OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 1 JUNE 1978 [1]

Mr President,
Members of the Court,

The Tribunal de Première Instance (Chambre Correctionnelle) (Court of First Instance (Criminal Chamber)), Neufchâteau, before giving judgment in the criminal proceedings before it against Mr Deckmann or Dechmann, the managing partner of a private limited company of the same name and a retail butcher whose premises are situated at Bouillon, has referred a question to this Court for a preliminary ruling on the compatibility of rules on maximum prices unilaterally adopted by the Belgian Government and the fixing of profit margins by Arrêté Ministériel (Ministerial Order) with the provisions of Community agricultural law, in particular those provisions concerning the organization of the market in pigmeat.

In answer to the question put to him by the Court, the defendant stated that the company of which he is the manager also has as one of its objects trade in "jambons d'Ardennes" (a kind of ham). The company obtains all its supplies of salt provisions, on the hoof or as carcases, in Belgium, and sells "almost exclusively" through other channels than the butcher's shop belonging to it. By contrast, for the needs of that shop, the butcher buys wholesale, in particular on the neighbouring French market.

As is usual in such a field, in order to enable the national court to protect the rights of those concerned, it will be necessary to compare the Community rules with the national rules. I shall begin with a short statement of the Belgian rules which gave rise to the dispute in the main action.

I — The Law of 30 July 1971 on economic regulation and prices, amending the Arrêté-Loi of 22 July 1945 concerning prevention of infringements of rules on provisioning the country, enables the minister responsible for economic affairs both to fix maximum prices for all products and foodstuffs, including animals, and to "fix the limit of the *profit* to be made by any vendor or intermediary".

As regards *retail sale* of beef and veal and pigmeat, an Arrêté Ministériel of 27 March 1975, which was supplemented subsequently and is in any case applicable to the facts of this case, made use of that power by fixing an identical *profit* margin for both categories of meat.

That Arrêté is not the first measure adopted in Belgium concerning prices of pigmeat to the consumer: it is one of a series of provisions of which it is merely a continuation even though it alters and strengthens the price system.

Of the two charges brought against Mr Dechmann, only the second is of interest to this Court. That charge is based on the allegation that the defendant failed to observe the selling prices to the consumer for pigmeat as laid down by the provisions of the abovementioned Arrêté Ministériel.

The relevant provisions of that order are the following:

Article 2:

"The selling prices of pigmeat to the consumer, inclusive of value-added tax, charged by retailer butchers . . . may not exceed the sum of the weighted average purchase price as increased by a maximum profit margin of Bfr 22 and by value-added tax calculated in accordance with Article 3."

1 — Translated from the French.

Under Article 3 (2) and (3),

(1) the profit margin is defined as being the weighted average of the differences established by type of purchase between, on the one hand, the weighted average selling price not inclusive of value-added tax and, on the other hand, the weighted average purchase price not inclusive of value-added tax;

(2) the weighted average selling price is determined, by type of purchase, by taking the product of the multiplication of the selling price of each piece by the figure relating to each cut laid down in the annexes to the Arrêté;

(3) the weighted average purchase price is defined in Article 3 (4), and is obtained by dividing the total of the invoices by type of purchase, not inclusive of value-added tax, for the four preceding weeks, by the number of kilograms of meat corresponding to those invoices, less 2.5%.

Where the retailer purchases his meat on the hoof, the weight in the form of carcases of the pigmeat purchased is the product of the multiplication of the weight on the hoof by 0.8; in order to obtain the purchase price of the caracases, the purchase price may be increased by Bfr 4 per kilogram on the hoof.

These are the provisions which the defendant in the main action is alleged to have infringed, such infringements being punishable by the criminal penalties of imprisonment and/or a fine pursuant to Article 9 of the Law on economic regulation and prices.

II — It is open to argument whether the national rules were intended to impose prices to the consumer or whether they were merely intended to control the trends of such prices. Be that as it may, in his defence the defendant entered an objection of illegality against the aforesaid provisions of the Arrêté Ministériel of 27 March 1975, which in his submission is incompatible with Regulation No 121/67/EEC of the Council of 13 June 1967 on the common organization of the market in pigmeat.

