JUDGMENT OF THE COURT
12 December 1995 *

In Case C-399/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arrondissementsrechtbank of Zutphen (Netherlands) for a preliminary ruling in the proceedings pending before that court between

H. G. Oude Luttikhuis and Others

and

Verenigde Coöperatieve Melkindustrie Coberco BA

on the interpretation of Article 85(1) of the EEC Treaty and Article 2(1) of Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward (Rapporteur), J.-P. Puissochet and G. Hirsch (Presidents of Chambers), J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann and L. Sevón, Judges,

* Language of the case: Dutch.

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Oude Luttikhuis and others, by P. J. L. J. Duijsens, of the Hague Bar,

— the Verenigde Coöperatieve Melkindustrie Coberco BA, by T. R. Ottervanger, of the Rotterdam Bar,

— the French Government, by C. de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and J.-M. Belorgey, *chargé de mission* in the same directorate, acting as Agents,

— the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by B. J. Drijber, of the Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Oude Luttikhuis and others, represented by P. J. L. J. Duijsens; the Verenigde Coöperatieve Melkindustrie Coberco BA, represented by T. R. Ottervanger; the French Government, represented by J.-M. Belorgey; the Netherlands Government, represented by J. W. de Zwaan,

Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; and the Commission of the European Communities, represented by B. J. Drijber, at the hearing on 21 February 1995,

after hearing the Opinion of the Advocate General at the sitting on 12 September 1995,

gives the following

Judgment

1 By order of 2 September 1993, received at the Court on 10 September 1993, the Arrondissementsrechtbank of Zutphen (Zutphen District Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 85(1) of the EEC Treaty and Article 2(1) of Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129, hereinafter 'the Regulation').

2 Those questions were raised in proceedings between Mr Oude Luttikhuis and eight other dairy farmers (hereinafter 'the applicants') and the Verenigde Coöperatieve Melkindustrie Coberco BA (hereinafter 'Coberco'), a cooperative association for processing milk into milk-and dairy products and selling those products, concerning the fee payable by the applicants under the latter's statutes on withdrawal or expulsion from the association.

3 In accordance with its statutes Coberco undertakes to buy all the milk produced by its members, who in consideration give it the exclusive right thereto. In the event of withdrawal or expulsion from Coberco, however, the farmer is liable to

pay Coberco 2% of the sums received by him for milk delivered during the five previous years (that is to say, 10% of the average annual sum paid over those five years). With effect from 1990, the amount of the payment is determined by reference to a sliding scale, being 90% of the abovementioned sum after eight years' membership and 20% after 15 years or more. Where the period of membership is less than five years, the outgoing member is liable to pay 2% of the amount received for milk delivered or the amount paid for milk received during his membership, multiplied by the number reached by dividing sixty by the number of complete months of his membership.

4 Article 1 of the Regulation, adopted on the basis of Article 42 of the EEC Treaty, provides that Articles 85 to 90 of the Treaty and provisions made in implementation thereof are to apply to all agreements, decisions and practices referred to in Article 85(1) of the Treaty which relate to production of or trade in the products listed in Annex II to the Treaty.

5 The first sentence of Article 2(1) of the Regulation, however, provides for an exception to that general rule, stating that Article 85(1) of the Treaty is not to apply to such of the agreements, decisions and practices relating to production of or trade in the products listed in Annex II to the Treaty as form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the EEC Treaty.

6 The second sentence of that article adds that in particular Article 85(1) 'shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized'.

7 The applicants withdrew from Coberco with effect from 1 January 1992, after the applicable period of notice. Coberco retained withdrawal fees calculated in accordance with its statutes from the sums which it owed the applicants for their deliveries. The applicants brought proceedings against Coberco before the Arrondissementsrechtbank of Zutphen, seeking a declaration that they owe no fee to Coberco or, in the alternative, that the fee cannot exceed 4% of the average annual amount paid to the outgoing member for milk delivered to Coberco over the last five complete financial years of membership. They also seek an order for payment of the difference between the amount retained by Coberco and the amount so determined by the national court which has made the reference.

