(a) to effect, from the proceeds of the receipts from the levy, the payment of bonuses for certain products intended to be marketed in the Common Market or exported to non-member countries;

(b) to inflict a financial disadvantage on any producer, who is compelled to pay the production levy, by reason of the fact that he effects his sales directly without availing himself of the intermediary or of the services of the central marketing agency.

7. The levy demanded within the framework of a national marketing system is not due from producers to the extent to which it is employed for purposes incompatible with the requirements of the Treaty on the free movement of goods and with the common organization of the market.

8. It follows from Article 38 (2) of the Treaty which gives priority to the rules for the organization of the agricultural markets as against the rules laid down for the establishment of the Common Market as a whole, of which Article 37 is one, that the provisions relating to a common organization of the market cannot be thwarted by describing as a "State monopoly" an agency vested with certain statutory powers in the agricultural sphere.

9. In principle any trader who is required, by the legislation of a Member State, to pay a levy has the right to claim the reimbursement of that part of the levy which is devoted to purposes incompatible with Community law. It is for the national court to assess, according to its national law, in each individual case, whether and to what extent the levy paid may be recovered and if so whether there may be set off against such a debt the sums paid to the trader by way of a bonus which is also incompatible with Community law.

In Case 177/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Ireland for a preliminary ruling in the action pending before that court between

PIGS AND BACON COMMISSION

and

McCARREN AND COMPANY LIMITED, an undertaking carrying on business as dealers in pigmeat and bacon curers having its registered office in Cavan,

on the interpretation of several provisions of the EEC Treaty and the regulations on the common organization of the market in pigmeat regarding a levy on pigs slaughtered for bacon,

THE COURT

composed of: J. Mertens de Wilmars, President of Chamber acting as President, Lord Mackenzie Stuart (President of Chamber), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

The Pigs and Bacon Act 1935 of 20 June 1935 established in Ireland rules for controlling and regulating the production and marketing of bacon and price regulations for pigs. The rules were amended on various occasions and in particular by the Pigs and Bacon Act 1937 of 12 June 1937, the Pigs and Bacon (Amendment) Act 1939 of 20 December 1939, the Pigs and Bacon (Amendment) Act 1956 of 14 November 1956 and the Pigs and Bacon (Amendment) Act 1961 of 6 June 1961.

The Pigs and Bacon (Amendment) Act 1939 abolished the two offices created by the Act of 1935, the Bacon Marketing Board and the Pigs Marketing Board,

and transferred their duties to a single central office, the Pigs and Bacon Commission.

The Acts involved a system of licensing bacon curing which was restricted to undertakings licensed by the Minister for Agriculture.

The Pigs and Bacon Commission directly controlled bacon production by fixing production periods and allotting production quotas to curers; it could also allot quotas to be sold by curers on the home and export markets. It could fix prices both for pigs and for bacon and prohibit sales at other than authorized prices.

The Pigs and Bacon (Amendment) Act of 1961 empowered the Pigs and Bacon Commission itself to engage in the export of bacon and to require licensed bacon curers by law to sell bacon to it; with the authorization of the Minister for Agriculture it could prohibit all export of bacon which was not done through its agency.

The Pigs and Bacon (Amendment) Act 1939 had made provision for every person licensed by the Minister to cure bacon to pay a levy to the Pigs and Bacon Commission on pigs slaughtered for the production of bacon. The product of this levy was intended in a system of guaranteed prices for export to make up the difference between the market price and the guaranteed price, to finance a rationalization plan for production and to cover the management costs of the Pigs and Bacon Commission.

In 1970 that Commission introduced a system of export bonuses for certain quality grades of bacon known as "specials"; these bonuses were also financed by the product of the production levy.

When Ireland joined the EEC the various acts relating to pigmeat and bacon were not repealed but the provisions which were regarded as incompatible with the obligations arising from membership of the Community ceased to be applied as from 1 February 1973. This was so in respect of the system of export price guarantees.

On 11 January 1973 at a meeting between representatives of the Pigs and Bacon Commission, the Minister for Agriculture and the Irish Bacon Curers Society Limited (an association of Irish bacon curers) an agreement was reached to the effect that from 1 February bacon curers would continue on a voluntary basis to use the Pigs and Bacon Commission as a central marketing organization for the export of bacon. The curers voluntarily agreed to sell all their bacon and pork for export to the Pigs and Bacon Commission and to permit the Pigs and Bacon Commission to market all their bacon and Pork abroad. It was also agreed that the production levy and export bonus scheme would continue and that the Pigs and Bacon Commission would continue to exercise its statutory power to raise the levy. All producers whether they export or not through the agency of the Pigs and Bacon Commission have therefore voluntarily continued to pay the levy; those who sell through the Pigs and Bacon Commission for export have continued to receive a refund of a portion of the levy by way of a bonus on export.

On 14 April 1975 McCarren and Company Limited, an undertaking

carrying on business as dealers in pigmeat and bacon curers informed the Pigs and Bacon Commission that it was withdrawing from the scheme; on 15 April it informed the Pigs and Bacon Commission that it would pay the sums due up to 30 April 1975.

The Pigs and Bacon Commission commenced legal proceedings before the High Court of Ireland against McCarren and Company Limited for payment for the sum of £28 594 as production levy for the period of 1 January to 31 September 1975 (sic).

McCarren and Company Limited counterclaimed to recover a sum of £52 787.10 representing the levy paid for the period from 1 February 1973 to 31 December 1974. It is alleged that the levy is a part of an intervention scheme in the pigmeat industry and as such incompatible with Community law.

By judgment delivered on 30 June 1978 the High Court of Ireland considered that in view of the facts of the case and the arguments put forward by the parties the case raised the following questions:

1. (a) Whether *Articles 92 and 93* are to be interpreted as imposing an obligation to inform the Commission under paragraph 3 of Article 93 of the agreement entered into as to the marketing system which would operate after 1 February 1973, and/or of the changes in the system which occurred since February 1973?

   (b) If so, whether the failure to inform the Commission means that the system was invalid for some or all of the period since 1973?

   If the answers to (a) and (b) are in the affirmative, whether the levy is payable for the period of invalidity?

2. If the answer to 1 (a) is in the negative, whether *Article 92* is to be interpreted as imposing an obligation on a national court where it considers that a State aid may be incompatible with *Article 92* to refer to the European Court of Justice for decision the question whether the marketing system is incompatible with the provisions of Article 92 (1) and (2) and if the question is answered affirmatively by that Court whether the national court should then stay proceedings before it pending an adjudication on the system by the Commission under Article 93?

3. If the answers to 1 and 2 above are in the negative

   (a) then are *Articles 92 and 93* to be interpreted as meaning that when a State grants aid to which these articles apply that the compatibility of the aid with the common market is a matter for determination by the Commission and not for the national courts of Member States?

   (b) If (a) is in the negative whether these articles mean that State aid within the meaning of the articles is valid until a decision has been made on its compatibility with the common market by the Commission under Article 93 (2) notwithstanding the fact that aspects of the aid may conflict with obligations under Community law other than those contained in Articles 92 and 93?

(c) If the answers to (a) and (b) are in the negative are these articles to be interpreted as meaning that even if a portion of State aid is incompatible with the Community law that a levy raised to finance it is nonetheless payable?

4. Is *Article 16* to be interpreted as meaning that if the operation of the marketing system referred to above results in a restriction or hindrance of exports by firms independently of the central marketing agency that a violation of this article has occurred and the levy payable to finance the system is irrecoverable?

