OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 3 March 2009 [1]

1. The introduction of an additional levy on milk, also known as a milk quota, has led to many legal disputes in the past, both at Community level and at national level (the 'milk quota cases' [2]). The present reference for a preliminary ruling concerns four questions raised by the Tribunale ordinario di Padova (District Court, Padua; 'the referring court') regarding the validity of Council Regulation (EC) No 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector. [3] The referring court has doubts as to the compatibility of Regulation No 1788/2003 with the objectives of the common agricultural policy ('CAP') and with the principles of equal treatment and proportionality.

2. Those questions arise in a legal dispute between milk producers, which are the claimants in the main proceedings ('the claimants in the main proceedings'), and Cooperativa Milka 2000 ('Cooperativa Milka'), the defendant in the main proceedings.

3. The claimants in the main proceedings supply milk produced by them to Cooperativa Milka. On the basis of Regulation No 1788/2003 Cooperativa Milka is claiming the additional levy on milk from them. The claimants in the main proceedings argue that Regulation No 1788/2003 is unlawful and cannot therefore form a legal basis for the additional levy.

I — Legal framework

4. Under the third paragraph of Article 5 EC, any action by the Community must not go beyond what is necessary to achieve the objectives of the EC Treaty.

1 — Original language: German.

2 — An overview can be found by Priebe, R., in Grabitz, E. and Hilf, M., *Das Recht der Europäischen Union*, Vol. I, Article 34, 21st Supplement, paragraph 61.

3 — OJ 2003 L 270, p. 123.

5. Under Article 33(1) EC, the objectives of the CAP are:

'(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilise markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices.'

6. Article 34(1) EC provides that in order to attain the objectives set out in Article 33 EC, a common organisation of agricultural markets may be established, which can take one of the following forms, depending on the product concerned:

'(a) common rules on competition;

(b) compulsory coordination of the various national market organisations;

(c) a European market organisation.'

7. Under Article 34(2) EC, the common organisation established in accordance with Article 34(1) EC may include all measures required to attain the objectives set out in Article 33 EC, in particular regulation of prices, aids for the production and marketing of the various products, storage and carry-over arrangements and common machinery for stabilising imports or exports. The common organisation must be limited to pursuit of the objectives set out in

Article 33 EC and must exclude any discrimination between producers or consumers within the Community.

II — The common organisation of the market in milk and the additional levy

8. Milk has been the subject of a common market organisation since 1964. Since the 1970s milk production has exceeded demand for milk. One of the reasons for this is that over the years milk production has become more efficient. Another reason was the structure of the common market organisation, under which milk producers were guaranteed, through support mechanisms, that they would be able to sell milk or milk products at a certain price. The result was that milk producers were no longer producing in the light of actual demand, but primarily in the light of the possibility of selling milk at support prices. Consequently, considerable structural surplus capacities were created on the milk market; supply exceeded demand significantly. [4] Various measures introduced by the Community legislature [5] failed to achieve the desired effect of stabilising the market.

9. The price-support measures for milk are financed from the Community budget. Because the market price for milk was well below the support price, the surplus production placed a considerable strain on the Community budget. The Community legislature considered that such strain was liable to jeopardise the future of the CAP. It considered two measures to resolve the problem. One alternative was to reduce the support price, whilst another was to introduce quotas in order to control production. By Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products [6] which instituted the additional levy on milk with a view to re-establishing the balance on the market, the Community legislature opted for a quota solution.

A — *The additional levy*

10. Under Regulation No 856/84, individual reference quantities, national reference quantities and a guaranteed total quantity of milk for the Community were fixed. The national reference quantities corresponded to milk production in a Member State in a certain reference year (1981, 1982 or 1983). Because

4 — With regard to this trend on the milk market, see Trotman, C., *The Development of Milk Quotas in the UK*, Sweet & Maxwell, 1996, Chapter 1,'The Creation of Surplus Europe', pp. 1 to 17.

5 — See, for example, Council Regulation (EEC) No 1079/77 of 17 May 1977 on a co-responsibility levy and on measures for expanding the markets in milk and milk products (OJ 1997 L 131, p. 6). Further measures are described in Trotman, C., cited in footnote 4, p. 11 et seq.

6 — OJ 1984 L 90, p. 10.

the figures for 1981 and 1982 for Italy were unfavourable, 1983 was fixed as the reference year for Italy. The national reference quantities have been adjusted over the years. The individual reference quantities corresponded in principle [7] to the quantity of milk which the milk producers had produced and milk purchasers had purchased in the reference year. The guaranteed total quantity for the Community was composed in principle of the production quantities in the individual Member States. [8]

11. In the event of an overrun of the individual reference quantity, an additional levy was collected. The additional levy made it uneconomical for the milk producers in question to produce milk over and above the individual reference quantity.

