equivalent to quantitative restrictions became applicable in the United Kingdom on 1 February 1973 in accordance with Article 60 (1) of the Act of Accession.

Mertens de Wilmars Koopmans Bahlmann Pescatore
Mackenzie Stuart O'Keeffe Bosco Due Everling

Delivered in open court in Luxembourg on 13 December 1983.

For the Registrar

H. A. Rühl
Principal Administrator

J. Mertens de Wilmars
President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 20 SEPTEMBER 1983 [1]

Mr President,
Members of the Court,

A number of questions have been referred to this Court for a preliminary ruling under the first and second paragraphs of Article 177 of the EEC Treaty by His Honour Judge Brian Grant sitting at Tunbridge Wells County Court concerning the activities of a body governed by English law known as the "Apple and Pear Development Council" [hereinafter referred to as "the Development Council"].

I — This request for a preliminary ruling is submitted in the context of a dispute between that body and three growers of apples and pears, K. & J. Lewis Ltd, Leighton Fruit Ltd and R. M. O. Capper. Section 1 (1) of the Industrial Organization and Development Act 1947 authorizes the relevant minister to make a "Development Council Order" in respect of an industry where it appears to him to be expedient "to increase the efficiency or productivity" of the economic sector in question. By means of inquiries carried out before the creation of such a body and subsequently at least every five years, the Minister is required to satisfy himself that the existence of such a Development Council is desired by a

1 — Translated from the French.

substantial number of the persons engaged in the industry.

By virtue of those provisions, the United Kingdom Minister for Agriculture, at the request of producers of apples and pears, made the Apple and Pear Development Council Order 1966. After consultations were made as to whether the Development Council should remain in being and a positive response was obtained, the Order was superseded by another bearing the same title in 1980. Pursuant to the Order, every grower in England or Wales with two hectares or more planted with 50 or more apple or pear trees is obliged to register with the Development Council and to pay to it an annual levy, the maximum amount of which is fixed by the Minister; the rate was fixed as UKL 29 per hectare by Article 9 (1) of the 1980 Order [1] and was increased to UKL 40 per hectare by the Order amending the latter. [2]

The Development Council brought an action against the defendants before the Tunbridge Wells County Court in order to obtain payment of the levy which was due and unpaid for the year ending on 30 March 1981.

The refractory growers claim that the creation and the functions of a body such as the Development Council are incompatible with the common organization of the market in fruit and vegetables and have an effect equivalent to quantitative restrictions on trade between the Member States. Consequently, they consider that the Development Council was not entitled to require them to pay a charge intended to finance unlawful activities. They therefore claim refund of the levy as from 1 February 1973.

1 — Statutory Instrument 1980 No 623.

2 — Statutory Instrument 1980 No 2001, Article 2.

The Development Council of course rejects that argument: it considers that its existence and the exercise of its functions are wholly in conformity with Community law. But the Development Council contends that, even if that were not the case, the defendants would not be entitled to oppose its request for payment of the charge or to secure any refund of the charges actually paid.

In order to settle this conflict, the national court has asked this Court to give a preliminary ruling on a number of questions which, for ease of exposition, I shall summarize as follows:

1. Are the following circumstances and measures contrary to Articles 30 and 34 or 38 to 47 of the EEC Treaty, Articles 42 and 60 of the Act of Accession or the regulation on the common organization of the market in fruit and vegetables?

   (i) The existence of a body having the constitution and functions of the Development Council;

   (ii) The fact that, as a general rule, English and Welsh producers of apples and pears are required to register with the Council and that failure to register is treated as a criminal offence;

   (iii) The fact that registered growers are required to furnish returns and information regarding their business activities and that failure to comply therewith is treated as a criminal offence;

   (iv) The obligation to pay an annual levy to the Development Council;

   (v) The fact that producers with less than two hectares or fewer than 50 fruit trees are exempted from such measures.

2. If the first question is answered, at least partially, in the affirmative, is that answer affected by the fact that the majority of the growers have declared themselves in favour of the continuation of the Development Council?

3. Do the provisions of Community law with which the measures described in the first question may possibly be incompatible have direct effect so as to confer on individuals rights upon which they may rely before the national courts?

   If so,

   (i) Do they have the effect of releasing a grower from the obligation to pay the levy?

