OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 12 February 1985 *

Mr President,
Members of the Court,

A. The request for a preliminary ruling which falls for the Court's consideration today arises out of proceedings instituted in Belgium against a retail butcher. The accused was prosecuted by the Belgian Public Prosecutor for having, in 1981, charged consumer prices which were not in conformity with the provisions of the Ministerial Decree of 27 March 1975 (as amended by the Ministerial Decree of 5 January 1980). At first instance, before the Tribunal correctionnel [Criminal Court], the accused was convicted. He appealed against that conviction to the Cour d'appel [Court of Appeal], Brussels. Before the Belgian courts the accused contended in his defence that the Ministerial Decree of 27 march 1975 was incompatible with Regulation No 121/67/EEC of the Council of 13 June 1967 on the common organization of the market in pigmeat and with Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal.

In order to rule on that contention the Cour d'appel requested the Court of Justice to give a preliminary ruling on the following question:

'In the retail marketing of pigmeat and beef and veal, is a standard assessment by the national legislature of marketing and import costs compatible with Community Regulations Nos 121/76 of 13 June 1967 and 805/68 of 27 June 1968 where those costs incorporate the maximum profit margin, that is to say the retailer's net profit?'

* Translated from the German.

Since the Court is familiar with the Belgian legislation from the two previous cases, [1] [2] I need only describe it briefly.

The consumer prices charged by retail butchers for beef, veal and pigmeat must not exceed the average weighted purchase price of the preceding four weeks plus a maximum gross profit margin of BFR 31 per kilogram and value-added tax. The resulting prices must be displayed in the sale room and entered in a control book. Once established, the prices cannot be increased until a further four weeks have passed. Increases in the purchase prices which occur in the meantime cannot therefore be passed on to the consumers immediately, but only after the expiry of the above-mentioned period, and this may lead to a reduction in the gross profit margin.

The Cour d'appel rightly points out that national provisions of that type may come into conflict with Community law in two ways:

(1) The national price legislation may be incompatible with the pricing rules of the common organization of the market.

1 — Judgment of 29 June 1978 in Case 154/77, *Procureur du Roi* v *Dechmann* [1978] ECR 1573.

2 — Judgment of 17 January 1980 in Joined Cases 95 and 96/79, *Procureur du Roi* v *C. Kefer and L. Delmelle* [1980] ECR 103.

(2) Or again a profit margin which is set too low may affect trade within the Community.

B. 1. The relationship between Community and national rules on prices

In proceedings instituted under Article 177 of the EEC Treaty the Court cannot rule on the compatibility of national legal rules with the provisions of Community law. It may, however, provide the national court with all the criteria for the interpretation of Comunity law which will enable that court to make a determination on the compatibility of such rules with the relevant Community provisions. The question referred to the Court by the Cour d'appel, Brussels, is therefore to be construed as seeking to ascertain whether and how far Regulation (EEC) No 2759/75 of the Council of 29 October 1975 (which replaced Regulation No 121/67 of the Council of 13 June 1967) on the common organization of the market in pigmeat, and Regulation No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal leave Member States the power to regulate consumer prices in those markets by national rules. In particular it is necessary to ascertain which costs may be incorporated in the standard gross profit margin fixed by the Ministerial Decree of 27 March 1975.

The Court has already delivered several judgments concerning the pricing rules of the organizations of the market in pigmeat and beef and veal (Case 154/77, [1] Case 223/78, [3] Joined Cases 95 and 96/79 [2]). Those organizations are intended to establish both in the market in pigmeat and in the market in beef and veal a single market for the Community under a common administration. In order to achieve those single markets, a system of rules and a framework for organization were established in which fundamental importance was attributed to a 'price system' applicable to the production and wholesale stages. Moreover, according to a consistent line of decisions of the Court (Case 31/74; [4] Case 65/75; [5] Joined Cases 88 to 90/75; [6] Case 154/77; [1] Case 223/78; [3] Case 5/79; [7] Joined Cases 16 to 20/79; [8] Joined Cases 95 and 96/79 [2]) the Court has stressed that in sectors covered by a common organization of the market, and *a fortiori* when that organization is based on a common price system, Member States may no longer adopt unilaterally national provisions affecting the machinery of price formation as established under the common organization. According to those decisions, Member States are still free to take appropriate measures relating to price formation at the retail and consumer stages where the Community rules on prices apply only to the production and

1 — Judgment of 29 June 1978 in Case 154/77, *Procureur du Roi* v *Dechmann* [1978] ECR 1573.