The Tribunal de Première Instance (Chambre Correctionnelle), Neufchâteau, acceded to the request of the person concerned and referred the following question to this Court for a preliminary ruling:

"Did the Arrêté Ministériel of 27 March 1975 fixing the selling price to the consumer of pigmeat *involve an infringement* of Regulation No 121/67/EEC of the Council on the common organization of the market in pigmeat, and in particular of Articles 3, 4 and 5 thereof, and of the regulations which established the basic price for pigmeat?"

According to custom, the terms of the question referred must be reformulated, because this Court does not have jurisdiction within the framework of Article 177 to answer it directly in the form in which it has been submitted.

I should also like to observe that this is a test case, because to my knowledge at least nine other similar cases (and in all probability still more) have been brought before the Belgian courts.

In all these cases the Belgian courts have asked a question identical to the one which has been sent to this Court by the Registry of the Tribunal de Neufchâteau, and I cannot conceal my surprise at the fact that none of these judgments making reference to this Court, which were delivered between the beginning of June 1975 and the beginning of November 1977 and which should have been notified to this Court pursuant to the provisions of Article 20 of the Protocol on the Statute of the Court, have reached Luxembourg.

Apparently the reason for this is that the Ministère Public (Public Prosecutor's Department) has appealed against all of them. This is a situation which remains somewhat disturbing with regard to the "effectiveness" of Article 177, as defined by the Court in its judgments of 6 April 1962 (Case 13/61 *de Geus* [1962] ECR 45, at pp. 49 and 50), of 16 January 1974 (paragraph 2 of the decision in Case 166/73 *Rheinmühlen* [1974]1 ECR 33, at p. 38) and of 30 January 1974 (paragraph 7 of the decision in Case 127/73 *B.R.T.* [1974]1 ECR 51, at p. 61).

III — In Case 83/78 *Pigs Marketing Board* v *Redmond*, the Court will again have occasion to consider the Community rules in this sector. Let me point out that, following Regulation No 20/62 of the Council on the *progressive* establishment of a common organization of the market in pigmeat, Regulation No 121/67 *introduces* the common organization of the market in pigmeat as from 1 July 1967. It was adopted on the same date as several provisions organizing the markets in cereals, eggs and poultrymeat (Regulations Nos 120, 122 and 123/67 of 13 June 1967). In fact the entry into force on 1 July 1967 of the common price for cereals made possible the establishment of a unified market within the Community for pigmeat, poultrymeat and eggs, which are derived products. Therefore what was said of Regulation No 120/67 in the judgment of 23 April 1975 (paragraph 8 of the decision in Case 31/74 *Galli* [1975] 1 ECR 47, at p. 61) can be transposed to Regulation No 121/67. This common organization of the market is intended, as is emphasized repeatedly in the preamble to the regulation, to create for the Community a "single market" in pigmeat subject to common administration.

In order to bring about this single market, the regulation established a system comprising a set of material rules and of powers, including a "framework of organization" calculated to meet *all* foreseeable situations (paragraph 9 of the decision in the *Galli* case).

A *"central place"* in this system is held by the *"price system"* provided for by Articles 3, 4 and 5 of the regulation and applicable, under Article 4 (1) and (2), at the stage of "animal carcases" of a standard quality defined with reference to a Community scale for grading pig carcases on the "representative" markets of the Community, that is to say at the stage of pig carcases "delivered at the abattoir on a hook". This definition re-appears in Article 4 (1) of Regulation No 2759/75 of the Council of 29 October 1975, which merely codifies the earlier provisions.

Thus it is a question of a guide price *at the production and wholesale levels;* indeed, the abattoir is generally the stage at which pig carcases are marketed. The basic price for pig carcases is a "political" price which constitutes a compromise between the interests of producers and those of consumers.

There is also *an intervention price* which can bring about the adoption of measures taking the form of aid for private storage or of buying-in (Article 3); that price amounts at most to 92 % and at least to 85 % of the basic price for pig carcases ("minimum buying-in price") (Article 5 (1)).

The function of that bracket is precisely to enable the Community authorities to influence market prices. According to the information supplied by the Commission, in the period from July 1974 to June 1975 Community intervention measures took the form only of aid for private storage.

