be quite short in describing the facts underlying the three criminal cases referred by the Court of Appeal of Brussels, which really only involved one crucial legal point and which were therefore rightly joined.

Several persons were accused in the proceedings of having understated levies to the Administration of Taxes and of having obtained export refunds by fraud. In Cases 178 and 179/73 cereal products allegedly exported to third countries were in fact exported by the accused to Member States and reimported into Belgium, as a result of which they had wrongfully obtained the payment of export refunds. In Case 180/73 we are concerned with the importation of beef into Belgium, in relation to which incorrect returns had been made so as to avoid the payment of levies.

The Belgian and Luxembourg States as part of the criminal proceedings made claims for the repayment of export refunds and for the payment of levies, due to them as a result of the conduct alleged against the accused; this they are entitled to do under Article 3 of the Belgian code of criminal procedure.

The present reference is concerned with the admissibility of these claims. The Court of Appeal of Brussels — doubtless

1 — Translated from the German.