12. Under Regulation No 856/84, the additional levy for milk originally applied only for a period of five years. However, it was extended first through Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector [9] and then by Regulation No 1788/2003, which has applied since 1 April 2004. [10] The rules governing the additional levy are part of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), [11] which entered into force on 1 January 2008. [12]

B — *Regulation No 1788/2003*

13. Under Article 1(1) of Regulation No 1788/2003, annual national reference quantities are fixed for each Member State. These are laid down in Annex I to the regulation. Under Article 1(3) of Regulation No 1788/2003, the national reference quantities laid down in Annex I thereto may be reviewed in the light of the general market

7 — The Member States could also use part of their guaranteed quantity as a national reserve, through which they were to be able to adjust the reference quantities on the basis of the specific situation of certain producers.

8 — Plus 1%.

9 — OJ 1992 L 405, p. 1.

10 — Article 27 of Regulation No 1788/2003.

11 — OJ 2007 L 299, p. 1.

12 — See Article 66 et seq. of Regulation No 1234/2007.

situation and particular conditions existing in certain Member States.

14. Under Article 1(2) in conjunction with Article 6 of Regulation No 1788/2003, the milk producers are allocated reference quantities, the sum of which may not exceed the national reference quantity. If the national reference quantity is exceeded, the Member State in question must pay the Community the corresponding additional levy under Article 3(1) of Regulation No 1788/2003. In that case, the additional levy is to be entirely shared, under the first paragraph of Article 4 of Regulation No 1788/2003, among the milk producers who have contributed to each of the overruns of the national reference quantities. Under Article 11(1) of Regulation No 1788/2003, the first purchaser of the milk is responsible for collecting the additional levy from producers.

15. Under Article 22 of Regulation No 1788/2003, the additional levy is to be considered intervention to stabilise agricultural markets.

III — Background to the dispute, main proceedings and questions referred

16. In the milk years 1995/96 to 2003/04 and the subsequent milk years, the claimants in the main proceedings exceeded the individual reference quantities for milk supplies allocated to them. As the first purchaser of the milk supplies in question, Cooperativa Milka requested the additional levy from the claimants in the main proceedings. The claimants in the main proceedings are contesting the collection of the additional levy by Cooperativa Milka. Before the referring court they are essentially seeking a declaration that Cooperativa Milka is not entitled to claim the additional levy from them. In this connection, they argue that Regulation No 1788/2003 is invalid. Because the referring court has doubts as to the validity of that regulation, it has made a reference to the Court of Justice for a preliminary ruling on the following questions:

‘(1) Is Regulation No 1788/2003, which imposes an additional levy on production of milk and milk products in excess of the national quota allocated, without taking account of periodical updating of the quantity allocated to each Community country following specific verification of the respective quantities produced, compatible with Article 32 of the Treaty and

with the aims of the CAP which that article sets out, such as increasing agricultural productivity, developing technical progress, ensuring rational development of agriculture and also optimising utilisation of the factors of production, in particular labour, since that mechanism also has an impact on Italian milk and milk products producers, detracting from a fair standard of living and from development as a result of inadequate remuneration of the factors of production and since Italy is in fact a milk-deficit country…, forced to import raw material to sustain the industries engaged in the processing and marketing of quality products …?

(2) Is Regulation No 1788/2003 compatible with Article 33 EC, in so far as the latter provides for organisation of the common market yet at the same time excludes all discrimination between producers or consumers in the Community, but nevertheless the uniform application of the additional levy, without identification of those producers who are in deficit as compared with those who are producing surpluses, ultimately discriminates against Italian producers belonging to a milk-deficit country?

(3) Is Regulation No 1788/2003 compatible with Article 34 EC, in so far as it provides that pursuit of the objectives set out in Article 33 EC "shall exclude any discrimination between producers or consumers within the Community", whereas such discrimination is created by the regulation, which, for the purpose of the additional levy, requires a uniform contribution both from producers belonging to milk-surplus countries and from those belonging to milk-deficit countries such as Italy?

(4) Is Regulation No 1788/2003 compatible with the principle of proportionality laid down in Article 5 [EC] in so far as the latter states that Community action "shall not go beyond what is necessary to achieve the objectives of this Treaty", whereas the uniform application of the additional levy goes further than the aim of creating a common organisation of the market because it perpetuates for average Italian farmers low productivity, low income and the need for permanent reliance on public support?'

IV — Procedure before the Court of Justice

17. The order for reference of 23 January 2008 was lodged at the Court of Justice on 28 January 2008. In the written procedure, the claimants in the main proceedings, the Commission and the Council submitted observations. At the hearing on 15 January 2009 the representatives of one of the claimants in the main proceedings, the Council and the Commission made oral submissions.

V — Arguments of the parties

18. The *claimants in the main proceedings* claim that the original national reference quantity for Italy was based on incorrect data. The statistical data did not accurately reflect actual milk production in Italy. Furthermore, it had not been taken into consideration that national milk production in Italy was lower than national demand for milk and was thus in deficit, whilst national milk production in other Member States exceeded national demand for milk. Despite subsequent adjustments to the national reference quantity for Italy, these original errors continue to have an effect to this day.