2 — Judgment of 17 January 1980 in Joined Cases 95 and 96/79, *Procureur du Roi* v *C. Kefer and L. Delmelle* [1980] ECR 103.

3 — Judgment of 12 July 1979 in Case 223/78, Criminal proceedings against *Adriano Grosoli*, [1979] ECR 2621.

4 — Judgment of 23 January 1975 in Case 31/74 *Filippo Galli* [1975] ECR 47.

5 — Judgment of 29 February 1976 in Case 65/75 *Riccardo Tasca* [1976] ECR 291.

6 — Judgment of 26 February 1976 in Joined Cases 88 to 90/75, *Società SADAM and Others* v *Comitato Interministeriale dei Prezzi and Others* [1976] ECR 323.

7 — Judgment of 18 October 1979 in Case 5/79 *Procureur Général* v *Hans Buys, Han Pesch, Yves Dullieux and Denkavit France Sàrl* [1979] ECR 3203.

8 — Judgment of 6 November 1979 in Joined Cases 16 to 20/79 *Openbaar Ministerie* v *Joseph Danis and Others* [1979] ECR 3327.

wholesale stages, provided that the national rules on prices do not jeopardize the aims or functioning of the common organization of the market in question, in particular its price system.

In its judgment of 17 January 1980 (Joined Cases 95 and 96/79 [2] the Court held that the above-mentioned organizations of the markets did not prohibit the unilateral fixing by a Member State of a maximum gross profit margin for the retail sale of pigmeat or beef and veal which was calculated essentially on the basis of prices charged at the previous marketing stages and which varied according to those prices, provided that the marketing and import costs actually borne by the retailer at the supply stage and the stage of sale to consumers were added to the purchase prices used in the calculation of the profit margin.

The parties who have submitted observations in these proceedings all base their arguments on the above-mentioned decisions of the Court. However, the conclusions which they reach differ in certain respects.

In the view of the *accused* in the main proceedings, the standard gross profit margin covers both the marketing and import costs incurred by the retailer and his net profit margin. Since it is not possible to determine what proportion of the retailer's gross profit margin is deemed to cover the marketing and import costs and what proportion represents the retailer's net profit, there is always a risk for the retailer that his net profit margin may be reduced to nil or may even become negative as a result of the marketing and import costs which he has actually incurred. With a view to averting that risk he proposes that the Court should reply to the question submitted by the Cour d'appel in the following terms: under the Community regulations in question all marketing and import costs actually borne by the retailer both at the supply stage and at the stage of sale to the consumer must be taken into account. That means that the national legislature can no longer fix a standard rate for those marketing and import costs.

The *Belgian Government* considers that the national court misinterprets the national legislation in question. Costs arising from the importation of beef, veal and pigmeat are regarded as a component of the purchase price and, as such, may be passed on in their entirety by the butcher in his retail prices. That is clear from Instruction No 223 to the officials of the Inspection générale économique [General Economic Inspectorate]. Consequently, the import costs — and the other supply costs — are not assessed at a standard rate, since they are not covered by the maximum gross profit margin. Thus the Belgian Government concludes that it is not incompatible with Community law for a Member State to fix unilaterally a maximum gross profit margin for beef, veal and pigmeat calculated as an absolute value on the basis of the prices charged at the previous marketing stages and which varies according to those prices, to which are added all the *purchasing costs* actually borne by the retailer including the import costs, provided that the *gross profit margin* is fixed at a level sufficient to cover the *overheads* and the marketing costs of

2 — Judgment of 17 January 1980 in Joined Cases 95 and 96/79, *Procureur du Roi* v *C. Kefer and L. Delmelle* [1980] ECR 103.

retailers in general, to guarantee them a fair profit, and to avoid any impediment to trade within the Community.