Under Article 19, the following are prohibited in the internal trade of the Community: all customs duties or charges having equivalent effect, all quantitative restrictions or measures

having equivalent effect and recourse to Article 44 of the Treaty (minimum prices).

All these rules are intended not only to organize trade between Member States and trade with third countries, but also to determine factors bearing on the quality and production conditions of products likely to form the subject-matter of such trade.

Thus in principle the findings of this Court in the *Galli* case (paragraph 31 of the decision [1975]1 ECR at p. 64) are equally valid for pigmeat:

"Since the power to take the measures necessary to combat a rise in prices on the markets in question is *reserved* to the Community institutions, any unilateral measures taken by Member States in this sector cannot be imposed on private persons who are subject to the Community regulations."

As the Court held in its judgment in the *Galli* case (at p. 63), it is necessary at the outset to rule out any recourse to the provisions of Article 103 of the Treaty, relating to conjunctural policy, and any reference to the Council Resolution on the fight against inflation, on which the Belgian Government seeks to rely; in fact (paragraph 24 of the decision), "Article 103, which refers to Member States' conjunctural policies, does not relate to those areas already subject to common rules, such as the organization of agricultural markets"; thus, even *assuming that* national rules *are proved to be* incompatible with the provisions of Regulation No 121/67, such incompatibility cannot be covered by those provisions.

IV — After *Galli* came several judgments on which diverse opinions were expressed by commentators and practising lawyers, some of whom maintain that those judgments are a regression made necessary by the fact that even with a "complete" market organization based on a common price system it is not in the Community's interest to strip the Member States of their powers whilst its own institutions are not yet capable of "holding the ground", because this would give rise to a vacuum particularly undesirable in a period of economic and monetary crisis. Thus it is said that the influence of Community law on national economic policies and on the process of integration has been somewhat over-estimated, and that instead of complete *lack of jurisdiction* on the part of the Member States one should speak of possible *incompatibility* or risk of incompatibility between national rules and the provisions of Community agricultural law.

Therefore it is appropriate to examine the case-law to date. In a series of relatively recent judgments this Court appeared to interpret very widely the concept of *"measures having equivalent effect"* for the purposes of Article 30 (I cite for example paragraph 5 of the decision in Case 8/74 *Dassonville* [1974] 1 ECR 837, at p. 852, judgment of 11 July 1974, or paragraph 12 of the decision in Case 104/75 *de Peijper* [1976] ECR 613, at p. 635, judgment of 20 May 1976), since it did not refer to the *practical* effects of the measures concerned:

"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, *actually or potentially*, intra-Community trade are *to be considered* as measures having an effect equivalent to quantitative restrictions."

This formula, applicable to trade in *industrial* products, was *a fortiori* transposed to trade in *agricultural* products covered by a common organization of the market; in that area at least, it is immaterial that such national rules are applicable without differentiation or without distinction to domestic products or imported products (paragraph 13 of the decision in Case

65/75 *Tasca* [1976] ECR 291, at pp. 307-308, judgment of 26 February 1976; paragraph 15 of the decision in Joined Cases 88 to 90/75 *Sadam* [1976] ECR 323, at p. 339, judgment of 26 February 1976).

The starting point, and so to speak the most liberal position, appears to me to have been expressed in paragraph 27 of the decision in the *Galli* case ([1975] 1 ECR 47, at pp. 63-64):

"... the very *existence* of a common organization of the market in the sense of Article 40 (2) (c) has the effect of precluding Member States from adopting in the sector in question unilateral measures capable of impeding intra-Community trade."

This finding is true even of an organization of the market which is not very extensive, such as that of oilseeds, which merely provides customs protection in relation to third countries and power to adopt protective measures.

A fortiori, "... the incompatibility of national measures intended to influence the formation of prices may be *particularly apparent* in the case of market organizations comprising a *Community price formation system*".

V — However, subsequent case-law seems to have softened somewhat any excessively apodictic aspects of paragraph 27 of the decision in *Galli* (which bears a certain resemblance to paragraph 20 of the decision in Case 48/74 *Charmasson* [1974] 2 ECR 1383, at p. 1395, judgment of 10 December 1974).