19. The result is that national milk production in Italy can meet barely 60% of national demand and milk has to be imported from other Member States. In other Member States, on the other hand, national milk production far exceeds national demand for milk. [13] Since the additional levy is intended to restrict surplus production of milk, however, it must affect most heavily the milk producers responsible for the surplus production.

20. First of all, failure to take into consideration the relationship between national milk production and national demand for milk is contrary to the principle of non-discrimination under Article 34 EC. It results in different situations being treated equally. This is not objectively justified either on the basis of the principle of regional specialisation or on the basis of solidarity between milk producers. Taking national demand into consideration is not necessarily contrary to these principles. The fact that the additional levy impedes certain undertakings in developing and adapting to the demands of the market also constitutes discrimination.

13 — The proportion of national milk production to national demand for milk is 125% in France, 125% in Germany, around 360% in Ireland and 230% in Denmark.

21. There is also a breach of the principle of proportionality. The additional levy affects small milk producers more than large milk producers because it has a greater impact on the profitability of small milk producers. Small milk producers can survive only by increasing production.

22. Lastly, the additional levy is not appropriate for meeting the objectives of the CAP, namely the rational development of agricultural production, a fair standard of living for the agricultural community and reasonable prices for supplies to consumers. The only objective pursued by the additional levy is the stabilisation of the milk market, albeit to the detriment of the other objectives.

23. The *Council* points out, first of all, that when the national reference quantity for Italy was fixed by way of derogation from other Member States, 1981 was not taken as the reference year, but 1983, because that year was more favourable for Italy. Furthermore, the national reference quantities have been adapted in the light of the general market situation and particular conditions existing in certain Member States.

24. In the view of the Council, failure to take into consideration the relationship between milk production in Italy and demand for milk in Italy does not constitute discrimination. Because there is a common organisation of the market in milk, this fact is not relevant.

25. Regulation No 1788/2003 is also compatible with the objectives of the CAP. The milk market is characterised by considerable surplus production and stabilising the market is thus very important. Reconciling that objective with the other objectives of the CAP is a complex process in which the Community legislature enjoys broad discretion. It is not permissible to pursue only one objective to the exclusion of the other objectives of the CAP. However, the Community institutions may give temporary priority to one of those objectives, if that is necessary.

26. Lastly, the principle of proportionality is also observed. First of all, the Community legislature enjoys broad discretion in this area. This covers not only the nature and scope of the measures to be taken, but to a certain extent also the ascertainment of the basic data on which a measure is based. The Community legislature can therefore rely on general findings. Secondly, the fact that milk production in Italy is in deficit nationally does not mean that Regulation No 1788/2003 is disproportionate. A breach of the principle of proportionality can be taken to exist only if the legislative decision is manifestly inappropriate for stabilising the markets. This has not been shown by the referring court.

27. In so far as the referring court asserts that Regulation No 1788/2003 leads permanently to low productivity, low income and the need for permanent reliance on public support for the average Italian milk producer, this is not evidenced in the order for reference.

28. In the view of the *Commission*, Regulation No 1788/2003 is compatible with the objectives of the CAP. First of all, it is not relevant to the objectives of the CAP whether there is a balance between demand for and supply of milk in a certain Member State because there is a European market organisation for milk. The stabilisation measures introduced by the Community legislature are therefore aimed at the European market as a whole and not at national markets. Furthermore, in Regulation No 1788/2003 the Community legislature took into consideration the other objectives of the CAP. The additional levy on milk was the most effective means of curbing the surplus production of milk. The alternative, reducing the intervention price, would have been a more drastic measure, because it would have had much less favourable effects on the incomes of milk producers. Furthermore, the additional levy pursued other objectives of the CAP aside from stabilising markets. Moreover, it is not shown in the order for reference that there is an inconsistency between Regulation No 1788/2003 and the objectives of the CAP. In any case, the Community legislature can give temporary priority to one of the objectives of the CAP if this is justified in the light of the circumstances and the economic context. The serious imbalance between supply and demand on the milk market justified the introduction of the additional levy and continues to justify it.

29. There is no breach of the principle of non-discrimination either. In a European market organisation, it is not relevant whether there is a deficit or a surplus at national level. In any case, when its national reference quantities were fixed Italy was given particularly favourable treatment. In the period between the milk

year 1984/85 and the milk year 2006/07, the national reference quantities for the then 10 Member States fell by 2% on average, whilst the national reference quantity for Italy rose by 6%. However, that increase was not attributable to growth in national demand, but to specific circumstances. Furthermore, the fact that the production level in a certain year is taken as the reference value reflects the principle of regional specialisation. This is a fundamental principle of the common market, according to which production should take place at the location in the Community which is the most sensible from an economic point of view. It is not compatible with this principle to take into consideration the relationship between milk production and demand for milk at national level. It should also be borne in mind that the market organisation for milk is characterised by production aid for farmers and surplus production. Against this background, a combined effort is required from all milk producers in the Community. Lastly, the fact that the additional levy has different effects on certain producers or certain Member States does not constitute discrimination. The reference quantities were based on objective criteria adapted in the light of the objective to be achieved. By taking production in one reference year as a basis, the economic importance of the milk producers and the benefits granted to them were taken into consideration at a specific time. In this connection, it should be borne in mind that the Community legislature enjoys broad discretion in matters concerning agricultural policy which covers not only the nature and scope of the measures to be taken, but also the ascertainment of the basic data on which a measure is based. The Community legislature can therefore rely on general findings.