5. Is *Article 34* to be interpreted as meaning if the operation of the marketing system referred to above restricts or hinders exports by firms independently of the central marketing agency that a violation of this article has occurred and that the levy payable as part of the system is irrecoverable?

6. *Are Articles 37 of the Treaty and Article 44 of the Act of Accession* to be interpreted as meaning that the operation of the new marketing system referred to above meets the obligations imposed by those articles, (a) up to 31 December 1977 and (b) since that time. If not, is the levy which is paid as part of the system recoverable from 1 February 1973 to 31 December 1977, or (c) since that date?

7. Are *Article 40* and *Regulation No 2759/75* to be interpreted as meaning that the marketing system referred to above is incompatible with the Community common organization of the market in pigmeat and accordingly invalid. If so, is the levy payable as part of the system irrecoverable?

8. Is *Article 85* to be interpreted as meaning that the agreement referred to above by virtue of which the marketing system has operated since 1 February 1973 is a violation of this article by reason of the fact that it hinders or restricts exports by firms independently of the central marketing agency, or because certain exports are subsidized under it? If yes, is the levy which is payable as part of the system irrecoverable?

9. (a) Is *Article 86* to be interpreted as meaning that the central marketing agency referred to above is in a dominant position in a substantial part of the Common Market.

(b) If so, is it to be interpreted as meaning that there has been an abuse by that agency of that position which has affected trade between Member States by reason of the fact that exports from firms independently of the agency are hindered or restricted and/or by reason of the fact that a bonus on exports is only paid to firms who export through the central marketing agency.

(c) If the answers to (a) and (b) are yes, is the levy which is paid as part of the system irrecoverable?

10. If the levy hereinbefore referred to is not lawfully payable by reason of the operation of Community law should a national court in considering a claim for a refund of the levy apply the principles of its national laws or those of the Community? If Community law is applicable do its principles justify a claim that payments actually made should be refunded, either with or without a deduction in respect of the bonus received by the defendants?

By order of 31 July 1978 the High Court accordingly stayed the proceedings and referred the questions contained in the judgment of 30 June to the Court for a preliminary ruling under Article 177 of the EEC Treaty.

The judgment and order of the High Court were registered at the Court Registry on 21 August 1978.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 13 November 1978 by the Commission of the European Communities, represented by Richard Wainwright and Götz zur Hansen, members of its Legal Department, on 15 November by McCarren and Company Limited, represented by John D. Cooke, Barrister, on 24 November by the Pigs and Bacon Commission, represented by Laurence B. McMahon, Barrister, and on 28 November by the Government of Ireland, represented by Louis J. Dockery, Chief State Solicitor.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. It nevertheless requested the parties to the main action, the Government of Ireland and the Commission to reply before the hearing to a certain number of questions. The questions were answered after the original time-limit had been extended.

II — Written observations submitted to the Court

The *Pigs and Bacon Commission*, the plaintiff in the main action, takes the view that the levy in question is in no way compatible with Community law.

(a) The Pigs and Bacon Commission ceased to be a national or State monopoly in February 1973. It continued as a central marketing agency and a State aid to the bacon industry with statutory powers to impose a levy on every pig carcase used for the production of bacon in the Republic of Ireland to finance the State aid. The only, or at any rate the primary, question in these proceedings is whether such a levy is recoverable in law having regard to the provisions of the Treaty of Rome. It follows clearly however from the judgment of the Court of 12 July 1973 (Case 2/73, *Riseria Luigi Geddo* v *Ente Nazionale Risi* [1973] ECR 865) that the Treaty does not prohibit an internal tax affecting domestic products alone and designed to build up a fund to promote national production.

The other issues raised in the order for reference are therefore irrelevant and do not require an answer.

(b) In any case, the Pigs and Bacon Commission and its activities supported by the levy in question constitute a State aid within the meaning of Article 92 of the EEC Treaty which existed in the Republic of Ireland prior to its entering the Community.

This State aid is compatible with the Common Market because it is intended, within the meaning of Article 92 (3), to "promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment" and to "facilitate the development of certain economic activities or of certain economic areas" without adversely affecting trading conditions to an extent contrary to the common interest.

As it existed prior to the Republic of Ireland's entering the Common Market, the legality of the aid cannot be challenged because Article 92 of the Treaty is not self-executing. It follows from the judgment of the Court of 19 June 1973 (Case 77/72, *Carmine Capolongo* v *Azienda Agricola Maya* [1973] ECR 611) that, as regards aids existing in the Member States, "the provisions of Article 92 (1) are intended to take effect in the legal systems of Member States, so that they may be invoked before national courts, where they have been put in concrete form by acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article 93 (2)".

It cannot be maintained that a new aid was introduced since 1 February 1973; the few changes made in the administration of the system of aid and the changes in the rate of the levy do not constitute an "alteration" of State aid within the meaning of Article 93 (3).

(c) The levy in question relates only to carcases used for the production of bacon; it is not a levy imposed on pig carcases or on pork meat generally.

There is however no specific Community legislation dealing with an intervention system for bacon. It is clear from Article 3 of Council Regulation (EEC) No 2759/75 of 29 October 1975 on the common organization of the market in pigmeat (Official Journal 1975, L 282, p.1) that the Community intervention system does not apply to "meat ... of domestic swine, salted in brine, dried or smoked", in other words, to bacon.

(d) The system of State aid administered by the Pigs and Bacon Commission does not constitute discrimination against the defendant in the main action.

The central marketing agency and the other services provided by the Pigs and Bacon Commission exist for the benefit of all producers and curers; the statutory levy imposed on pig carcases used for the production of bacon is imposed for the benefit of the bacon industry generally and to support the State aid administered by the Pigs and Bacon Commission. McCarren and Company Limited is in the position of any citizen who has to pay out a levy or taxation for a service supplied by the State, whether or not he accepts that service.

The defendant benefits from the activities of the Pigs and Bacon Commission which, in its capacity as a central marketing agency, helps to

eliminate fluctuations on the home and export markets and to provide a system which will give proper returns to producers and to curers.

(e) The central, if not the only, issue in the main action is the validity of the statutory levy to support the State aid administered by the Pigs and Bacon Commission.

In this respect it is necessary to state that Article 16 of the EEC Treaty has nothing to do with this issue. The levy in question and the system of aid supported by it cannot be regarded as a quantitative restriction on exports or as a measure having equivalent effect within the meaning of Article 34.

The Pigs and Bacon Commission is not a State monopoly within the meaning of Article 37: the Republic of Ireland abolished the State monopoly which formerly existed in the market in bacon prior to joining the EEC and since February 1973 no discrimination has existed regarding the conditions under which bacon is procured and marketed between nationals of Member States. In any event, under the provisions of Article 44 of the Act of Accession the Republic of Ireland was not obliged to complete the adjustment of State monopolies until 31 December 1977.

It is appropriate to recall, as regards Article 40 of the Treaty and Regulation No 2759/75, that that regulation provides no system of intervention for the bacon industry and that there is nothing in that regulation to prevent the kind of State aid and statutory aid with which this case is concerned.

The examination of a system of State aid is a matter for the Commission, not for a private individual. The mere fact that the Community has enacted legislation dealing with a particular matter does not preclude national legislation not inconsistent with it and not designed to undermine it.

Articles 85 and 86 of the Treaty have nothing to do with a levy designed to support a scheme of State aid.

The scheme of State aid administered by the Pigs and Bacon Commission prior to February 1973 is an "old aid" within the meaning of Articles 92 and 93 of the Treaty. No true alteration has been made to this system of aid; it is not a new aid or an altered aid within the meaning of Article 93 (3).