The *Commission* considers that the Cour d'appel's question is intended to establish whether the Community rules prohibit the incorporation in a maximum gross profit margin for the retail sale of beef, veal and pigmeat not only the retailer's net profit but also a standard assessment of the marketing and import costs. The Commission points out that in the case of prices at the retail stage, a stage which is not covered by the common organizations of those markets, the fixing of a retailer's profit margin is, according to the case-law of the Court, in principle not liable to jeopardize the aims of that organization, provided that certain conditions are met.

In the first place the amount of the margin must allow the retailer a fair remuneration for his activity. It is then necessary to consider what factors were taken into account in order to calculate the margin.

The Commission considers that import costs should not be incorporated in the maximum gross profit margin, because otherwise the importation of products from other Member States would be made more difficult or even impossible, since the retailer's profit would be reduced by the amount of the import costs. That would be contrary to Article 30 of the EEC Treaty. On the other hand it is clear that the maximum gross profit margin may include, in addition to the retailer's profit, the costs incurred at the stage of sale to the consumer, provided that the level of the margin is fixed so as to guarantee a fair remuneration.

In conclusion the Commission proposes that the national court's question should be answered to the effect that the organizations of the markets in question do not prohibit the unilateral fixing by a Member State of a maximum gross profit margin, expressed in a fixed amount, for the retail sale of beef, veal or pigmeat, calculated essentially on the basis of the prices charged at the previous marketing stages, to which are added the import costs actually borne by the retailer, provided that the margin is fixed at a level which is capable of guaranteeing, in general, a fair remuneration for the retailer's activities and provided always that the margin either incorporates only the retailer's profit and the costs corresponding to the stage of the sale to the consumer, or, 'where it incorporates a part of the marketing costs connected with the stage of the supply to the retailer, is fixed at a level at which it covers all the costs of that type actually borne by the retailer.'

Nothing has emerged either in the written or the oral procedure in this case which would justify a change in the Court's fundamental position. In this instance I therefore propose that the Court should in substance follow the decision of 17 January 1980. At most, it may be asked perhaps what additional specific indications can be given to the national court. In my view the Cour d'appel would like to know how the marketing and import costs are to be classified. Are they part of the purchase price or are they to be included in the maximum gross profit margin? If the latter is the case, the amount which is supposed to guarantee the retailer a fair remuneration for his activity would be reduced.

I consider that in its judgment of 17 January 1980 [2] which I have already cited several times, the Court provided a clear answer to that question. It held that it is necessary to start with prices charged at the previous marketing stages, increase these by the marketing and import costs actually incurred and only then calculate the profit margin. In my view that is quite clear from the operative part of the judgment. Consequently, the answer which I shall propose to the Court at the end of my Opinion essentially follows the judgment of 17 January 1980. I can see no reason for departing from established case-law by adopting the Belgian Government's proposal or the alternative proposal put forward by the Commission, which would incorporate in any event the marketing costs in the standard gross profit margin, provided that that margin is fixed at such a level that it covers all the costs actually borne by the retailer.

2. I turn now to the question whether national price rules such as those in this case may be regarded as measures having an effect equivalent to quantitative restrictions. The Cour d'appel takes the view that the Belgian Ministerial Decree of 27 March 1975 cannot be applied if it is established that its provisions impede trade within the Community inasmuch as they do not guarantee *all* retailers a fair return for their activity.