30. There is no breach of the principle of proportionality either. The Community legislature enjoys broad discretion on the basis of the complex political, economic and social assessments for which it is responsible. A measure adopted by the Community legislature is therefore unlawful only if it is manifestly inappropriate for meeting the objective pursued. However, the additional levy is appropriate for meeting the objective of stabilising markets by limiting production surpluses. Alternative measures would not have been as effective.

VI — Answers to the questions referred

31. By its four questions, the referring court is seeking to ascertain whether Regulation No 1788/2003 [14] is lawful and can therefore form the basis for Cooperativa Milka's claims against the claimants in the main proceedings. The referring court has doubts as to the compatibility of Regulation No 1788/2003 with the objectives of the CAP, the principle of non-discrimination and the principle of proportionality. The main basis for these legal doubts is that in fixing the national reference quantity for the Member States

14 — The questions submitted by the referring court relate solely to Regulation No 1788/2003. I will therefore restrict my comments to that regulation. However, the relevant provisions of Regulation No 3950/92 and Regulation No 1234/2007 appear to be essentially comparable to those of Regulation No 1788/2003.

under Regulation No 1788/2003 the relationship between milk production and demand for milk in the individual Member States was not taken into consideration in each case.

A — *First question*

32. By its first question, the referring court is seeking to ascertain whether Regulation No 1788/2003 is compatible with the objectives of the CAP. In this connection, the referring court mentions Article 32 EC. However, the objectives of the CAP to which the referring court makes substantive reference are not laid down in Article 32 EC, but in Article 33 EC. The first question submitted by the referring court is therefore to be construed as being directed at the compatibility of Regulation No 1788/2003 with the objectives of the CAP referred to in Article 33 EC.

33. According to Article 33(1) EC, the objectives of the CAP are diverse. They include increasing agricultural productivity, ensuring a fair standard of living for the agricultural community, stabilising markets, assuring the availability of supplies and ensuring that supplies reach consumers at reasonable prices.

34. The main purpose of the additional levy is to eliminate the structural surpluses on the milk market, in order to limit the imbalance between supply and demand, thereby achieving better market equilibrium. [15] The additional levy thus serves primarily to stabilise markets and therefore pursues one of the objectives of the CAP.

Compatibility of the additional levy with the objectives of the CAP

35. In so far as the compatibility of Regulation No 1788/2003 with the objectives of the CAP is challenged because it pursues the stabilisation of markets as its sole objective to the detriment of the other objectives of the CAP, that criticism is unfounded.

36. In assessing the objectives pursued by the additional levy, it must be borne in mind that its establishment is closely connected with other intervention measures in the common organisation of the market in milk. As has been explained above, [16] the price of milk is supported by intervention measures. Through this and other measures, milk producers are to be ensured a fair standard

15 — See recital 3 in the preamble to Regulation No 1788/2003. With regard to the predecessor Regulation No 857/84, see also Case 84/87 *Erpelding* [1988] ECR 2647, paragraph 26.

16 — See point 8 of this Opinion.

of living. If milk is produced with no regard for actual demand and only in the light of the possibility of selling it at a support price, there is a risk, as shown by the experience before the additional levy was introduced, that the Community budget will reach its limits as a result of the creation of milk lakes and butter mountains. Stabilising markets, which is the purpose of the additional levy, [17] should therefore also ensure the capacity to finance the price-support measures. [18] It thus also serves to allow milk producers a fair standard of living with an acceptable burden on the Community budget. Furthermore, it is aimed at the rational development of milk production. [19] The additional levy therefore does not seek only to stabilise the milk market.

37. It must also be pointed out that pursuit of only the objective of stabilising markets would not necessarily constitute infringement of Article 33 EC. The Community legislature enjoys broad discretion in the implementation of the CAP. This is in keeping with the political responsibility conferred on it by Article 32 et seq. EC for the organisation of the CAP. [20] As part of that discretion it has a duty to reconcile the (to some extent contrary) objectives of the CAP. [21] However, it may give any one of the objectives of the CAP temporary priority in order to satisfy the demands of the economic factors or conditions. [22] The limit of the discretion is not therefore reached until the Community legislature pursues one of the objectives of the CAP taken individually in a way that makes it (permanently) impossible to achieve the other objectives.