(f) The judgment of the Court of 22 March 1977 (Case 74/76, *Iannelli & Volpi S.p.A* v *Ditta Paolo Meroni* [1977] ECR 557) answers clearly the only relevant question raised by the main action which is whether the amount of the statutory levy claimed by the Pigs and Bacon Commission is recoverable or not; it follows clearly from that judgment that "the fact that an aspect of aid, which is not necessary for the attainment of its object or for its proper functioning, is incompatible with a provision of the Treaty other than Articles 92 and 93 does not in fact invalidate the aid as a whole or for that reason vitiate by reason of illegality the system of financing the said aid".

(g) It is necessary to give the following answers to the questions raised by the High Court of Ireland:

Questions 1 (a) and (b): No; Question 1 (c): Yes; Question 2: No; Question 3 (a): Yes, except in the case of failure to follow the procedure prescribed under Article 93 (3) of the Treaty in the case of

new or altered aid. Question 3 (b): Yes; Question 3 (c): Yes; Question 4: No; Question 5: No; Question 6: The levy is recoverable from 1 February 1973 and (though it does not arise directly in these proceedings) since that date. Question 7: The system is not compatible with Article 40, or with Regulation No 2759/75. In any event, the levy is recoverable. Question 8: The agreement is not a violation of Article 85. The levy is recoverable in any event. Question 9 (a): Article 86 has no application to the circumstances of the present case. Question 9 (b): This question does not arise. Question 9 (c): The levy is unaffected by the provisions of Article 86, and is recoverable. Question 10: This is a matter of Irish law. The money should not be refunded in the circumstances found in the present case. If the monies were refunded, a deduction should be made in respect of the bonus received by the defendants.

McCarren and Company Limited, the defendant in the main action, considers that a number of facts established before the High Court indicate clear breaches of a number of articles of the EEC Treaty.

(a) It is doubtful whether the operations of the Pigs and Bacon Commission can truly be regarded as "State aid" in the sense of Article 92 of the Treaty. The dominant feature of its operations is its export marketing system and the bonus incentive scheme. Their effects on competition and freedom of movement of goods have become ends in themselves and not side-effects of and incidental to the primary function of the aid.

The Pigs and Bacon Commission claims no longer to act as a public organization pursuing a public policy; the "State aid" aspect of the operation consists only in the ready availability of the statutory powers to enforce its decisions on all producers. These powers are only a means and not the object of the operations themselves; the objects of the operation are the purely commercial objects pursued by the producers. It may not be appropriate therefore to approach the matter as being exclusively for consideration under Articles 92 and 93 of the Treaty.

(b) To the extent to which the operations of the Pigs and Bacon Commission fall to be considered as State aids, they constitute a new aid or, at best, an existing aid which was radically and fundamentally altered as of 1 February 1973.

The Pigs and Bacon Commission has expressly claimed that, as from 1 February 1973, it "adjusted" the old state monopoly so as to create the fundamentally new "voluntary organization". The obligation to notify the introduction of such a new system to the Commission under Article 93 (3) therefore also existed on that date.

Whether the system is regarded as being an entirely new one or the fundamental alteration of the old system the obligation to notify under Article 92 of the Treaty, Article 21 of Regulation No 2759/75 and Article 60 (1) of the Act of Accession was binding upon Ireland. The

obligation to inform the Commission and the absolute prohibition came into effect on the same day as the aid itself was introduced. The introduction of the system on 1 February 1973 without notification to the Commission was an infringement of the provision of Article 93 (3). Further the changes which have occurred since 1973 in the so-called "voluntary system" are substantial alterations which, if they had been introduced by a government independently, would have been regarded as being new aids in themselves.

(c) *Question 1 (a)* must be answered in the affirmative: any national marketing system for an agricultural product which was based upon facilities which constitute a State aid and which came into operation on or after 1 February 1973 is governed by the provisions of Article 93 (3) which lay down the requirement to inform the Commission and the prohibition against giving effect to the system. In addition, any material alteration in a system of aid which increased the amount of the aid or extended its scope or purpose was similarly governed by the procedure and the prohibition of Article 93 (3).

Question 1 (b) must also be answered in the affirmative: the prohibition contained in Article 93 (3) is absolute where there has been no notification of the intended aid or alteration to the Commission.

The third part of Question 1 must also be answered in the affirmative and to the effect that the absolute prohibition contained in Article 93 (3) extends to all aspects of an aid including a compulsory financing system implemented as part of that aid under national law where the aid in question has been illegal *ab initio* by reason of the absence of any notification.

(d) The *second question* will not need to be answered. In any event in the light of the decided cases of the Court of Justice, in particular the judgment of 22 March 1977 (Case 78/76 *Steinike and Weinlig* v *Germany* [1977] ECR 595) and the judgment of 9 March 1978 (Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629) there is an obligation for a national court to refrain from enforcing a provision of national law which is potentially in conflict with Article 92 until such time as it has been satisfied that no incompatibility exists.

(e) The answer to the question posed in *Question 3 (a)* is to be found in the case-law of the Court of Justice: any question as to the compatibility of a particular aid with the Common Market is to be determined solely by the Commission subject to an appeal to the Court of Justice. The second and third parts of this question do not, therefore arise.

(f) The test to be borne in mind in relation to *Question 4*, relating to Article 16 of the EEC Treaty, is that formulated by the Court of Justice in its judgment of 26 February 1975 (Case 63/74 *Cadsky* v *I.N.C.E.* [1975] ECR 281). The combined effect of the levy charge with the bonus system is to hinder and restrict exports of pigmeat from Ireland by enterprises who wish to operate independently of the Pigs and Bacon Commission. Even if the levy is to be judged separately from the bonus payment analogous application of the judgment of the Court of Justice of 23 January 1975 (Case 51/73 *Van der Hulst* v *Produktschap voor Siergewassen* [1975] ECR 79) clearly shows that it is still a measure equivalent to a customs duty on exports.

A compulsory national levy on a product constitutes a measure equivalent in effect to a customs duty on exports and prohibited by the Treaty, where it falls more heavily on a particular class of exports or where it has the effect of hindering exports which take place independently of an organized marketing system.

(g) As regards the *fifth question* it should be held that the system in question falls within the scope of the prohibition on measures having an effect equivalent to quantitative restrictions as defined by the judgments of the Court of Justice of 11 July 1974 (Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837), of 20 May 1976 (Case 104/75 *De Peijper* [1976] ECR 613) and of 12 July 1973 (Case 2/73 *Geddo* v *Ente Nazionale Risi* [1973] ECR 865).

(h) In answer to *Question 6* it must be held that the Pigs and Bacon Commission is a State monopoly of a commercial character within the meaning of Article 37 of the EEC Treaty: it is established as such in law; it operates as a body entrusted with the supervision of all aspects of trade in pigmeat in Ireland; the compulsory element was an indispensable element in the system. The fact that producers can export independently is irrelevant: the discriminatory refund of part of the levy through the bonus system is equivalent to the action of a monopoly.

In those circumstances the introduction of the marketing system operated by the Pigs and Bacon Commission did not constitute a sufficient adjustment of a state monopoly of a commercial character to satisfy the requirements of Article 37 (1). By the introduction of a new system which failed to satisfy the requirement of Article 37 (1), a new measure was introduced by the Pigs and Bacon Commission which constituted a breach of Article 37 (2) even during the transitional period. The levy is not enforceable through the agency of the Pigs and Bacon Commission since the date of infringement of Article 37 (2) namely, 1 February 1973.