   (ii) May they serve as a ground for claiming restitution of the levies paid (a) wholly or in part and (b) after, or even before, promulgation of the judgment of the Court?

   (iii) In deciding to order restitution of the charges, is the court of the Member State entitled to take into account the fact that the money raised by the annual charges has been used by the Development Council for purposes from which the growers have or might have derived a benefit?

4. If any of the measures described in the first question is incompatible with Article 30 or Article 34 of the Treaty, did that incompatibility arise on 1 January 1975, the date mentioned in Article 42 of the Act of Accession or on 1 February 1973, the date referred to in Article 60 thereof?

These various questions raise difficulties of different kinds. I shall give particular attention to the first question, for in answering that question I will come to deal with two of the three matters which are the only ones to have given rise to real differences between the various parties to these proceedings.

Those two matters are:

The compatibility with Community law of the advertising for British apples and pears,

(a) in general,

(b) for certain varieties;

The compatibility with Community law of the action taken by the Council regarding quality standards.

The third main subject in the proceedings before this Court relates to the classification as aid, within the meaning of Articles 92 and 93 of the Treaty, of the charge levied on growers by the Council. Since that question was not among those submitted by the national court, it is debatable whether the Court may give an answer to it on its own initiative.

II — Because this point is of a preliminary nature, I shall consider it first.

1. At the hearing, the Development Council expressed serious doubts as to whether such an examination was appropriate. It pointed out that that question, which had been raised for the first time in the proceedings before this Court, was entirely new and unconnected with any of the matters contemplated by the national court. It takes the view that to give an answer on that point would jeopardize the balance between the prerogatives of the national courts on the one hand and of the Court of Justice on the other, in the matter of references for preliminary rulings. It considers that to do so might endanger the rights of the parties to the main proceedings, who would have been able to submit observations or at least more wide-ranging observations on those questions before the national court and before this Court

if they had been raised at a stage in the proceedings prior to the submission of written observations by a Community institution and a Member State, which are not parties to the dispute.

Those remarks, which are indeed relevant, would have convinced me if, in addition, the question of the classification of the contested charges as aids had seemed to me to be decisive for resolving the dispute.

But that does not seem to me to be the case. It is clear from the judgments of this Court of 29 November 1978 [1] and of 26 June 1979 [2] that, in a dispute bearing upon an agricultural sector governed by a common organization of the market, the problem which arises must first be considered from that point of view. By virtue of Article 38 (2) of the Treaty, the general rules for the establishment of the common market must be regarded as subordinate to the specific provisions adopted in the context of the common agricultural policy. The latter provisions include, for the reasons already set out in the *Pigs Marketing Board* judgment,[3] the provisions of the Treaty relating to the removal of tariff and trade barriers to intra-Community trade.[4] It is necessary to accord priority to an examination of the rules of agricultural law particularly in relation to the provisions of the chapter of the Treaty relating to the rules on competition, that is to say Articles 85 to 94 in their entirety. By virtue of Article 31 of Regulation No 1035/72 on the common organization of the market in fruit and vegetables recourse by a Member State to the provisions of Articles 92 to 94 on aids cannot take priority over the provisions of the regulation on the organization of that sector of the market.[5]

In these circumstances, I shall deal with the question of the compatibility with Articles 92 to 94 of the Treaty of the charge levied on growers only summarily and as a secondary consideration, in case the Court does not agree with my analysis.

2. This question assumed great importance in the oral procedure, probably because of the position adopted by the Commission. It considers that the activities of the Development Council contravene Community law.

Its view is based on the incontestable fact that services such as those provided by the Development Council constitute aid within the meaning of Article 92 of the Treaty, even if they are financed by a charge levied on the growers. In the Court's judgment of 22 March 1977,[6] it was held in respect of measures similar to those involved in this case, that "A measure adopted by the public authority and favouring certain undertakings or products does not lose the character of a gratuitous advantage by the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned".[7] The services rendered by the Development Council to the growers of apples and pears therefore certainly constitute aid within the meaning of Article 92 of the Treaty.

1 — Case 83/78, *Pigs Marketing Board (Northern Ireland)* v *Redmond* [1978] ECR 2347.

2 — Case 177/78, *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161.