That idea seems to be based on paragraph 10 of the decision in the judgment of 17 January 1980. [2] In that paragraph the Court stated that the price system of the common organization of the market could be affected where the gross profit margin itself was fixed at a level which, taking into account the detailed rules for the calculation of purchase prices, was not capable of ensuring that the retailer obtained fair remuneration for his activity. A gross profit margin which did not fulfil those conditions could affect the price mechanism of the common organization of the markets at the earlier marketing stages or affect intra-Community trade by bringing about an appreciable reduction in imports. I would summarize those statements in simplified form by saying that there may be situations in which the retailer is 'caught' between two price systems: on the one hand, the Community system of minimum prices at the wholesale stage and, on the other, the national system of maximum prices at the retail stage. If the margin were confined within too narrow limits, it would not be sufficient to cover all the retailer's costs and to ensure him remuneration for his activity. Such a margin could in fact freeze maximum retail selling prices and therefore constitute a measure 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' (Case 8/74 [9]). That extreme case was envisaged by the Belgian Government itself (however, the accused in the main proceedings and the Commission do not discuss the question). If the margin is fixed too low there is a danger that Belgian retail butchers would discontinue sales of beef, veal and pigmeat, and sell other types of meat. That could lead to a decrease in

2 — Judgment of 17 January 1980 in Joined Cases 95 and 96/79, *Procureur du Roi* v *C. Kefer and L. Delmelle* [1980] ECR 103.

9 — Judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837.

imports of beef, veal and pigmeat into Belgium and an increase in exports of those types of meat from Belgium.

I do not consider that sufficient information is available to the Court for it to adopt a position on that matter. It is for the national court to decide whether the standard margin is too low. The statistics before the Court show only that from 1976 to 1981 the margin has increased by about 40%, whilst the consumer prices in Belgium have increased by about 25%. Nor does consumer behaviour provide any clear indication since, although in that period the consumption of beef and veal (per head of population) has decreased by about 10%, that of pigmeat has increased by 11%. On the other hand, the increase in the consumption of other types of meat in that period is slightly higher than the increase in the consumption of beef, veal and pigmeat together.

The Court has been provided with no statistics regarding imports and exports.

I do not think it is possible to construct from the figures on the evolution of prices and meat consumption the trade patterns which would exist if the Belgian rules on prices were not in force. Whilst it is true that the Belgian Government hints that if the margin were fixed too low a situation could arise in which it appeared no longer worthwhile for Belgian retail butchers to sell beef, veal and pigmeat, it may in any event be assumed that a low margin can stimulate the consumption of those types of meat so long as they are still offered for sale by the retail butchers. I therefore propose to answer that whole question in purely general terms and to leave it to the national court to ascertain and to appraise the specific circumstances of the case in point.

3. I would like to make one more brief closing remark.

In the written procedure and at the hearing some importance was attached to Instruction No 223 of 21 December 1979 addressed to the officials of the Inspection générale économique. The Belgian Government submitted that that internal instruction ensured that the Ministerial Decree of 27 March 1975 was for the most part applied in conformity with Community law.

That internal instruction is intended to ensure that the Ministerial Decree is applied uniformly by the officials of the Economic Inspectorate. As an internal instruction it is clearly binding on the officials of the inspectorate. However, it is irrelevant for the criminal prosecution authorities and the courts since they must concern themselves only with the text of the Ministerial Decree of 27 March 1975, which is extremely vague. Furthermore, the Belgian Government's submission that Instruction No 223 in practice prevents the institution of criminal proceedings does not entirely convince me. The best proof that the instruction is ineffective in that respect lies in these proceedings. The instruction did not prevent the accused from being convicted at first instance. It was not until the matter reached the appeal court that it was considered necessary to refer any doubts to the Court of Justice.

C. Finally I propose that in reply to the questions submitted by the Cour d'appel the Court should state as follows:

The unilateral fixing by a Member State of a standard maximum gross profit margin for the retail sale of beef, veal or pigmeat is compatible with Regulation No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal and Regulation No 2759/75 of the Council of 29 October 1975 on the common organization of the market in pigmeat only where it is guaranteed that:

(1) That margin is essentially calculated on the basis of the prices charged at the earlier marketing stages and the retail prices vary in accordance with those prices;

(2) The import and marketing costs actually borne by the retailer at the supply and consumer stages are added to the purchase prices used to calculate the margin;

(3) The margin is set at a level which does not impede trade in beef, veal and pigmeat within the Community.