OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 9 February 1988 *

Mr President,
Members of the Court,

1. When the Court, by order of 20 May 1987,[1] declared inadmissible actions for annulment brought against Commission Regulation No 2040/86 of 30 June 1986 laying down detailed rules for the application of the co-responsibility levy in the cereals sector,[2] it stated, in reply to an argument pointing out the need to provide the persons concerned with effective judicial protection, that:

'... a plaintiff may, in support of an action brought against a national measure implementing a Community measure, plead that the Community measure is unlawful and thus require the national court to give a ruling on all the submissions made in that respect.'[3]

2. This reference for a preliminary ruling is made in somewhat different circumstances from those which were then envisaged by the Court. In fact, the Brasschaat Cantonal Court, which is inquiring as to the validity of Regulation No 2040/86, has before it not an action against national measures implementing that regulation[4] but an action for repayment of the amount retained, by way of co-responsibility levy in the cereals sector, by the company Mera NV, the defendant in the main proceedings, when it purchased cereals from the farmer, Mr Van Landschoot, the plaintiff in the main proceedings. The question of the validity of the regulation in question therefore arises in the context of a dispute between private parties. In fact, both parties challenge before the national court the aforesaid regulation's validity. This particular feature of the case should not, however, prevent the Court from replying to the question which has been referred to it.

3. The essential complaint made against the regulation concerns the rules governing exemptions from the levy. First-stage processing operations are exempted from the co-responsibility levy provided that the products of the processing are used as animal feed on the same holding and that the processing is carried out with the farm's own machinery, whether temporary or permanent,[5] by a farmer whom I will call:

a self-supplier, when he himself produces the cereals, or

a farmer-processor, when he buys them from a third party.

4. There is alleged to be discrimination between two groups, first as between producers and secondly as between processors. The discrimination between producers is constituted by the fact that

* Translated from the French.

1 — Order of 20 May 1987 in Joined Cases 233 to 235/86 *Champlor SA and Others* v *Commission* [1987] ECR 2251.

2 — OJ L 173, 1.7.1986, p. 65.

3 — See the abovementioned order, at paragraph 10.

4 — These are: A Royal Decree of 2 July 1986, *Moniteur belge* of 5.8.1986, at p. 10902; a Ministerial Decree of 16 July 1986, ibid, at p. 10903 and a Ministerial Decree of 15 September 1986, *Moniteur belge* of 3.10.1986, at p. 13499, all relating to the prior authorization by the Minister for Agriculture of persons carrying out first-stage processing of cereals.

5 — Article 1 (2) of Regulation No 2040/86, as amended by Commission Regulation No 2572/86 of 12 August 1986, OJ L 229, 15.8.1986, p. 25.

first-stage processing operations concerning other producers' cereals, in particular those of suppliers to industrial processors, are not covered by the exemption, whereas self-suppliers and producers selling to farmer-processors are. There is said to be discrimination between processors because those who process and use cereals on their holdings are exempt whereas those who only process cereals, that is to say industrial manufacturers of compound feed, are not. This system of exemption applies to 58% of cereals intended for animal feed, a percentage which itself represents 60% of the total quantity of cereals produced in the Community.

5. As the Court is aware, the Commission arrived at a result of such proportions by the meaning which it gave, as it was empowered to do by Article 4 (6) of Council Regulation No 2727/75,[6] as amended by Regulation No 1579/86,[7] to the term 'first-stage processing' and by interpreting, in its telex message of 5 September 1986,[8] the expression 'producteur' as including any farmer, even a farmer not engaged in producing cereals.

6. Although the effectiveness of the system and its potential effects, whether direct or indirect, particularly on the processing industry, have been debated at length in the written and oral observations submitted in connection with this reference, it is not a question of judging whether the detailed rules for the application of the co-responsibility levy laid down by the Commission were suited to the purpose. What the Court has to assess is the validity of the Commission regulation in the light of the general principle of equal treatment and non-discrimination which, in the case of the common agricultural policy, is laid down in particular in the second subparagraph of Article 40 (3) of the Treaty and, for our purposes, in Article 4 (8) of Regulation No 2727/75, as amended by Regulation No 1579/86. The latter provision provides that 'the Commission shall ensure that the co-responsibility levy system does not create any distortion with competing products'. It should also be borne in mind that, under Article 4 (6) of Council Regulation No 2727/75, as amended by Regulation No 1579/86, the levy is passed on to the producer and this rule is repeated in Article 5 (1) of Commission Regulation No 2040/86, which is at issue in these proceedings.

7. It is precisely because the amount of the co-responsibility levy is passed on to the *producer* that there can be no question of discrimination between processors. The latter do not themselves bear the burden of the levy which is neutral as regards them. Since, moreover, the product involved is a surplus product and therefore one which is widely offered on the market, it is difficult to see how producers could raise their prices to compensate for the effect of the levy. One cannot therefore claim that its cost is borne by the processing industry.

8. Even supposing that the processing industry proposes to some producers that it itself bear the amount of the levy, in view of

6 — Regulation No 2727/75 of 29 October 1975 on the common organization of the market in cereals, OJ L 281, 1.11.1975, p. 1.

7 — Council Regulation No 1579/86 of 23 May 1986 amending Regulation No 2727/75 on the common organization of the market in cereals, OJ L 139, 24.5.1986, p. 29.

8 — Only the English language version of Regulation No 2040/86 has been so corrected, see the corrigenda in OJ L 252, 4.9.1986, p. 30.

the surplus nature of the production in question, it will only be induced to do so for commercial reasons which have nothing to do with the requirements of the common agricultural policy which underlie the existence and the rules for the application of the co-responsibility levy. In my view, there is therefore no discrimination between processors by reason of the co-responsibility levy.

9. The same cannot be said in the case of producers. Whilst one may understand the reasons justifying a general regime favouring self-suppliers, whose production is consumed by themselves and does not contribute to the creation of surpluses, it is difficult to see, when one considers the *raison d'être* of the co-responsibility levy, the justification for a system which is different depending on whether the producer sells cereals for processing to a farmer-processor or to an industrial processor. The reasons put forward by the Commission, relating to the practical difficulties of supervising transactions between farmers, are not such as to justify such a difference of treatment.

10. Therefore, the situation appears to me to be this:

Regulation No 2040/86 cannot be invalid

(i) in so far as it makes producers, such as the plaintiff in the main proceedings, subject to the co-responsibility levy in respect of their production intended to be industrially processed, and

(ii) in so far as it exempts self-suppliers from the levy.

The regulation is contrary to the principle of equal treatment between producers inasmuch as it grants, not only to self-suppliers, but also to producers who sell their production to farmer-processors, an exemption which it denies to other producers lawfully subject to the levy.

11. I therefore conclude that the Court should declare that Commission Regulation No 2040/86 must be considered invalid as long as it exempts from the co-responsibility levy producers who sell their production to farmer-processors whilst making cereal producers who sell their production to the processing industry subject to it.