3 — Paragraphs 52 to 55, [1978] ECR at pp. 2370 and 2371.

4 — In particular Articles 13 and 16 and 30 and 34 thereof.

5 — *Pigs and Bacon Commission* v *McCarren*, cited above, paragraphs 9 to 11 of the Decision, at pp. 2186 and 2187.

6 — Case 78/76 *Steinike und Weinlig* V *Federal Republic of Germany* [1977] ECR 595.

7 — Paragraph 22; see also paragraph 21; both on p. 611.

It is also apparent from the documents before the Court that the maximum amount of the levy has been increased on three occasions since the United Kingdom's accession to the Community, namely on 1 April 1975 and on 7 May and 18 December 1980. I share the view expressed by Mr Advocate General Warner in his Opinion in the *Pigs and Bacon Commission* case [1] that an increase of a parafiscal charge intended to finance an aid may constitute an alteration to aid within the meaning of Article 93 (3). The Commission states that it was not informed in advance of the alteration in any of the three cases, contrary to the requirements of Article 93 (3). As a result, in the Commission's view, that aid has been illegal since 1 April 1975, the date on which the rate was altered for the first time.

That view is vigorously contested by the United Kingdom Government. It considers that it has at all times kept the Commission informed of the Development Council's activities and in particular of changes in the amount of the charge, in accordance with the provisions of the Treaty on State aids. In that connection it produced copy extracts from the inventory of aids granted in the United Kingdom in the fruit and vegetables sector, which it has notified to the Commission. The extracts produced relate to the years 1973, 1974, 1976, 1979, 1980 and 1981. It may be seen that the amount of the aid is in fact mentioned in each extract.[2] But the Commission correctly states in reply that that information is of a kind different from the notification required by Article 93 (3) of the Treaty — it is provided after the aid is put into effect, whereas Article 93 (3) requires prior notification.

However, that consideration does not seem to me to be decisive with regard to the dispute. I consider that the procedure laid down in Article 93 (3) was not applicable in this case. Whilst I share Mr Advocate General Warner's view that "there is ... no reason to interpret Article 93 (3) otherwise than strictly",[3] I also agree with Mr Advocate General Trabucchi's view that "adjustments of minor importance provided for in the basic system" are exempted from the requirement of notification.[4] In this case, I consider that the change in the amount of the aid, which, according to the United Kingdom, was made only in order to take account of inflation, must be treated as secondary, or indeed negligible.

III — I shall now examine the first question submitted by the national court and thus consider the compatibility with Community law of the advertising campaigns for English and Welsh fruit and the Development Council's activities regarding quality standards.

I shall also answer the specific questions raised by the national court concerning in particular the constitution of the Development Council, compulsory registration, the obligation to furnish returns and information and the obligation to pay a charge.

1 — [1979] ECR 2203 and 2204.

2 — However, it is not apparent from the documents before the Court whether the latest increase of the charge, made in December 1980, was in fact notified to the Commission.

3 — Opinion in *Pigs and Bacon Commission*, cited above, at p. 2204.

4 — Opinion in Case 51/74 *Van der Hulst*, [1975] ECR at p. 105.

A — The advertising of English and Welsh fruit.

I think it is helpful to distinguish between the campaigns organized for that fruit in general and those which concentrate on certain specific varieties.

The applicable rules of Community law are, first, those relating to the common organization of the market and, secondly, those relating to the free movement of goods which, as I have already said, are to be regarded as forming an integral part of the common organization.

1. In this case, it is incontestable that the campaigns in question are intended to enable British growers to recover their share of the market.[1] Certain documents in the file clearly show that their share has decreased in recent years, to the advantage of growers in other member countries of the Community (in particular France) and even growers in non-member countries (South Africa, New Zealand).

Thus, and in view of the extremely broad terms in which the case-law of the Court defines the concept of a measure having an effect equivalent to quantitative restrictions on imports, such campaigns might be regarded as contrary to Article 30 of the Treaty. It would then be the responsibility of the court making the reference to establish whether the conditions laid down in the judgments of this Court are actually satisfied with regard to the promotional activities of the Development Council.