(i) As regards *Question 7* and the common organization of the market in pigmeat, as laid down by Regulation No 2759/75, it should be held that the system of the Pigs and Bacon Commission involves the regulation of the level of domestic Irish prices by controlling the level of exports, the deliberate channelling of all exports through a single body, the ability to monitor the home and export markets and the stimulation of trade which constitute a complex of national measures and mechanisms through which the Irish market in pigmeat is regulated. They are deliberately designed to partition the Irish market and to exploit it as a national entity; they constitute a deliberate interference with the creation of a single market.

Such a national system is incompatible with the common organization of the market at Community level: it infringes the prohibition on customs duties and quantitative restrictions as well as the provisions of Articles 92 and 93 of the Treaty and it is, therefore, in direct breach of Articles 19 and 21 of Regulation No 2759/75,

By subsidising exports to third countries the Pigs and Bacon Commission is artifically stimulating the trade of one Member State and runs contrary to the objects and effects of the common organization of the market.

The objectives of Article 39 (1) of the Treaty cannot be achieved throughout the Community on a basis of equality where Member States continue to distort or augment the effects of the common organization by maintaining national organizations.

The facility provided at national level, based upon a compulsory levy and a bonus system, distorts and hinders both intra-Community trade and exports to third countries.

The Pigs and Bacon Commission is guilty of introducing a threefold discrimination affecting Irish exporters who operate through it and who therefore pay the levy but receive both the bonus and the Community export refund, Irish exporters who operate independently of the Pigs and Bacon Commission but pay the levy while receiving back only the Community export refund and exporters from other Member States who adhere to the Community system and rely only upon the Community export refund.

The fundamental incompatibility between the very existence of national measures such as those at issue in the main action and the Community organization of the market is confirmed by the judgments of the Court of Justice of 23 January 1975 (Case 31/74 *Galli* [1975] ECR 47 and Case 51/74 *Van der Hulst* v *Produktschap voor Siergewassen* [1975] ECR 79), of 30 October 1974 (Case 190/73 *Officier van Justitie* v *Van Haaster* [1974] ECR 1123) and of 16 March 1977 (Case 68/76 *Commission* v *France* [1977] ECR 515).

(j) Both parts of *Question 8* must be answered in the affirmative.

Since 1 February 1973 the operations of the Pigs and Bacon Commission have been conducted upon the basis of and as a result of the agreement with the enterprises engaged in the production of bacon in Ireland. Accordingly, the system involves not just a concerted practice but a continuing express agreement by virtue of which 27 of the 28 producers in Ireland are able to hinder and restrict exports from Ireland by the defendant in the main action.

The main characteristic of the Pigs and Bacon Commission is now that of a joint selling agency or trade association of producers; its primary activities and the principal effects are those of a commercial and competitive kind and the public authority aspects of the situation are in a sense incidental and accidental. The mere fact that a commercial organization happens to be organized in law as a public authority does not remove the commercial activities of that organization from the requirements of Articles 85 and 86.

The system operated by the Pigs and Bacon Commission, consisting of an exclusive dealing agreement with producers backed by a compulsory levy under national law adversely affects exports and hinders competition.

(k) As regards *Question 9*, the Pigs and Bacon Commission is in a dominant position because it can behave independently. The dominant position can result not merely from economic factors.

The dominant position applies in a substantial part of the Common Market, which as regards bacon consists of two Member States only, namely the United Kingdom and Ireland, the only States in which bacon is purchased in substantial quantities.

The Pigs and Bacon Commission abuses its dominant position by using its powers and its economic independence to compel all producers to export only through its agency. The bonus payments made only to producers who submit to that compulsion is in fact a form of loyalty rebate.

The levy should be declared to be irrecoverable, because it forms part of the very mechanism used by the Pigs and Bacon Commission to achieve objectives which themselves infringe the Treaty. Community law requires the national court to give full effect to the directly applicable provisions of Community law, to protect the rights, conferred on individuals and to refuse to enforce any conflicting provisions of current national law.

Where a national authority or anybody conferred with delegated powers seeks to enforce a provision of national law for the purpose of maintaining or implementing a system or practice which is contrary to a directly applicable provision of Community law, the national court should refuse to give effect to the national measure so long as the infringement is continued and to the extent to which the infringement is thereby rendered possible.

(l) The answer to *Question 10* flows from the fundamental principle that Community law should be applied equally to all Member States and should have equal effect and consequences in them. The question of the recoverability of the money paid on the basis of powers rendered illegal by Community law cannot depend solely on the diverse laws of the Member States, for this would give rise to discrimination.

The principles of Community law are applicable to a claim for repayment of money levied by a national authority in breach of the provision of Community law; the principle of equal application and effect of that law requires that such money should be repaid to the individuals or undertakings concerned subject only to any deductions allowable under national law in respect of benefits which the individuals or undertaking may have received from the authority in question.

The *Government of Ireland* takes the view that the EEC Treaty does not preclude the imposition of a statutory levy, the proceeds of which are to be used to finance the work of a central marketing organization, and the payment of aids in the form of an export bonus.

(a) The levy at issue is an internal charge of a para-fiscal nature, and no grounds exist under the Treaty for challenging its validity. It follows from the case-law of the Court that the fact that an aspect of aid is incompatible with a provision of the Treaty other than

Article 92 and 93 does not in fact vitiate by reason of illegality the system of financing the aid.

(b) A number of other functions performed by the Pigs and Bacon Commission can be regarded as aid to the pigmeat industry in Ireland; the payment of the export bonus constitutes an aid paid out of State resources to the extent to which it is financed by a levy charged under a statute.

Article 92 of the Treaty prohibits aid which distorts or threatens to distort competition. Such aid is regarded as incompatible with the Common Market to the extent to which it adversely affects trade between Member States. However, Article 92 (3) recognizes many forms of aid which may be regarded as consistent with the Treaty obligations. Moreover, it has been recognized in a number of judgments of the Court that the appropriate mechanism for monitoring the grant of aid and for challenging its validity where it appeared to be necessary to do so, was the systematic examination by the Commission referred to in Article 93, with the ultimate sanction of proceedings before the Court by the Commission or by any interested State, but not at the behest of an individual aggrieved by the existence of the aid.

(c) The bonus payment to exporters existed as a form of aid for the pig industry in Ireland prior to accession to the Community, and has continued ever since in essentially the same form.

The Commission has been informed of it. A breach of Article 93 (3) of the Treaty by failure to give notice of the aid can undoubtedly in theory give rise under certain circumstances to rights in favour of private persons enforceable in the national courts concurrently with the right of the Commission itself to proceed under Article 169. Annulment of the aid could have the effect of bringing to an end the payment of the aid in whole or in part, but would not invalidate the levy in so far as past payments were concerned, or bring about its termination for the future. Any question as to a possible infringement of Article 93 (3) is of necessity intimately associated with other aspects of the aid whose legality or acceptability are for the Commission to decide. Any question concerning the effect in a particular case of the prohibition contained in the last sentence of Article 93 (3) should await the Commission's examination of the aid as a whole.

(d) The establishment of a common organization of the market in pigmeat does not exclude all national measures but only those which directly impinge on the mechanisms provided by the common organization of the market.

The price fixing exercise to be carried out for the purposes of Regulation No 2759/75 is carried out by reference to pig carcases of a standard quality, while the export bonus referred to in the present proceedings is payable only for pig carcases of a higher quality than that referred to in the regulation. Even in principle, therefore, the payment of the aid could not affect the price determined for the purposes of the common organization of the market.