(1) *In fact*, in the matter of agricultural prices, national rules for the same marketing stages as the system of Community prices will *normally* "run a greater risk" of conflicting with the said system than rules applying exclusively to other stages (paragraph 6 of the decision in *Tasca*). I shall describe this as "direct conflict".

I interpret this concept as meaning that there is a patent conflict between a national measure and the aims and functioning of the common organization of the market to the extent to which the stage governed by national price-fixing precisely coincides with that which is governed by Community law. There is incompatibility between the national rules and the Community rules, at least where they refer to the same stages of trade and where the maximum national price is lower than the Community guaranteed price level.

The same would be true if the national maximum retail price was fixed at a lower level than the Community target or guide price.

(2) However, it is already laid down in the judgment in the *Galli* case (paragraph 34) that where the price system established by common rules on the agricultural markets is applicable solely at the production and wholesale stages, it leaves Member States free — without prejudice to other provisions of the Treaty — to take the appropriate measures relating to price formation at the retail and consumption stages, *on condition* that they do not jeopardize the aims or functioning of the common organization of the market in question.

The judgment in the *Tasca* case deals with the problem in more detail (paragraph 6 of the decision [1976] ECR 291, at p. 306). The Court held:

"From the point of view of compatibility with the Community rules on the fixing of prices by national authorities a strict distinction between maximum consumer prices and maximum prices applicable at previous marketing stages is difficult due to the fact that ... price rules at the stage of the sale to the ultimate consumer *may well* have repercussions on price formation at the previous stages ..."

In my view, it cannot be maintained in economic terms that national rules on

retail prices have no repercussions of any kind not only on prices charged by intermediaries at earlier stages but also on producers' prices and ultimately on production itself; for economists, the opposite would be true.

Just as there is a certain relationship between the prices charged at the different stages of marketing, the prices of "derived" products normally stand in a certain relationship to the price of pigmeat or cuts of pigmeat (Regulation No 2767/75 of the Council of 29 October 1975).

Moreover the Commission had stated this in its answers to two parliamentary written questions (Journal Officiel of 13 October 1971, C 101, p. 4, and Official Journal of 29 September 1973, C 78, p. 5). In particular, it informed the Netherlands authorities that if the retail selling price (be it a maximum price or a minimum price) were controlled by the authorities it would prevent all competition at the distribution stage and rule out any beneficial effect of competition on the consumer.

As regards maximum prices or maximum profit margins, experience shows that such prices or margins rapidly tend to become the prices or margins actually charged. Each undertaking knows the prices of its competitors and knows that the risk of losing trade to third parties offering better terms is practically nil.

That is why the Court took care to add in the judgment in the *Galli* case that even if they are applicable to the later stages of marketing, that is to say the retail and consumption stages, national rules on prices must not "jeopardize the aims or functioning of the common organization of the market in question" (paragraph 34 of the decision).

The same idea prompted the Court to hold in its judgment in the *Tasca* case (last sentence of paragraph 10 of the decision [1976] ECR 291, at p. 307) that sugar manufacturers are *indirectly* impeded from obtaining a price at least equal to the intervention price if, even without regulating prices at the production stage, a Member State fixes "maximum selling prices for the wholesale and the retail stages at *such a low* level that the grower finds it practically impossible to sell at the intervention price since, if he were to do so, it would force the wholesalers or retailers, bound by the said maximum prices, to sell at a loss". I shall refer to this as "indirect conflict".

Producers of live swine are indirectly impeded — contrary however to the common price system — from obtaining a price at least equal to a certain percentage of the basic price for pig carcases if a Member State so delimits the selling price at the retail stage that retailers receive such a small profit margin that the producer is practically unable to sell at the price thus guaranteed to him since, it he were to do so, it would force the retailers, bound by that discipline, to sell at a loss.

(3) Finally, paragraph 15 of the decision in the *Galli* case states that:

"Such a system [that is to say a common price system at the production and wholesale stages, designed to liberalize trade within the Community] *excludes any national system of regulation* impeding directly or indirectly, actually or potentially, trade within the Community."