But it seems to me to be difficult to assert that the contested activity of the Development Council in fact consists of the "establishment of a national practice, introduced by the ... government and prosecuted with its assistance, the potential effect of which on imports from other Member States is comparable to that resulting from government measures of a binding nature".[2] In fact, by contrast with the Irish Goods Council, the Apple and Pear Development Council has not received public grants to cover its advertising campaigns, the aims and broad outlines of which have not been defined by the United Kingdom Government.[3]

2. The Development Council's annual reports show that it has undertaken promotional activities for certain varieties of fruit. I refer to the action taken to promote Cox and Bramley apples.[4]

It is necessary to assess the compatibility of such activities with Regulation No 1035/72 on the common organization of the market in fruit and vegetables and with Article 40 (3) of the Treaty.

(a) It is apparent from its provisions that the above-mentioned regulation itself determines, on the basis of criteria adopted at Community level, the extent of the support which may be granted to the various varieties of apples produced in the Community within the framework of the system of public intervention. The fact that certain varieties receive special attention in promotion campaigns may upset the proper functioning of the machinery of the common organization

1 — 1981 Report, paragraph 11 ("Outlook"), p. 18.

2 — Judgment of 24 November 1982 in Case 249/81, *Commission* v *Ireland* (the "Buy Irish" campaign), paragraph 27 of the Decision, [1982] ECR 4005.

3 — Same judgment, paragraph 15.

4 — Annual report and accounts for the year ended on 31 March 1981, p. 17.

of the market in so far as such campaigns are organized with the deliberate intention to exclude the other varieties from the market. Exclusion of that kind would entail the risk of an imbalance in the prices of the other varieties not only on the United Kingdom market but also on all the other markets in the Community. Other Member States might thus be induced, at the expense of the Community budget, to repurchase apples of other varieties which as a result of those measures have become more difficult to dispose of.

Within the framework of the judicial cooperation established by Article 177 of the Treaty, it is the task of the national court, which alone has direct knowledge of the facts of the case and may, if appropriate, order any relevant measures of inquiry, to determine the exact scope of the action taken by the Development Council to promote the Cox and Bramley varieties. If, as it states, the campaigns in question are merely very specific campaigns of a very limited scope, it may be admitted that they do not have the effect of excluding other varieties contrary to the common organization of the markets.

(b) The promotion campaigns for the Cox and Bramley varieties would also be contrary to the principle of non-discrimination between producers laid down in Article 40 (3) of the Treaty if they were organized with the aim and had the effect of excluding from the market the other varieties produced in the United Kingdom. In this respect also it is for the national court to investigate whether that is the case.

B — Activities regarding quality standards

The Development Council issues "recommendations" to those engaged in the British trade with the aim of ensuring that traders market only fruit which meets certain quality standards.

The regulation on the common organization of the market in fruit and vegetables permits the marketing of fruit which meets other quality standards (in fact, fruit of inferior quality).

It is therefore important to determine whether the "recommendations" are of a mandatory nature, since if they are they would be contrary to Regulation No 1035/72 and more specifically to Title I thereof; Common standards.[1]

Unfortunately, only one reference in this respect is before the Court. In a passage in its 1981 report, the Development Council "is pleased to be able to report that, while fruit below the recommended minimum size was found on the wholesale markets, it was rarely that a grower again marketed such fruit after the lapse had been brought to his notice" [2] and it adds that "Reports of substandard fruit by wholesalers were also analysed and the names of wholesalers who featured on several occasions were brought to the notice of the National Federation of Fruit and Potato Trades".[2]

On this point also, only the national court can verify the exact scope of the recommendations — it does not seem to me that mere opinions are necessarily contrary to the provisions of Regulation No 1035/72.

1 — Articles 2 to 12.
2 — Page 11.

IV — I shall now consider the matters expressly dealt with by the national court in the various parts of this question.

1. It is not in doubt that the constitution of the Development Council to which the national court refers again in the first subquestion is in no way incompatible with Community law.

I should make clear that the expression "Constitution of the Council" refers to the members of the Development Council (growers, employees, independent members and persons having special knowledge of matters relating to marketing or distribution) who are appointed by the Minister. [1]

The same applies to other activities actually carried out by the Development Council, such as market surveys and, on a very modest scale, scientific research or the promotion thereof.

It seems clear that the Development Council has never exercised and still does not exercise the functions listed in Schedule I to the 1966 and 1980 Orders.