The continued functioning of the Pigs and Bacon Commission is quite

compatible with the common organization of the market; its statutory power to impose a compulsory levy on meat processors for the purpose of financing its activities is also compatible with the Treaty and with Regulation No 2759/75. The validity of the aid falls to be considered in accordance with the procedure referred to in Article 93 of the Treaty.

(e) The aid in question cannot be regarded either as a customs duty on exports or a charge having equivalent effect within the meaning of Article 16 or as a quantitative restriction on exports or measure having equivalent effect within the meaning of Article 34 ot the EEC Treaty.

Assuming that the Pigs and Bacon Commission was a State monopoly within the meaning of Article 37 of the Treaty and Article 44 of the Act of Accession in the pre-accession period, it should be found that it divested itself of this character by discarding all its former statutory powers of compulsory purchase and price-fixing; it has retained only the power to impose a levy to defray the cost of its operations as a marketing organization enjoying the voluntary co-operation and support of the pigmeat industry in Ireland. It cannot be denied that, by the expiry of the period referred to in the Act of Accession, the Pigs and Bacon Commission had suffered an adjustment of the most far-reaching nature in its character and functions, in accordance with the obligations undertaken by Ireland. The continuing system of compulsory levies and payment of export bonuses does not in any way involve a discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed.

Any question of distortion of competition as a result of the present operations of the Pigs and Bacon Commission arises not in relation to Articles 85 and 86 of the Treaty but in the context of the grant of aids, and hence in relation to Articles 93 to 94. In any event the Pigs and Bacon Commission should not be regarded as an undertaking holding a dominant position within the Common Market or in a substantial part of it, and there has been no abuse by it of a dominant position, in particular no abuse calculated to affect trade between Member States.

In relation to the claim for repayment of levies received by the Pigs and Bacon Commission, it is submitted that there is no principle of Community law which would require a Member State statutory body or private undertaking to make a refund in a situation such as that envisaged by the counterclaim. Therefore the national court should in any event apply the national law.

(f) The questions referred to the Court should be answered as follows:

— Where the validity of aids granted by Member States or through State resources is in issue, the matter falls to be determined by reference to the provisions of Articles 92 and 94 of the Treaty, rather than by reference to other Articles of the Treaty in respect of which it is alleged that some incidental breach has also occurred.

— The provisions of Article 92 (1) do not have direct effect in the legal systems of the Member States and cannot therefore be relied on before the national courts.

— Where the question whether part of an aid has been granted in disregard of procedure in Article 93 so as to be caught by a prohibition which has direct effect is a complex one which is closely associated with other aspects of the aid the validity of which is a matter for the Commission, it is appropriate that all aspects of the aid should be considered by the Commission and that any question as to a possible disregard of procedure under Article 93 should be postponed pending the Commission's examination of the aid as a whole.

— The appropriate procedure for testing the validity of aids by reference to the provisions of Article 92 of the Treaty involves an examination of the situation by the Commission in accordance with the provisions of Article 93, and the adoption by it (where considered necessary) of the procedure therein set forth; alternatively by the exercise by the Council of the powers reserved to it by the same Article.

— Where, however, the real issue in a particular case concerns not the validity of an aid but the validity of charges of a fiscal nature which are imposed for the purpose of financing the payment of aids, the principle to be applied is that already enunciated by the Court in previous cases, to the effect that a fiscal charge is not *per se* invalidated by reason of the fact that it provides the resources out of which is paid *(inter alia)* some form of aid which may be deemed to be incompatible with the Common Market.

— If a situation arises where payments of charges or levies which have already been made could not lawfully have been demanded by reason of some incompatibility with the Treaty or secondary legislation thereunder, the question whether a claim for reimbursement arises is to be determined in accordance with the national law in the absence of any positive law of the Community dealing with the situation.

The *Commission of the European Communities* considers that where there is a common organization of the market, as in the case of pigmeat, the compatibility of any national measures must above all be considered in the light of that organization.

(a) The case-law of the Court shows that, once the Community has established a common organization of the market, Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it.

The outstanding feature of the Irish national system financed by the production levy is the bonus scheme which amounts to an export aid. Such a scheme of aids for exports is incompatible with the common organization of the market in pigmeat.

The bonus scheme hinders and restricts the exports of curers who choose to sell independently of the Pigs and Bacon Commission by depriving them of the export bonus. The bonus gives the Pigs and Bacon Commission a competitive advantage over the defendant in the main action; the bonus penalizes it for

not selling to the Pigs and Bacon Commission.

The bonus scheme amounts to an aid which is implicitly excluded by the common organization: the export bonus gives an incentive to the sale of certain grades on the export market and thereby potentially deprives the home market of the relevant supplies.

The price system etablished by Regulation (EEC) No 2759/75 involves the fixing of a basic price for the Community and intervention measures when the prices on the representative markets in each Member State fall below a certain level. The Irish export bonus scheme has the potential to affect prices on representative markets in other Member States.

Bacon is one of the products subject to the system of monetary compensatory amounts. The export bonus could be analysed as amounting to a reduction in the amount charged on exports from Ireland; it thus derogates from the system of monetary compensatory amounts applicable to products subject to the common organization of the market.

The export bonus conflicts with Title II of Regulation (EEC) No 2759/75 dealing with trade with third countries. Article 15 provides for an export refund; however, the export bonus amounts to an additional export refund, applicable to any Irish exports to third countries.

(b) The prohibition by Article 16 of customs duties on exports and charges having equivalent effect covers any pecuniary charge affecting goods by reason of their crossing a frontier. This is not the case with the charge in question. As for the bonus system financed by the charge, it must be regarded rather under Article 34 than under Article 16 of the Treaty.

(c) The discriminatory nature of the export bonus may have an effect equivalent to a quantitative restriction on exports in so far as it is paid only to undertakings exporting through the Pigs and Bacon Commission. Article 34 of the Treaty is to be interpreted as forbidding the maintenance in force of national legislation which requires producers to market products subject to a common organization only through a national marketing board. In this case operators may lawfully export separately from the Pigs and Bacon Commission but are financially penalized for doing so.

(d) With regard to Articles 92 and 93 of the Treaty it should be noted that the reply given by the Court in the present proceedings under Article 177 cannot in any event prejudice the outcome of any investigation by the Commission as to whether Irish state aids are incompatible with Article 92. Furthermore, although national courts have jurisdiction under Article 93 (3) where aid is introduced or altered without the proper formal notice to the Commission, they have no jurisdiction in the case of existing aids where the procedure under Article 93 (1) can only be implemented by the Commission. In addition, incompatibility of an aid with the Treaty does not necessarily vitiate its system of financing.

(e) In the case of a product covered by a common organization of the market, a

national marketing system including aids and other measures must be assessed, by virtue of Article 44 (1) and Article 60 (1) of the Act of Accession, not in the context of Article 37 of the Treaty but within a purely agricultural framework.

(f) The legal problem before the national court cannot be resolved by reference to Article 85 or 86; it is primarily a state system for financing an export bonus by means of a levy imposed by law.

(g) The Irish export bonus scheme is incompatible with the common organization of the market in pigmeat and with Article 34 of the Treaty. However, a distinction must be made between the raising of an internal tax or levy and the use of its proceeds; the fact that the proceeds are used partly to finance a national aid system incompatible with the common organization of the market does not render the tax itself invalid.