8 On the issue of the compatibility of the withdrawal fee with Article 85 of the Treaty and Article 2(1) of the Regulation, that court decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) What criteria should be applied in this case to decide whether Coberco's arrangements for resignation of membership conflict with Article 85(1) of the Treaty?

(2) What criteria should be applied to decide whether the arrangements in question fall within the exceptional arrangements in Regulation No 26 of the Council of the EEC?'

The criteria for the application of Article 85(1) of the EEC Treaty

9 Article 85(1) prohibits agreements, decisions or practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

10 It is settled case-law that in defining the criteria for the application of Article 85(1) to a specific case, account should be taken of the economic context in which the undertakings operate, the products or services covered by the agreements, the structure of the market concerned and the actual conditions in which it functions.

11 In order to determine whether the withdrawal fee scheme is compatible with Article 85(1), the criteria to be examined are therefore first the object of the agreement, then its effects and finally whether it affects intra-Community trade.

12 With regard first to the object of the agreements or the clauses in the statutes at issue in the main proceedings, organizing an undertaking in the specific legal form of a cooperative association does not in itself constitute anti-competitive conduct. As the Advocate General noted in point 30 of his Opinion, that legal form is favoured both by national legislators and by the Community authorities because it encourages modernization and rationalization in the agricultural sector and improves efficiency.

13 However, it does not follow that the provisions in the statutes governing relations between the association and its members, in particular those relating to the termination of the contractual link and those requiring the members to reserve their milk production for the association, automatically fall outside the prohibition in Article 85(1) of the Treaty.

14 In order to escape that prohibition, the restrictions imposed on members by the statutes of cooperative associations intended to secure their loyalty must be limited to what is necessary to ensure that the cooperative functions properly and in particular to ensure that it has a sufficiently wide commercial base and a certain stability in its membership (see Case C-250/92 *Gottrup-Klim* v *Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641, paragraph 35).

15 With regard, next, to the effects of the agreements or the clauses in the statutes, a combination of clauses such as those requiring exclusive supply and payment of excessive fees on withdrawal, tying the members to the association for long periods and thereby depriving them of the possibility of approaching competitors, could have the effect of restricting competition.

16 Such clauses are liable to render excessively rigid a market in which a limited number of traders operate who enjoy a strong competitive position and impose similar clauses, and of consolidating or perpetuating that position of strength, thereby hindering access to that market by other competing traders.

17 With regard, finally, to intra-Community trade, suffice it to note that Community trade may be affected as a result of a combination of several factors which, taken in isolation, would not necessarily be decisive.

18 An agreement between undertakings is to be regarded as liable to affect trade between Member States if in the light of certain considerations of law or fact it is capable of influencing the pattern of trade between Member States directly, indirectly, actually or potentially in a manner which may prejudice the aims of a single market between States (see *Gottrup-Klim*, cited above, paragraph 54).

19 In undertaking the economic analysis described above the national court may take into account, if relevant, the fact, noted by the Advocate General in point 35 of his Opinion, that it is always technically and economically feasible for the dairy industries in States neighbouring the Netherlands to obtain supplies from farmers in that country.

20 The answer to the first question must be therefore that, in order to decide whether fees payable under the statutes of a cooperative association on withdrawal or exclusion are compatible with Article 85(1), the national court must consider the object of the agreement providing for such fees, the effects of that agreement and whether it affects intra-Community trade, taking into account the economic context in which the undertakings operate, the products or services covered by the agreement, the structure of the market concerned and the actual conditions in which it functions.

The criteria for application of the Regulation

21 In the second question, the national court seeks guidance on the criteria which the clauses at issue must satisfy in order to qualify for the derogation provided for by the Regulation.

22 Article 1 of the Regulation lays down the general rule of applicability of Articles 85 to 90 of the Treaty while Article 2(1) provides for a triple derogation from that general rule in the case of agreements, decisions and practices which relate to production of or trade in the products listed in Annex II to the Treaty.