38. Against the background of the surplus production and the structural surplus capacities on the milk market, the additional levy to stabilise markets is justified. The fact that this objective is not pursued to the permanent exclusion of the other objectives of the CAP could be seen from the time-limit laid down in Regulation No 1788/2003. [23] The temporary nature of the additional levy is also confirmed by the fact that on 20 November 2008 the Council considered dropping the additional levy entirely in 2015.

17 — See Case C-311/90 *Hierl* [1992] ECR I-2061, paragraph 10.

18 — *Erpelding*, cited in footnote 15, paragraph 26.

19 — *Erpelding*, cited in footnote 15, paragraph 26, and Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 82.

20 — Priebe, cited in footnote 2, Article 33, paragraph 2, points out that provision is not made for ambitious goals like those contained in Article 33 EC with regard to other Community policies.

21 — *Hierl*, cited in footnote 17, paragraph 13; Joined Cases 279/84, 280/84, 285/84 and 286/84 *Rau Lebensmittelwerke and Others* v *Commission* [1987] ECR 1069, paragraph 21; and *O'Dwyer and Others* v *Council*, cited in footnote 19, paragraph 80.

22 — *Rau Lebensmittelwerke and Others* v *Commission*, cited in footnote 21, paragraph 21, and Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 10.

23 — See Article 1(1) of Regulation No 1788/2003. Priebe, cited in footnote 2, Article 33, paragraph 3, rightly points out that longer-term priorities may also be set if and in so far as the economic situation so requires.

Compatibility of the national reference quantities with the objectives of the CAP

39. The main basis for the referring court's doubts as to the compatibility of Regulation No 1788/2003 with the objectives of the CAP is the fact that the national reference quantity for Italy was based on incorrect data and that error continues to have an effect to this day. In my opinion, these misgivings also appear to be unfounded.

40. I do not consider that taking production in one reference period as the basis is incompatible with the objectives of the CAP.

41. By taking production in one reference period as the basis, the concept of specialisation of production in the European internal market is taken into account. According to that concept, one of the economic benefits of an internal market is that production of a product takes place at the location which is the most appropriate from an economic point of view. The claimants in the main proceedings object that the level of milk production in the individual Member States was not necessarily an indication of where production takes place most effectively. The production of milk is certainly not an area in which market forces take effect unrestrained. However, the regional distribution of milk production in the Community in a reference period constitutes an acceptable basis which takes into consideration not only territorial specialisation, but also other aspects to which consideration must be given in the context of the CAP.

42. Taking one reference year as a basis takes account of the economic strength of the milk producers and the benefits which the milk producers and the Member States obtained from the system at a specific time. By taking the milk produced in one reference year as the basis, it is thus ensured that the additional levy does not deprive milk producers in the individual Member States of a fair standard of living.

43. Moreover, account is also taken of the concept of solidarity between milk producers. The milk producers are supported from the

Community budget. If the additional levy is intended to limit surplus production on the milk market and to maintain the capacity to finance the burden on the Community budget, the consideration of national and individual production in a reference period or the increase or reduction of the reference quantities allocated in the same proportion reflects a concerted effort by all milk producers in the Community. [24]

44. Furthermore, the relationship between milk production and demand for milk in Italy is not a factor which, in my opinion, had to be taken into consideration by the Community legislature in the adoption of Regulation No 1788/2003.

45. The Community legislature may also undertake a regional differentiation in the context of a European market organisation if that is necessary according to the product in question, the market structure or for other objective reasons which are relevant to the implementation of the CAP. In this connection, I do not consider a distinction on the basis of the Member States' territories to be ruled out in principle either, even though such a distinction is naturally in some conflict with a common organisation of the market. [25]

46. However, consideration of national demand for a product does not constitute a reason to which consideration must be given in the context of a common organisation of the market. Instead, consideration of national demand is not consistent with the principle of specialisation of production in the European internal market. [26] How high demand for milk is in a Member State and whether it is rising or falling do not give any indication as to whether milk can be produced particularly favourably in that Member State. Consideration of national demand thus runs the risk of limiting the benefits entailed by specialisation in an internal market.

47. Lastly, I cannot see any further evidence (beyond the wrongly criticised failure to take into consideration national demand) to suggest that the reference quantities which apply to Italy under Regulation No 1788/2003 are based on incorrect data. The Council and

24 — See also Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 32, and *Spain* v *Council*, cited in footnote 22, paragraph 29.

25 — See points 41 to 43 of this Opinion.

26 — See also *Spain* v *Council*, cited in footnote 22, paragraph 25, and *O'Dwyer and Others* v *Council*, cited in footnote 19, paragraph 113.

the Commission have pointed out that 1983 was adopted as the reference year for Italy after it had transpired that the data for 1981 had been unfavourable. There is no clear evidence that the data on which Regulation No 1788/2003 was based were incorrect. The fact that the Community legislature relies on statistical data does not constitute an error of assessment. The Court has consistently held that the discretion of the Community legislature in matters concerning the CAP does not extend exclusively to the nature and scope of the measures to be taken but also to some extent to the ascertainment of the basic data. [27]

Conclusion

48. Consequently, I do not consider that either the additional levy in itself or the failure to take into consideration the relationship between milk production and demand for milk in a Member State in fixing the national reference quantities is incompatible with the objectives of the CAP under Article 33 EC.