The question remains whether the levy itself, regardless of the manner in which its proceeds are used, is incompatible with Article 34 or with the regulation establishing the common organization. As regards Article 34, it should be noted that the levy is charged on all bacon production in Ireland, irrespective of its destination, and that it cannot therefore be classified as a measure having equivalent effect to a quantitative restriction on exports; the levy could only be incompatible with the common organization if, by affecting the prices which bacon curers can pay to producers of pigs, it had the effect of modifying the formation of prices as provided for in the context of the common organization of the market. The national court could not be justified in finding that the levy was incompatible in this way unless it could be shown that the levy on curers in Ireland affects the prices which they could pay for their carcases and thereby put the "basic price" at risk.

(h) If the answers suggested by the Commission are given to the national court it is extremely unlikely that the latter would find that the levy was incompatible with Community law and therefore irrecoverable; the counterclaim made by the defendant in the main action would therefore also fail.

With regard to charges imposed in infringement of a directly applicable provision of Community law, they should, to the extent to which the action was brought within the prescribed periods, be refunded by the national authority, otherwise the direct applicability of Community law would be put in jeopardy.

(i) The following answers should be given to the questions submitted by the High Court of Ireland:

1. Article 34 of the EEC Treaty is to be interpreted as prohibiting a national measure which discriminates against products exported otherwise than through a particular agency.

2. Regulation (EEC) No 2759/75 is to be interpreted as prohibiting a national export subsidy on products covered by the regulation.

3. Regulation (EEC) No 2759/75 is not to be interpreted as prohibiting a national levy on processing of products covered by the regulation except in so far as the levy has the effect of modifying the formation of prices as provided for in the regulation.

III — Oral procedure

The Pigs and Bacon Commission, represented by D. Barrington, Senior Counsel, McCarren and Company Ltd., represented by John D. Cooke, Barrister, the Government of Ireland, represented by Roderick O'Hanlon, Senior Counsel, and the Commission of the European Communities, represented by its Agent, Richard Wainwright, and Nial Fennelly, Senior Counsel, submitted oral argument and their answers to questions put by the Court at the hearing on 4 April 1979.

The Advocate General delivered his opinion at the hearing on 15 May 1979.

Decision

1 By a judgment of 30 June 1978, received at the Court of Justice on 21 August 1978, the High Court of Ireland referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a number of questions relating to the interpretation of Articles 92 and 93 on the subject of aids granted by States, of Article 16 relating to the abolition of customs duties on exports, of Article 34 relating to the abolition of quantitative restrictions on exports, of Article 37 of the Treaty in conjunction with Article 44 of the Act of Accession relating to State monopolies, of Article 40 of the Treaty and of Regulation No 2759/75 of the Council of 29 October 1975 on the common organization of the market in pigmeat (Official Journal L 282, p. 1) and of Articles 85 and 86 of the EEC Treaty. These questions were raised in the context of an action between the Pigs and Bacon Commission (hereinafter referred to as "the PBC"), a public body carrying out certain duties in the field of regulating the market in pigmeat and, more particularly, of bacon marketing, on the one hand, and a bacon exporter, McCarren & Co. Ltd., on the other hand, in connexion with the imposition by the PBC of a levy intended to subsidize marketing outside Ireland, and in particular in the United Kingdom, of high quality bacon.

2 It appears from the judgment referring the matter to the Court that Ireland created as long ago as 1935, for the production and marketing of pigmeat in the form of bacon, a market organization managed as from 1939 by a public

body, the PBC, composed of representatives of the government and of the trades interested, and endowed by law with extensive powers for controlling, as a central marketing agency, the whole of the sector in question. In order to finance its activities the PBC had the statutory right to charge a levy on pig carcasses intended for the manufacture of bacon. This levy was used on the one hand for financing the PBC's general activities intended to improve the production and marketing of bacon and, on the other hand, for the payment of a bonus — granted in fact in the form of a refund of a part of the levy charged — for the export, principally to the United Kingdom, of high quality bacon.

3 At the time of Ireland's accession to the Community the compatibility of this system with Community law was considered by the Irish authorities and the trade circles concerned. It was conceded on that occasion that the powers and duties of the PBC might no longer be in all respects compatible with the requirements of Community law. It was understood in consequence that the PBC would thenceforth relinquish its statutory powers and would carry out its duties in future only on a voluntary basis, which was accepted by all the representatives of the trades concerned.

4 However, there was one exception to the voluntary nature of the activities of the PBC from then on: the PBC still has the statutory right to charge the levy intended to finance its various activities and it also continues to pay a bonus for the export of high quality bacon, it being understood that the bonus is payable only to those of the producers who effect their exports through the intermediary of the PBC acting as a central marketing agency. It is common ground that the result of this is that all producers of carcasses intended for manufacture into bacon are compelled to pay the levy but only those who use the PBC as their intermediary receive the export bonus. This action essentially concerns the functioning of this levy/bonus scheme which, according to the information supplied by the national court, forms a distinct element in the whole of the PBC's activities.

5 It appears from the file that in the beginning the defendant in the main action took part in the arrangement made in the conditions described above between the Irish authorities and the producers. During that period it paid the contribution on the carcasses intended for the production of bacon and exported its product through the intermediary of the PBC and drew the bonus. At a later stage McCarren & Co. felt that it could with greater advantage export its production directly and withdrew from the scheme as from 30 April 1975. From that date it has refused to pay the levy to the PBC and has been deprived of the export bonus.

6 The action brought against McCarren & Co. before the High Court concerns the claim by the PBC for the levy to which it considers itself entitled by law. McCarren & Co. for its part has made a counterclaim for reimbursement of the levy paid by it subsequent to 1 February 1973, the date of the application in Ireland of the common organization of the market in pigmeat and until it severed its links with the PBC.

7 McCarren & Co. claimed before the national court that the activities of the PBC as regards the charging of the levy on pig carcasses and the application of the proceeds to the payment of a bonus reserved exclusively for producers exporting their bacon through the intermediary of the PBC were incompatible with the EEC Treaty and the regulations relating to the common organization of the market in pigmeat.

8 Having regard to the arguments put forward by the parties to the dispute the High Court referred to the Court of Justice for a preliminary ruling nine questions within the context of the principal proceedings and a tenth additional question relating to the counterclaim. The questions are as follows:

1. (a) Whether *Articles 92 and 93* are to be interpreted as imposing an obligation to inform the Commission under paragraph (3) of Article 93 of the agreement entered into as to the marketing system which would operate after 1 February 1973, and/or of the changes in the system which occurred since February 1973?

(b) If so, whether the failure to inform the Commission means that the system was invalid for some or all of the period since 1973?

If the answers to (a) and (b) are in the affirmative, whether the levy is payable for the period of invalidity?

2. If the answer to 1 (a) is in the negative, whether *Article 92* is to be interpreted as imposing an obligation on a national court where it considers that a State aid may be incompatible with *Article 92* to refer to the European Court of Justice for decision the question whether the marketing system is incompatible with the provisions of Article 92 (1) and (2) and if the question is answered affirmatively by that Court whether the national court should then stay proceedings before it pending an adjudication on the system by the Commission under Article 93?

3. If the answers to 1 and 2 above are in the negative

(a) Then are *Articles 92 and 93* to be interpreted as meaning that when a State grants aid to which these articles apply the compatibility of the aid with the Common Market is a matter for determination by the Commission and not for the national courts of Member States?

(b) If (a) is in the negative whether these articles mean that State aid within the meaning of the articles is valid until a decision has been made on its compatibility with the Common Market by the Commission under Article 93 (2) notwithstanding the fact that aspects of the aid may conflict with obligations under Community law other than those contained in Articles 92 and 93?

(c) If the answers to (a) and (b) are in the negative are these articles to be interpreted as meaning that even if a portion of State aid is incompatible with the Community law a levy raised to finance it is none the less payable?