2. The obligation to register (second subquestion submitted by the national court) merely constitutes in my opinion a means of ensuring collection of the compulsory charge referred to in the fourth subquestion. It appears necessary to oblige growers to register with the Development Council so as to make possible the effective collection of the charge which they must pay. It does not seem to me that making non-compliance with that obligation a specific criminal offence is sufficient to make that obligation separate from the collection of the charge.

3. Likewise, the Development Council's entitlement to require growers to furnish returns and information on their business and the fact that non-compliance with that obligation is made a criminal offence do not seem to me to be contrary to any rule or principle of Community law.

4. On the other hand, the matter of appraising the lawfulness of the annual compulsory charge paid by growers to the Development Council to enable it to cover the costs of its activities is more complex.

I must emphasize that I shall confine myself to giving my opinion on the legality of the charge in itself and not in its capacity as a means of enabling activities on the part of the Development Council which might be incompatible with Community law to be financed. If the national court finds that the activities carried out with regard both to advertising and to quality standards are incompatible with Community law, that finding of incompatibility must of course extend to the charge which finances them.

I can say without hesitation that the charge, being a measure of a pecuniary nature, cannot be analysed in the light of Article 30 *et seq.* of the Treaty. [2]

It is also clear from the case-law of this Court that the charge cannot be viewed as a charge having an effect equivalent to customs duties on imports or exports which are prohibited by Articles 13 and 16 of the Treaty respectively, because it is not imposed on apples and pears by

1 — Article 4 of the 1966 and 1980 Apple and Pear Development Council Orders.

2 — See to that effect, in particular, the judgment of 22. 3. 1977 in Case 74/76, *Iannelli* [1977] ECR 557, paragraph 9 of the Decision; Opinion of Mr Advocate General Warner in Case 177/78, *Pigs and Bacon Commission* v *McCarren*, [1979] ECR at pp. 2209 and 2210.

reason of a crossing of an intra-Community frontier. [1]

It still remains to examine the compatibility of the charge with the rules on the common organization of the markets. In its judgment of 10 March 1981 [2] the Court held that a charge to be borne by producers and levied on the value of certain agricultural products falling within a common organization of the market is not, in principle, incompatible with the rules of that common organization unless it had "the effect of impeding the proper functioning of the machinery established as part of the relevant common organizations for the formation of common prices and to regulate market supplies". [3] In this case, it seems clear to me that the charge has no such effects. But I must add that, as I have already said, certain of the activities financed by it may possibly have such effects.

5. Finally, as regards the last subquestion submitted by the British court, it seems to me to be logical to exempt very small growers from the obligations described in the foregoing subquestions. It may be assumed that growers with less than two hectares of land planted with apple or pear trees or fewer than 50 apple or pear trees do not market their production or do so only to an extremely limited extent.

V — The second question:

It seems clear to me that if the measures in question are incompatible with Community law, neither the fact that they emanate from a body which was created on the initiative of a majority of the growers concerned nor the fact that it is continued as their wish renders those measures lawful. It goes almost without saying that neither that consent nor, *a fortiori,* consultation with other interested parties can render such measures compatible with Community law.

VI — Like the first question, the third question submitted by the national court is subdivided into a number of subquestions.

1. The court asks whether the rules of Community law which may have been infringed by the Development Council have direct effect so as to confer upon individuals rights enforceable in the courts of a Member State.

In answering the first question, I have considered the possibility that certain of the Development Council's activities may be incompatible on the one hand with the rules on the common organization of the market in fruit and vegetables and on the other hand with Article 40 (3) of the Treaty.

The direct effect of the rules on the common organization of the markets derives from the fact that they form part of a regulation which, by virtue of Article 189 of the Treaty, is "directly applicable in all Member States". [4]

1 — Judgment of 12. 7. 1973 in Case 2/73, *Geddo* [1973] ECR 865, paragraphs 5 and 6 of the Decision; judgment of 17. 5. 1983 in Case 132/82, *Commission* v *Belgium,* paragraph 8 of the Decision, [1983] ECR 1649, and in Case 133/82, *Commission* v *Luxembourg,* paragraph 9 of the Decision, [1983] ECR 1669.