27 — Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 25.

B — *Second and third questions*

49. By its *second question*, the referring court is seeking to ascertain whether Regulation No 1788/2003 is compatible with the principle of equality. In this connection, the court refers to Article 33 EC. However, the principle of equal treatment is laid down in the second subparagraph of Article 34(2) EC. The second question submitted by the referring court must therefore be interpreted as being directed at the compatibility of Regulation No 1788/2003 with the principle of equality laid down in the second subparagraph of Article 34(2) EC. [28] With its *third question* the referring court is seeking to ascertain whether Regulation No 1788/2003 breaches the principle of non-discrimination under the second subparagraph of Article 34(2) EC because a uniform contribution is required from producers in Member States with surplus production and those with a deficit. The second and third questions are thus both directed at the compatibility of Regulation No 1788/2003 with the principle of equality under the second subparagraph of Article 34(2) EC. I will therefore examine them together.

28 — In so far as the mention made by the referring court of the principle of equality in the second question should be construed as a reference to the general principle of equality, it should be pointed out that the prohibition of discrimination laid down in the second subparagraph of Article 34(2) EC is merely a specific enunciation of the general principle of equality (see Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 9).

50. In the view of the referring court, the fact that in fixing the national reference quantity the relationship between milk production and demand for milk in a Member State was not taken into consideration constitutes discrimination against Italian milk producers. I cannot see any breach of the principle of equality.

51. Under the principle of equality laid down in the second subparagraph of Article 34(2) EC, any discrimination between producers or consumers within the Community is prohibited. The principle of non-discrimination thus prevents comparable situations being treated differently and different situations being treated alike unless such treatment is objectively justified. [29]

52. I have already examined above [30] the fact that, in matters concerning the CAP, the Community legislature has a broad discretion which corresponds to the political responsibilities imposed upon it by Article 32 et seq. EC. That discretion is also to be taken into consideration in the context of the second subparagraph of Article 34(2) EC. [31]

53. First of all, I have doubts whether failure to take into consideration the relationship between milk production and demand for milk in the individual Member States in fixing national reference quantities constitutes equal treatment of different situations within the meaning of the second subparagraph of Article 34(2) EC.

54. In my opinion, the principle of equal treatment does not apply where two situations with a different element are treated equally. Rather, equal treatment of different situations can be taken to exist only where the element which distinguishes the two situations is relevant having regard to the pertinent Community legislation and the objectives pursued by it. [32] In my view, there can be no question of equal treatment of different situations for the purposes of the second subparagraph of Article 34(2) EC if the relationship between milk production and demand for milk in the individual Member States is not relevant within the framework of Article 32 et seq. EC. This is consistent in particular with the objectives of the CAP.

29 — *Hierl*, cited in footnote 17, paragraph 18, and *Spain* v *Council*, cited in footnote 22, paragraph 25.

30 — See point 37 of this Opinion.

31 — See in particular Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 14.

32 — Hernu, R., *Principe d'égalité et principe de non-discrimination dans la jurisprudence de la Cour de justice des Communautés européennes*, LGDJ, 2003, p. 357, takes the view that the situations are not similar or distinctive in themselves, but that the situation is assessed solely on the basis of the object and aim of the provision.

55. As I have explained above, [33] consideration of the relationship between national milk production and national demand for milk is not a factor to which consideration must be given in the context of the common organisation of the market for milk, but a factor which is not consistent with the principle of regional specialisation and may not therefore be taken into consideration in a common organisation of the market. In my view, no equal treatment of different situations for the purposes of the second subparagraph of Article 34(2) EC can therefore be taken to exist.

56. Even if the failure to take into consideration the relationship between national milk production and national demand for milk were to be regarded as equal treatment of different situations for the purposes of the second subparagraph of Article 34(2) EC, that equal treatment would be objectively justified for the abovementioned reasons.

57. Regulation No 1788/2003 is therefore also compatible with the principle of equal treatment under the second subparagraph of Article 34(2) EC. [34]

C — *Fourth question*

58. By its fourth question, the referring court is seeking to ascertain whether Regulation No 1788/2003 is compatible with the principle of proportionality laid down in the third paragraph of Article 5 EC.

Assessment criterion

59. Under the third paragraph of Article 5 EC, any action by the Community must not go beyond what is necessary to achieve the objectives of the EC Treaty. The proportionality requirement under the third paragraph of Article 5 EC applies in the case of interference by the Community institutions in the fundamental rights of individuals [35] or in the interests of the Member States. [36]

33 — See points 44 to 46 of this Opinion.