4. Is *Article 16* to be interpreted as meaning that if the operation of the marketing system referred to above results in a restriction or hindrance of exports by firms independently of the central marketing agency a

violation of this article has occurred and the levy payable to finance the system is irrecoverable?

5. Is *Article 34* to be interpreted as meaning that if the operation of the marketing system referred to above restricts or hinders exports by firms independently of the central marketing agency a violation of this article has occurred and that the levy payable as part of the system is irrecoverable?

6. Are *Articles 37 of the Treaty and Article 44 of the Act of Accession* to be interpreted as meaning that the operation of the new marketing system referred to above meets the obligations imposed by those articles, (a) up to 31 December 1977 and (b) since that time? If not, is the levy which is paid as part of the system recoverable from 1 February 1973 to 31 December 1977, or (b) since that date?

7. Are *Article 40* and *Regulation No 2759/75* to be interpreted as meaning that the marketing system referred to above is incompatible with the Community common organization of the market in pigmeat and accordingly invalid? If so, is the levy payable as part of the system irrecoverable?

8. Is *Article 85* to be interpreted as meaning that the agreement referred to above by virtue of which the marketing system has operated since 1 February 1973 is a violation of this article by reason of the fact that it hinders or restricts exports by firms independently of the central marketing agency, or because certain exports are subsidized under it? If yes, is the levy which is payable as part of the system irrecoverable?

9. (a) Is *Article 86* to be interpreted as meaning that the central marketing agency referred to above is in a dominant position in a substantial part of the Common Market?

   (b) If so, is it to be interpreted as meaning that there has been an abuse by that agency of that position which has affected trade between Member States by reason of the fact that exports from firms independently of the agency are hindered or restricted and/or by reason of the fact that a bonus on exports is only paid to firms who export through the central marketing agency.

(c) If the answers to (a) and (b) are yes, is the levy which is paid as part of the system irrecoverable?

10. If the levy hereinbefore referred to is not lawfully payable by reason of the operation of Community law should a national court in considering a claim for a refund of the levy apply the principles of its national laws or those of the Community? If Community law is applicable do its principles justify a claim that payments actually made should be refunded, either with or without a deduction in respect of the bonus received by the defendants?

Preliminary considerations on the scope of the questions raised

9 Consideration of the questions raised shows that they cannot all be simultaneously decisive for the solution of the problem. In this connexion the situation before the High Court is not without analogy with the one forming the basis of the Court's judgment of 29 November 1978 in Case 83/78 *(Pigs Marketing Board (Northern Ireland)* v *Redmond,* [1978] ECR 2347), where the national court submitted to the Court of Justice a preliminary question inquiring, as a result of contradictory views adopted with regard to a similar situation by the parties concerned, what the decisive Community provisions in the matter were. In that judgment the Court pointed out that in the event of proceedings relating to an agricultural sector governed by a common organization of the market the problem raised must first be examined from that point of view having regard to the precedence necessitated by Article 38 (2) of the EEC Treaty for the specific provisions adopted in the context of the common agricultural policy over the general provisions of the Treaty relating to the establishment of the Common Market.

10 The application of that principle to this case means that first of all consideration should be given to Question 7 relating to the interpretation of Article 40 of the Treaty and of Regulation No 2759/75, which must be associated with Questions 4 and 5 relating to the interpretation of Articles 16 and 34 respectively of the Treaty. In fact, for the reasons explained in the judgment referred to above (paragraphs 52 to 55), the provisions of the Treaty relating to the abolition of tariff and commercial barriers to intra-Community trade are to be regarded as an integral part of the common organization of the market.

11 This method of dealing with the questions is necessary also from another point of view. By virtue of Article 42 of the Treaty the provisions of the chapter relating to rules on competition — that is to say Articles 85 to 94 inclusive — are applicable to production of and trade in agricultural products only to the extent determined by the Council within the framework of measures adopted for the organization of agricultural markets. In Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (Official Journal, English Special Edition 1959 to 1962, p. 129) the Council of the EEC adopted certain general provisions on this subject intended to permit of a limited application of the rules of competition to the agricultural sector; specific provisions were subsequently adopted in the various agricultural regulations with a view to a wider application of the rules of competition in the different sectors of the market. Such is the case with Article 21 of Regulation No 2759/75 in the words of which: "Save as otherwise provided in this regulation, Articles 92 to 94 of the Treaty shall apply to the production of and trade in the products specified in Article 1 (1)". The result of that provision is that, although Articles 92 to 94 are fully applicable to the pigmeat sector, their application nevertheless remains subordinate to the provisions governing the common organization of the market established by the regulation. In other words recourse by a Member State to the provisions of Articles 92 to 94 on aids cannot receive priority over the provisions of the regulation on the organization of that sector of the market. Article 21 of the regulation accordingly makes it necessary to accord priority to an examination of the questions raised on the subject of the interpretation of the regulation itself and of the articles of the Treaty relating to the abolition of tariff and commercial barriers to freedom of exports.

An assessment of the activities of the PBC in the light of the common organization of the market in pigmeat and of the rules of the Treaty relating to freedom of exports (Questions 4, 5 and 7)

12 The High Court's seventh question is whether Article 40 of the Treaty in conjunction with Regulation No 2759/75 contains factors which make a marketing system characterized by the charging of a levy on all bacon producers and the payment of a bonus solely to exporters who avail themselves of the intermediary of the PBC as a central marketing agency appear incompatible with Community law. Questions 4 and 5 inquire whether such a system, involving a financial disadvantage for exporters who operate independently of the central agency, may constitute a charge having an effect equivalent to a customs duty on exports which is prohibited by

Article 16 of the Treaty, or a measure having an effect equivalent to a quantitative restriction on exports which is prohibited by Article 34.

13 The central question therefore involves a consideration of the compatibility with Community law of a marketing system which applies to bacon, a product coming under the common organization of the market in pigmeat, and which consists in allowing an agency endowed by law with power to impose a levy on the production of all pig carcasses intended for the manufacture of bacon, to subsidize the export of certain qualities of that product to other Member States or to non-member countries, reserving the advantage of the bonus to those of the exporters who pursue their activities through the intermediary of that same agency, acting as a central marketing agency. There are therefore in reality two distinct questions: on the one hand, whether, in itself, the grant of bonuses on exports is compatible with the system of intra-Community trade and the system of export to non-member countries; and on the other hand whether the provisions governing the sector of the market in question make it possible to establish a difference in treatment according to whether a producer sells in the Common Market or to a non-member country through the intermediary of the central agency in question, or whether he effects his exports directly, it being understood that in the latter case, whilst being compelled to pay the levy, he cannot benefit from the marketing bonus.

14 As the Court has repeatedly stated, on the last occasion in the above-mentioned judgment of 29 November 1978, once the Community has, pursuant to Article 40 of the Treaty, legislated for the establishment of the common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. The marketing system established by Regulation No 2759/75 in the context of the system for the free movement of goods guaranteed by the provisions of the Treaty is intended to ensure freedom of trade within the Community by the abolition both of barriers to trade and of all distortions in intra-Community trade and hence precludes any intervention by Member States in the market otherwise than as expressly laid down by the regulation itself. A Member State cannot therefore, either directly, or through the intermediary of an agency on which it confers powers to that intent, pay bonuses in whatever form for products intended to be marketed within the Common Market.

15 According to the idea on which the regulation dealing with the common organization of the market in pigmeat is based, the products referred to therein are in fact required to move freely within the Community at the price level resulting from the operation of the machinery for the common organization of the market, and neither Member States nor agencies on which they have conferred powers are entitled to create advantages for the marketing of national products as against those of other Member States by means of financial machinery such as the grant of bonuses.