For my part I take this as meaning that, for a product covered by a common organization of the market, any national system of regulation concerning prices is *incompatible with Community agricultural law* if it is capable ("potentially") of affecting trade *within the Community,* thus even if only indirectly.

The touchstone here is not the income of domestic agricultural producers, but the development of trade between the Member States.

Certain commentators have claimed that the *Sadam* and *Tasca* judgments completely reverse this paragraph of the decision, taking the view that the Court no longer excluded the compatibility of national measures, even where they apply to stages directly subject to the Community price system.

I do not share this view, and in my recent address to the meeting of visiting lawyers I only spoke of *changes of direction* in case-law, however the final answer rests with yourselves. At all events it appears to me that the Court has in fact subsequently tempered the strictness of its case-law by requiring that it must appear from the case file that the national measures *did actually* affect trade: thus it is not enough for the restrictive effect to be *theoretically* possible, it is also necessary to prove in each case that the measure has had or is having that effect in practice. I ask you the question whether such a "change of direction" was justified or not. In my view, it involves serious disadvantages for the continuity of the case-law of the Court.

VI — However, although the effects of national rules such as those at issue in this case are likely to be passed up the line by degrees to wholesale prices and production prices, I admit that in law it is difficult to prove this and to show that such rules do in fact constitute a measure having an effect equivalent to a quantitative restriction on imports, the prohibition of which must be enforced by the national court on its own assessment of the position.

This is demonstrated by the fact that one could just as well invert the terms of the answer proposed by the Commission to the question submitted and say that a measure taken unilaterally by a Member State to limit the selling price of pigmeat is *compatible* with Regulation No 121/67/EEC if it does not jeopardize the aims or the functioning of that organization, in particular its price system; and, conversely, that national rules applicable only at the stage of sale of meat by a retailer to consumers and confined to limiting the profit margin which that retailer is authorized to include in his selling prices, are *incompatible* with Regulation No 121/67/EEC to the extent to which the maximum profit margin which they impose is fixed at a level such that the effects of the rules are likely to have repercussions on earlier stages of production or marketing or to make themselves felt in the patterns of trade.

Thus for my part I do not intend to maintain as an absolute rule that the Member States have lost all power to fix prices for agricultural products subject to a common organization of the market at any other stage than the production or wholesale stage, in particular where such intervention is based on grounds of conjunctural policy.

Undoubtedly it hardly accords with "legal certainty" to make the content of Community agricultural rules dependent upon contingent events and changing circumstances, such as interventions by national authorities in the field of prices; however, in a field dominated by economic expediency, it would be paradoxical to set up "legal certainty" as an absolute rule.

None the less I should like to try to deal with the problem more fully in order to lighten the burden of the national court, whose duty it is, according to the case-law of this Court, to decide in each case whether or not the price-fixing system before it produces *effects* incompatible with the Community provisions.

Undoubtedly, it is not for the Court of Justice to interpret national law within the framework of proceedings under Article 177, and the Court also has no jurisdiction to assess the *effects* of such law (paragraph 25 of the decision in

Case 52/76 [1977] ECR 163, at p. 182, judgment of 3 February 1977).

However, the praiseworthy concern to decentralize Community jurisdiction and leave the court deciding on the facts free to assess the compatibility of national law with Community law must not result in presenting the national court with an impossible task; to do so would risk compromising the direct effect which this Court attributes to Community regulations and giving rise to divergent conclusions: such a result would be incompatible with the principle of legal certainty.

In this connexion, I shall confine myself to citing the order of 26 January 1971 of the Hoge Raad (Strafkamer) (Supreme Court of the Netherlands (Criminal Chamber)), according to which the provisions of the Treaty relating to agriculture do not affect Member States' power to adopt price rules, or the decision whereby the Italian Consiglio di Stato held that the steps taken by the national authorities in the field of selling prices for sugar were lawful, or the judgment of the same Consiglio di Stato of 25 September 1974 to the converse, holding that a national decision fixing a compulsory production price for milk was unlawful, and finally, the order made by the Pretore of Rome on 10 January 1976 concerning beef and veal.

VII — In conclusion, I should like to attempt a synthesis of the criteria.