34 — The fact that the additional levy has serious effects for certain milk producers does not constitute discrimination within the meaning of the second subparagraph of Article 34(2) EC. This may be relevant, however, in connection with proportionality. With regard to proportionality, see points 58 to 72 of this Opinion.

35 — Case C-404/92 P *X* v *Commission* [1994] ECR I-4737, paragraph 18.

36 — Priebe, R., cited in footnote 2, Article 37, paragraph 26b.

60. The question whether a measure taken by the Community institutions is compatible with the principle of proportionality depends on whether the measure is appropriate and necessary for meeting the objectives legitimately pursued and is reasonable in relation to the interference in the rights of individuals or to the interests of the Member States. [37] In reviewing the proportionality of measures in matters concerning the CAP, however, in some cases [38] the Court has simply examined whether the measure is not manifestly inappropriate for meeting the objective pursued by the Community legislature. The Court has justified this limited review of proportionality by the broad discretion enjoyed by the Community legislature in matters concerning the CAP. [39]

61. I do not find this approach persuasive. As Advocate General Sharpston argued convincingly in her Opinion of 14 June 2007 in *Zuckerfabrik Jülich*, the judicial review of a measure taken by the Community legislature is not precluded by its broad discretion. [40] I share her view and would like to make the following additional points.

62. First of all, I do not see why the broad discretion enjoyed by the Community legislature in matters relating to the CAP should necessarily mean that the three-stage review of proportionality (appropriateness, necessity and reasonableness) is reduced to a one-stage review of appropriateness. I do understand the misgivings which exist over an excessive review of acts of the Community legislature by the Court of Justice. It is not for the Court to substitute its own decisions for the social, economic or political decisions of the

37 — Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, paragraph 21, and *O'Dwyer and Others* v *Council*, cited in footnote 19, paragraph 107. The third paragraph of Article 5 EC is also construed in this sense, even though the requirement of reasonableness cannot be inferred directly from the wording of the provision itself (see Schima, B., in Mayer, H. (ed.), *Kommentar zum EUI- und EG-Vertrag*, Article 5, 50th Supplement, paragraph 44).

38 — However, in a few other cases the Court has applied a stricter test criterion, for example in Case C-118/89 *Lingenfelser* [1990] ECR I-2637, paragraphs 12 to 14, Case C-319/90 *Pressler* [1992] ECR I-203, paragraphs 12 to 17, and Case C-356/97 *Molkereigenossenschaft Wiedergeltingen* [2000] ECR I-5461, paragraphs 35 and 36.

39 — See, for example, *Schräder HS Kraftfutter*, cited in footnote 37, paragraph 22; Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13 et seq.; and *O'Dwyer and Others* v *Council*, cited in footnote 19, paragraph 107.

40 — Joined Cases C-5/06 and C-23/06 to C-36/06 [2008] ECR I-3231, point 65: '… That does not however give the Community legislature *carte blanche* in the agricultural sector. The Court has not excluded judicial review of the institutions' exercise of their wide discretionary powers. If such review is to be of any value, it must be possible for the Court to intervene when, as in the present cases, the method of calculation of a production levy intended to be a means by which producers bear the cost to the Community of disposing of surplus production manifestly leads to overcharging, thereby placing a disproportionate burden on the producers.'

Community legislature.[41] However, those misgivings can be countered by the argument that the review is limited to examining whether the measures in question are *manifestly* unnecessary or unreasonable and that in that review account is taken of the right of assessment (*Einschätzungsprärogative*) and the broad discretion enjoyed by the Community legislature.[42] In this way, respect for the political margin of discretion enjoyed by the Community legislature can be guaranteed.

63. An argument against limiting the review of proportionality to examining the manifest inappropriateness of a measure is that the conditions of appropriateness, necessity and reasonableness do not reflect different shades of the same concept, which can be limited or extended depending on the intensity of the judicial review. Rather, the examination of the necessity and reasonableness of a measure is distinct from appropriateness and important for individual protection. The objective pursued by the Community legislature and the affected rights of individuals are 'compared' only in the context of necessity and reasonableness. If only the appropriateness of a measure is examined, there is no review of proportionality, but only an objective review of discretion without elements of individual protection.[43] Because the additional levy could interfere appreciably in the rights of milk producers, it seems important in this sector in particular not to restrict the review of proportionality to an objective review of discretion.

64. I do not therefore believe that the review of proportionality for a measure in the sphere of the CAP should be restricted to examining whether the measure is manifestly inappropriate. I will therefore examine below whether the additional levy and the fixing of the reference quantities in the light of the objectives pursued by the Community legislature appear to be manifestly inappropriate, manifestly unnecessary or manifestly unreasonable, taking into account in each of these individual stages of the examination the right

41 — With regard to these misgivings, in particular from the point of view of the common law, see Jacobs, F., 'Recent Developments in the Principle of Proportionality in European Community Law', in: Ellis, E. (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart, 1999, p. 1 et seq., p. 20, who does, however, point out that certain reasons for a limited judicial review of the legislature at national level relate to the organisation and historical development of the national legal orders and cannot therefore necessarily be applied at Community level. See also Schima, cited in footnote 37, paragraph 48, who observes that the Community legislature has primary responsibility for safeguarding the principle of proportionality and that the Court cannot directly substitute its own view for the view of the legislature.