16 The same consideration applies to exports to non-member countries since Article 15 of Regulation No 2759/75, so as to ensure that Community products are competitive on the world market, provides for the payment to producers of an export refund which, in the words of paragraph (2) of that article, must be "the same for the whole Community". That provision prevents Member States from conferring a special advantage on their producers by granting them an export bonus in addition to any refund which may be received in pursuance of the regulation at the risk of thus distorting conditions of competition between Community producers on external markets.

17 It therefore appears that the payment of a bonus for the marketing of bacon or other products coming under the common organization of the market, which are intended for other Member States or for export outside the Community, as provided by the system practised in Ireland under the authority of the PBC, is in itself incompatible with the rules of the Common Market under the provisions of the Treaty relating to the free movement of goods and more particularly under the provisions of Regulation No 2759/75.

18 Moreover the system practised by the PBC is incompatible with the provisions of Regulation No 2759/75 by reason of the difference in treatment for which it provides between producers according to whether or not they make use of the intermediary or the PBC to effect the sale of their products in other Member States or to export them to non-member countries. As the Court has emphasized in its judgment of 29 November 1978, the common organization of the market in pigmeat, like the other common organizations, is based on the concept of an open market to which

every producer has free access and the functioning of which is regulated solely by the instruments provided for by that organization. A fiscal device by virtue of which a central marketing agency is allowed to charge a levy on all bacon producers and to reserve the benefit of a bonus for the marketing of certain qualities of that product solely to producers who agree to effect their sales through the intermediary of the same agency constitutes an interference with the liberty which is guaranteed to all traders in the Common Market to avail themselves directly and without thereby suffering any economic disadvantage of the facilities of production, import and export which are guaranteed by the common organization of the market.

19 It follows from the foregoing that a system such as that practised by the PBC in Ireland in reality conflicts in two separate ways with the rules relating to the free movement of goods and the common organization of the market in pigmeat: on the one hand because it is calculated, by the grant of a bonus on sales of bacon intended to be marketed outside the national territory, to distort patterns of trade between Member States and the competition of Community producers on external markets; and on the other hand by the fact that it confers on a central marketing agency, vested with power to charge levies on the whole of the production of one of the products coming under the common organization of the market, the right to impose charges in such conditions that traders who choose to market their products directly without recourse to an intermediary which is privileged uner the law are penalized.

20 The answer to be given to Questions 4, 5 and 7 considered together should therefore be that Regulation No 2759/75, having regard to the provisions of the Treaty relating to the free movement of goods, must be interpreted as meaning that a national system is incompatible with the common organization of the market in pigmeat where the object of that system is to permit a central marketing agency vested by law with power to charge a levy on the whole of the production of a commodity coming under the common organization of the market, such as pig carcasses intended for the production of bacon,

(a) to effect, from the proceeds of the receipts from the levy, the payment of bonuses for certain products intended to be marketed in the Common Market or exported to non-member countries;

(b) to inflict a financial disadvantage on any producer, who is compelled to pay the production levy, by reason of the fact that he effects his sales directly without availing himself of the intermediary or of the services of the central marketing agency.

The levy demanded within the framework of a marketing system with the above-mentioned characteristics is not due from producers to the extent to which it is employed for purposes incompatible with the requirements of the Treaty on the free movement of goods and with the common organization of the market.

21 It follows that recourse to the provisions of Articles 92 to 94 of the Treaty cannot modify the requirements flowing, for the Member States, from observance of the rules relating to that common organization. Questions 1, 2 and 3 put by the national court may therefore be left unanswered.

22 Similarly the provisions relating to the common organization of the market cannot be thwarted by describing as a "State monopoly" an agency vested with certain statutory powers, such as the PBC. That consequence results from Article 38 (2) of the Treaty which gives priority to the rules for the organization of the agricultural markets as against the rules laid down for the establishment of the Common Market as a whole, of which Article 37 is one. That consideration makes it superfluous to carry out any investigation as to wheter in fact an agency such as the PBC may legitimately be described as a "monopoly" within the meaning of Article 37. Question 6 can therefore equally remain unanswered.

23 Finally, having regard to the answer given to Questions 4, 5 and 7 it does not appear necessary to go into the question whether the activities of the PBC might have adversely affected the provisions of Articles 85 and 86 of the Treaty.

The counter-claim (Question 10)

24 The questions to which an answer has been given above relate to the action brought before the national court in so far as it relates to the claim for the recovery of levies which the defendant in the main action refused to pay as

from the time when it decided to withdraw from the system operated by the PBC. It follows from the foregoing that its refusal to pay that levy was justified to the extent to which the levy serves to finance a bonus for the marketing of pigmeat. The defendant has also, by a counter-claim, applied for reimbursement of the same levy for the prior period during which it co-operated with the PBC and consequently had the advantage of the bonus and the national court wishes to know whether it must apply to such a claim the principles of its national law or the principles of Community law. It states moreover that on the basis of the principles of its national law it would probably feel it necessary to dismiss the counter-claim. However, it wishes to know, in the event of Community law's being applicable to such a claim, whether the principles inherent in Community law might make it possible to allow a claim the refund of sums actually paid, with or without deduction of the bonus received by the defendant.

25 It follows from the foregoing that the levy demanded in the framework of a national marketing system for pigmeat is not due to the extent to which it is devoted to purposes incompatible with the requirements of the Treaty relating to the free movement of goods and with the common organization of the market in the sector concerned. In principle any trader who is required to pay the levy has therefore the right to claim the reimbursement of that part of the levy which is thus devoted to purposes incompatible with Community law. However, it is for the national court to assess, according to its national law, in each individual case, whether and to what extent the levy paid may be recovered and whether there may be set off against such a debt the sums paid to a trader by way of export bonus.

26 The answer to be given to Question 10 must therefore be that it is for the national court to determine, on the one hand, whether and to what extent the levy charged on a product coming under the common organization of the market and devoted to purposes incompatible with that organization must be reimbursed and, on the other hand, whether and to what extent there may be set off against that right to reimbursement the amount of the bonuses paid to the trader concerned.

Costs

27 The costs incurred by the Government of Ireland and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Ireland by judgment of 30 June and by order of 31 July 1978, hereby rules:

1. **Having regard to the provisions of the Treaty relating to the free movement of goods, Regulation No 2759/75 must be interpreted as meaning that a national system is incompatible with the common organization of the market in pigmeat where the object of that system is to permit a central marketing agency vested by law with the power to charge a levy on the whole of the production of a commodity coming under the common organization of the market, such as pig carcasses intended for the production of bacon,**

   (a) to effect, from the proceeds of the receipts from the levy, the payment of bonuses for certain products intended to be marketed in the Common Market or exported to non-member countries;

   (b) to inflict a financial disadvantage on any producer, who is compelled to pay the production levy, by reason of the fact that he effects his sales directly without availing himself of the intermediary or of the services of the central marketing agency.

2. **The levy demanded within the framework of a marketing system having the above-mentioned characteristics is not due from producers to the extent to which it is devoted to purposes incompatible with the requirements of the Treaty on the free movement of goods and with the common organization of the market.**

3. **It is for the national court to determine, on the one hand, whether and to what extent the levy charged on a product coming under the common organization of the market and devoted to purposes incompatible with that organization must be reimbursed and, on the other hand, whether and to what extent there may be set off against that right to reimbursement the amount of the bonuses paid to the trader concerned.**

Mertens de Wilmars Mackenzie Stuart Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 26 June 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber,
acting as President.