First, it should be considered whether the national rules apply at the same stage as the Community rules. For example, there would be total incompatibility if the nationally imposed profit margin did not even allow retailers to reach the basic price for pig carcases and obliged them to sell *at a loss*. As I have said, the use of this criterion derives from the last sentence in paragraph 10 of the decision in the *Tasca* case

Secondly, the normal level or, conversely, the excessively reduced level of the *profit* margin which the retailer is allowed must have an effect.

This consideration results from paragraphs 13 and 14 of the more recent *Van Tiggele* judgment of this Court of 24 January 1978 (Case 82/77 [1978] ECR 25, at p. 39):

"Whilst national price-control rules applicable without distinction to domestic products and imported products cannot in general produce such an effect [that is to say an effect equivalent to quantitative restrictions], they may do so in certain specific cases.

Thus imports may be impeded in particular when a national authority fixes prices or profit margins at such a level that imported products are placed at a disadvantage in relation to identical domestic products, either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out."

However in the present state of affairs, it appears difficult to give more precise indications. If a producer cannot complain of being unable to obtain a price higher than the target price or the guide price, what on the other hand is the position of traders further down the marketing line, that is to say the retailers?

At what level must the price of their own intervention be set?

What is the "normal" margin which must be added to the basic price of pig carcases to make due allowance for remuneration for their activities? The most one can say is that the fixing of the profit margin at a specific amount, and not at a percentage of the cost price, is not incompatible with the functioning and the aims of the common organization of the market where that amount is a relatively small part of the final retail price. But what is to be understood by "relatively small"?

In that connexion, the accused in the main action alleges that he is placed at a disadvantage in relation to "supermarkets", on the one hand by the failure to include in the purchase price the cost of "placing goods on the market", particularly in the case of imports, whether that situation results from internal rules or from practice, and on the other hand by the difference between the price on the day when the meat was actually sold and the prices prevailing during the reference period. It will be for the national court, with the help of the information supplied by the Commission in answer to the questions which this Court asked it, to consider whether these two facts together did in fact have the result that the freezing of the *profit* margin at Bfr 22 prevented any profit being made.

Thirdly, the actual effect of the national rules on the *volume of intra-Community trade* should be examined. This effect may appear both in imports and in exports. As the Commission states, it can indeed have the result that the prices imposed in one State are considered so inadequate by traders that they prefer to export their products to other Member States or to non-member countries rather than to put them on the domestic market. However, this analysis is complicated by the operation of monetary compensatory amounts. At certain periods the application of these amounts has led, as the Court is aware, to distortions of competition.

Thus, the reduction of the amounts applicable to French exports of cereals encouraged exports to Belgium, which led in 1974 to a fall in the French prices for swine under the impact of competition from exports of Belgian swine. On the other hand, in sectors where there is no *permanent* intervention, market prices are formed more freely and monetary distortion operates to the full; when that is the case, compensatory amounts are not sufficient to re-establish equilibrium. This Court has already had occasion to observe this several times.

Thus it appears to me that only the Commission is in a position to supply the necessary information. It is for the Commission in the first instance to decide, in the exercise of the powers conferred on it by Article 155 of the Treaty, whether the Belgian rules could have constituted or still can constitute a measure having an effect equivalent to a quantitative restriction on imports, and to take adequate steps to eliminate that state of affairs, if necessary even by recourse to proceedings under Article 169 of the Treaty.

In conclusion, I am of the opinion that the Court should rule that:

1. In the market sector under consideration, Regulation No 121/67 ensures, with direct effect for individuals, free movement of goods, in particular through the elimination of quantitative restrictions and all measures having equivalent effect;

2. It is incompatible with Regulation No 121/67 on the common organization of the market in the sector under consideration, for a Member State unilaterally to fix the selling price to the consumer of pigmeat by freezing the profit margin, if such fixing jeopardizes the aims or functioning of that organization, particularly the price system which it introduces;

3. To the extent to which a selling price unilaterally fixed by a Member State is incompatible with the provisions of the agricultural law of the Community, the Member State concerned cannot base the justification for such fixing either on Article 103 of the Treaty, or on the need to protect the economy from speculative practices, or again on a change having occurred in the economic situation in the sector under consideration.