42 — See also Rivers, J., 'Proportionality and discretion in international and European law', in Tsagourias, N. (ed.), *Transnational Constitutionalism*, Cambridge University Press, 2007, p. 114 et seq., and p. 120 et seq., who distinguishes in particular between 'policy-choice discretion' and 'evidential discretion'.

43 — See also von Danwitz, T., 'Der Grundsatz der Verhältnismäßigkeit im Gemeinschaftsrecht', *Europäisches Wirtschafts- und Steuerrecht*, 2003, p. 396, who observes that such an approach reduces the principle of proportionality to a review of discretion.

of assessment and the broad discretion enjoyed by the Community legislature.

Assessment of proportionality

65. For the reasons given above, it is clear that neither the additional levy in itself [44] nor the fixing of the national reference quantities [45] is manifestly inappropriate for meeting the objectives of the CAP.

66. Furthermore, I cannot see anything to suggest that the additional levy and the fixing of the national reference quantities were manifestly unnecessary. A measure is necessary if, from among several measures which are appropriate for meeting the objective pursued, it is the least onerous for the interest or legal asset in question. [46]

67. As the Council and the Commission have argued, the Community legislature gave particular consideration to reducing the support price as an alternative to introducing the additional levy. However, it opted to introduce the additional levy because, in its estimation, reducing the support price would have had much less favourable effects on the income of milk producers than introducing the additional levy.

68. With regard to the fixing of the national reference quantity, a method which takes into consideration the relationship between milk production and demand for milk in the individual Member States is ruled out as a less onerous measure because, for the abovementioned reasons, [47] it would not be appropriate, in particular, for taking into account the principle of regional specialisation and the principle of solidarity between milk producers.

69. Lastly, nor is there a manifestly unreasonable relationship between the objectives pursued and the disadvantages caused.

70. It should be pointed out, first of all, that, as a result of surplus production of milk, which is not based on actual demand but on the possibility of selling milk at a support price, the Community budget had reached its limits before the additional levy was introduced. Regulation No 1788/2003 serves the

44 — See points 35 to 38 of this Opinion.

45 — See points 39 to 47 of this Opinion.

46 — *Schräder HS Kraftfutter*, cited in footnote 37, paragraph 21, and *O'Dwyer and Others* v *Council*, cited in footnote 19, paragraph 107.

47 — See points 39 to 46 of this Opinion.

aim, inter alia, of maintaining the capacity to finance the costs of the support measures. In so far as the sales opportunities of milk producers are limited as a result of this correction measure, this must be accepted in principle by the milk producers on account of the public interest, on the one hand, in controls on food production to a certain extent and, on the other, in the capacity to finance such controls. [48]

For that reason, the fixing of the reference quantity cannot be regarded as a manifestly unreasonable burden on small milk producers. It should also be pointed out that the provisions of primary law on the CAP do not seek to favour the least profitable undertakings.

Conclusion

71. In so far as the referring court mentions that small milk producers in Italy could not survive without increasing their production or would be committed permanently to low productivity, low income and the need for permanent reliance on public support, the following points should be made. The additional levy serves in particular to maintain the capacity to finance the price-support measures which are intended to ensure a fair standard of living for milk producers. Without the support mechanism, competition could be expected to be waged primarily over price in the case of a largely homogeneous mass product like milk. Because small milk producers tend to be able to benefit less from economies of scale than large milk producers, abolishing the individual reference quantities would tend to favour large milk producers. The additional levy therefore guarantees the operation of a system which also allows a fair standard of living for small milk producers.

72. In my view, Regulation No 1788/2003 does not interfere disproportionately in the rights or interests of milk producers and is therefore compatible with the third paragraph of Article 5 EC. [49]

D — *Summary*

73. In summary, Regulation No 1788/2003 is not contrary to the objectives of the CAP, the principle of non-discrimination or the principle of proportionality.

48 — *O'Dwyer and Others* v *Council*, cited in footnote 19, paragraph 89.

49 — See also Joined Cases C-231/00, C-303/00 and C-451/00 *Cooperativa Lattepiù and Others* [2004] ECR I-2869, paragraph 73, on Regulation No 3950/92.

VII — Conclusion

74. In the light of the foregoing, the questions referred by the Tribunale ordinario di Padova should, in my opinion, be answered as follows:

Council Regulation (EC) No 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector is compatible with the objectives of the common agricultural policy under Article 33 EC, the principle of equal treatment under the second subparagraph of Article 34(2) EC and the principle of proportionality, even if the national reference quantities are not adjusted in the light of the relationship between milk production and demand for milk in a Member State.