2 — Joined Cases 36 & 71/80, *Irish Creamery Milk Suppliers Association and Others* v *Government of Ireland and Others; Martin Doyle and Others* v *An Taoiseach and Others* [1981] ECR 735.

3 — Same judgment, paragraph 24 of the Decision.

4 — Judgment of 29. 11. 1978 in Case 83/78, *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraph 67 of the Decision.

Within the framework of the market in fruit and vegetables, the direct effect of Article 40 (3) derives from its implementation in Regulation No 1035/72. [1]

2. It is also incontestable that if it were ascertained that the charge was intended for the financing of activities which are incompatible with those provisions, growers would be able to rely upon that fact as a complete defence to any action to recover the charge. [2]

3. The direct effect of the provisions which may have been infringed can also, in principle, serve as a ground for claiming restitution of the annual charges paid by the growers. Such a claim for restitution must be limited to the portion of the charge used for financing activities contrary to Community law. It is for the national court to determine on that basis, and in accordance with the procedures laid down by its national law, how that restitution ought to take place. [3]

4. The national court then asks whether a claim for restitution of the charges extends to the charges paid before promulgation of the judgment giving the preliminary ruling or whether it is limited to such payments as may be made thereafter.

(a) The answer to that question provided by the case-law of the Court is that in principle the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177, "the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule *as it must be or ought to have been understood and applied from the time of its coming into force.* It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied". [4]

However, by way of exception, the Court may, by reason of "important considerations of legal certainty affecting all the interests involved, both public and private", limit the retroactive effect of such a judgment to those persons "who have already brought legal proceedings or made an equivalent claim". [5]

(b) However, the choice between the principle and the exception is delicate. On the one hand, it seems to me that the *ex tunc* effect of judgments giving preliminary rulings should be firmly maintained. On the other hand, it seems to me that in this case the conditions for application of the exception provided for in the *Defrenne II* judgment and maintained in the *Ariete* judgment are satisfied. [6]

1 — Judgment in *Geddo*, cited above, paragraphs 2 to 4 of the Decision.

2 — Judgment in *Pigs and Bacon Commission*, cited above, paragraph 24 of the Decision.

3 — Same judgment, paragraph 25 of the Decision.

4 — Judgment of 27. 3. 1980 in Case 61/79, *Amministrazione delle Finanze dello Stato* v *Denkavit* [1980] ECR 1205, paragraph 16 of the Decision; judgment of the same date in Joined Cases 66, 127 and 128/79, *Salumi* [1980] ECR 1237.

5 — Judgment of 8. 4. 1976 in Case 43/75, *Defrenne* v *Sabena* (Defrenne II) [1976] ECR 455, paragraphs 69 to 75 of the Decision, in particular paragraphss 74 and 75; judgment of 10. 7. 1980, Third Chamber, in Case 811/79 *Amministrazione delle Finanze dello Stato* v *Ariete*, [1980] ECR 2545, paragraph 6 of the Decision.

6 — Judgment cited above, paragraph 7 of the Decision.

The present case resembles the *Defrenne* case owing to the similarity of the attitude which the Commission has for a long time adopted regarding the problem in question. It is important not to lose sight of the fact that bodies similar to the Apple and Pear Development Council exist in other Member States and that the Commission has never contested the validity of their activities under Community law or, *a fortiori*, brought an action, regarding those activities, for failure of a State to fulfil its obligations. On the contrary, it is clear from the reply sent on 17 August 1981 by Mr Dalsager, the Member of the Commission responsible for agriculture, to Mr Scott Hopkins, a member of the European Parliament, to the effect that at that time he regarded the Development Council's activities, and in particular the levying of the charge, as compatible with Community law.

5. Finally, the national court asks whether, in deciding whether to order restitution of any charges, the court of the Member State is entitled to take into account the fact that the money raised by the charges has been used for purposes from which the grower has or might have derived a benefit.

The case-law of the Court is also well-established on this point. The Court has held that "There is nothing from the point of view of Community law to prevent national courts from taking account, in accordance with their national law, of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to purchasers". [1] The Court has even stated specifically "that the protection of rights guaranteed in the matter by the Community legal order [the rights which the national courts are obliged to safeguard] does not require an order for the recovery of charges improperly levied to be granted in conditions such as would involve an unjustified enrichment of those entitled". [2]

It seems to me that that solution may be applied to the cases referred to by the national court where a charge has been used for purposes from which those who have paid it may benefit.