23 As a preliminary point, it must be noted that any derogation from or exception to a general rule must be interpreted strictly.

24 The first derogation provided for by Article 2(1) of the Regulation applies to agreements in the context of a national market organization.

25 The second derogation applies to agreements necessary for attainment of the objectives set out in Article 39 of the Treaty. That description implies that it must be demonstrated that the agreement is necessary for attainment of all those objectives (see Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraphs 24, 25 and 26).

26 Those two derogations can be disregarded in examining the second question referred, which, in the context of the main proceedings, concerns the scope of the third derogation.

27 The third derogation is subject to three cumulative conditions. For that derogation to be applicable, it must be confirmed, firstly, that the agreements in question concern cooperative associations belonging to a single Member State, secondly that they do not cover prices but concern rather the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of such products, and thirdly that they do not exclude competition or jeopardize the objectives of the common agricultural policy.

28 With regard to the third condition, it cannot be ruled out that the cumulative effect of clauses in statutes tying the members to the association for long periods and thereby depriving them of the possibility of approaching competitors jeopardizes one of the objectives of the common agricultural policy, namely, as the Advocate General notes in point 38 of his Opinion, that of increasing individual earnings in the agricultural sector, in so far as those active in that sector will not be able to benefit from competition in purchase prices for raw materials paid by different processors.

29 The question of the powers of the Commission and the national courts in this area is the subject-matter of a judgment delivered today in Joined Cases C-319/93, C-40/94 and C-224/94 *Dijkstra, Van Roessel and Others*, and *De Bie and Others*.

30 In the second paragraph of the operative part of that judgment, the Court rules that a national court before which a party pleads the nullity of a clause in the statutes of an agricultural cooperative on the ground that it infringes Article 85(1) of the Treaty, and before which the cooperative seeks to rely on Article 2(1) of Regulation No 26, may continue the proceedings and adjudicate on the dispute if it is clear that the criteria for the application of Article 85(1) are not fulfilled, or may declare the clause void under Article 85(2) if it is certain that that provision does not fulfil the conditions for application of the exception laid down in Article 2(1) of Regulation No 26 and does not qualify for exemption under Article 85(3). Where there is any doubt, the national court may, if it is appropriate and consistent with the national rules of procedure, obtain additional information from the Commission or allow the parties to seek a decision from the Commission.

31 The reply to the second question must therefore be that fees payable under the statutes of a cooperative association on withdrawal or exclusion may fall within the derogation provided for in the Regulation only if the agreement providing for them concerns a cooperative association belonging to a single Member State, does not cover prices but concerns rather the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of such products, and finally does not exclude competition or jeopardize the objectives of the common agricultural policy.

Costs

32 The costs incurred by the Netherlands and French Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main

proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Arrondissementsrechtbank of Zutphen by order of 2 September 1993, hereby rules:

1. **In order to decide whether fees payable under the statutes of a cooperative association on withdrawal or exclusion are compatible with Article 85(1) of the EEC Treaty, the national court must consider the object of the agreement providing for such fees, the effects of that agreement and whether it affects intra-Community trade, taking into account the economic context in which the undertakings operate, the products or services covered by the agreement, the structure of the market concerned and the actual conditions in which it functions.**

2. **Fees payable under the statutes of a cooperative association on withdrawal or exclusion may fall within the derogation provided for in Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products only if the agreement providing for them concerns a cooperative association belonging to a single Member State, does not cover prices but concerns rather the production or sale of agricultural products or the use of joint facilities for the storage,**

treatment or processing of such products, and finally does not exclude competition or jeopardize the objectives of the common agricultural policy.

Rodríguez Iglesias Kakouris Edward

Puissochet Hirsch Moitinho de Almeida

Kapteyn Gulmann Murray

Jann Sevón

Delivered in open court in Luxembourg on 12 December 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President