VII — The fourth question

This question is intended to determine the date as from which any of the measures described in the first question is to be held to be incompatible with Article 30 or Article 34 of the Treaty.

I have already said that none of the Development Council's activities can be regarded as incompatible with Article 34 of the Treaty. But I have pointed out that the activities of that body to promote certain varieties and with regard to quality standards may be capable "of hindering directly or indirectly, actually or potentially, intra-Community trade". [3] That question is therefore by no means theoretical.

The national court is unable to decide between two dates: 1 January 1975 and 1 February 1973. The choice of 1 January 1975 would amount to an application of the second paragraph of Article 42 of the Act of Accession; that provision comes

1 — Judgment of 10. 7. 1980, *Ariete*, cited above, operative part; to the same effect: *Pigs and Bacon Commission* v *McCarren*, cited above, paragraph 25 of the Decision and third paragraph of the operative part.

2 — *Ariete* judgment cited above, paragraph 13 of the Decision.

3 — Classical formula used since the judgment of 11. 7. 1974 in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5 of the Decision.

under Title I (Free movement of goods) in the fourth part (Transitional measures) of the "Act concerning the conditions of accession and the adjustments to the Treaties". It provides that measures having an effect equivalent to quantitative restrictions on imports and exports are to be abolished by that date at the latest.

Article 60 (1) forms part of Title II (Agriculture) of the fourth part. It provides that the system applicable in the Community as originally constituted in respect of measures having an effect equivalent to quantitative restrictions is to apply in the new Member States as from 1 February 1973, save in exceptional circumstances which are not relevant here.

There is no doubt that the latter provision, constituting as it does a *"lex specialis"* for agricultural products, applies here and so therefore does the date 1 February 1973.

For all the foregoing reasons, my opinion is that the Court should give the following answers to the questions submitted by his Honour Judge Brian Grant sitting at Tunbridge Wells County Court:

I. (i) A body having the constitution of the Apple and Pear Development Council is not contrary to Community law;

Advertising activities to promote certain varieties of fruit carried out by a body such as the Development Council are incompatible:

with Regulation No 1035/72 on the common organization of the market in fruit and vegetables if their effect is to exclude other varieties;

with Article 40 (3) of the Treaty if their object and effect is to exclude other varieties from the market;

The Development Council's "recommendations" regarding quality standards are incompatible with Regulation No 1035/72 if they are mandatory.

(ii) The obligation for growers to register with the Development Council is not in itself incompatible with Community law;

(iii) The creation of a body entitled to require growers of apples and pears to furnish returns and other information is compatible with Community law;

(iv) A charge such as that to which this case refers is not in itself incompatible with Community law. It becomes so if it is used to finance activities which are themselves contrary to Community law;

(v) The exemption from those measures of growers occupying less than two hectares of land or land planted with fewer than 50 apple or pear trees is compatible with Community law.

II. If the measures in question are incompatible with Community law, neither the consent of a majority of growers nor, *a fortiori*, consultation with other interested parties has the effect of remedying that incompatibility.

III. Article 40 (3) of the Treaty and Regulation No 1035/72 of the Council have direct effect so as to confer upon individuals rights enforceable in the national courts:

The incompatibility with Community law of activities financed by the charge levied by the Development Council on growers may be relied upon by the growers as a complete defence to any action for recovery of the said charge;

Conversely, growers are entitled to claim restitution of the whole of any amounts levied in contravention of Community law;

The procedures for such restitution are those laid down by national law. The national court may in particular, in accordance with national law, take into account any benefit which the growers have or might have derived from the proceeds of the charge;

In the present case, by reason of important considerations of legal certainty, the restitution of charges improperly paid is available only with respect to actions relating to payments made before the promulgation of the judgment, except as regards persons who have already brought legal proceedings or made an equivalent claim.

IV. If any of the Development Council's activities proves to be contrary to Article 30 of the Treaty, as implemented by Regulation No 1035/72, that incompatibility should be regarded as having commenced on 1 February 1973, by virtue of Article 60 (1) of the Act of Accession.