OPINION OF ADVOCATE GENERAL ELMER

delivered on 14 November 1996 *

1. In this case the Pretura Circondariale (District Magistrate's Court), Verona (Italy), has referred to the Court for a preliminary ruling a question on the interpretation of various provisions adopted for the application of the premium system for raw tobacco. The background to the question is a dispute concerning the conversion rate to be applied in calculating the premium payable by a group of producers to one of its members whose raw tobacco it had delivered to the processor concerned.

The basic regulation

2. In accordance with Council Regulation (EEC) No 2075/92 of 30 June 1992 on the common organization of the market in raw tobacco [1] ('the basic regulation'), aid is granted to raw tobacco producers via the processors in the form of a premium for delivery of leaf tobacco to the processors.

3. Article 5, Article 6(1) and Article 12(1) of the basic regulation provide as follows:

'*Article 5*

Granting of the premium shall be subject in particular to the following conditions:

(...)

(b) quality requirements must be fulfilled;

(c) the leaf tobacco must be delivered by the producer to the premises of the first processor under a cultivation contract.

* Original language: Danish.

1 — OJ 1992 L 215, p. 70, most recently amended by Council Regulation (EC) No 415/96 of 4 March 1996 amending Regulation (EEC) No 2075/92 on the common organization of the market in raw tobacco, and fixing the guarantee thresholds for leaf tobacco by group of tobacco varieties for the 1996 and 1997 harvests (OJ 1996 L 59, p. 3).

Article 6

1. Cultivation contracts shall comprise:

— an undertaking by the first processor to pay to the grower, in addition to the purchase price, a sum equal to the premium at the time of delivery for the quantity under contract and effectively delivered;

— an undertaking by the grower to deliver to the premises of the first processor raw tobacco corresponding to the quality requirements.

Article 12

1. In order to concentrate supply and adapt it to the qualitative requirements of the market, specific aid equivalent to 10% of the premium shall be granted where cultivation contracts are concluded between a first processor and a recognized group of producers and where the deliveries covered by such contracts account for the entire output of the members of the group.'

The implementing regulation

4. The following provisions of Commission Regulation (EEC) No 3478/92 of 1 December 1992 laying down detailed rules for the application of the premium system for raw tobacco [2] ('the implementing regulation') are relevant to the case in point:

'(...) provision should be made whereby the premium, expressed in national currency, shall be identical for all producers concerned who deliver their tobacco to producers over a given period of time, by applying the conversion rate applicable at the beginning of the said marketing period' (ninth recital).

'*Article 2*

(...)

2. Cultivation contracts shall be concluded by group of varieties. They shall commit the

2 — OJ 1992 L 351, p. 17, most recently amended by Commission Regulation (EC) No 1350/96 of 11 July 1996 (OJ 1996 L 174, p. 15).

processor to taking delivery of the quantity of leaf tobacco provided for in the contract and the producer or group of producers to deliver that quantity to the processor, to the extent that their actual production so allows.

3. Cultivation contracts shall include at least the following details:

(...)

(h) the quality to which the price refers,

(i) the minimum quality requirements agreed,

(...)

(k) the period of payment of the purchase price, which may not exceed one month from the end of each delivery.

(...)

Article 6

Tobacco delivered to processors must be of sound, fair and merchantable quality and free from any of the characteristics given in Annex II. The contracting parties may agree on stricter quality requirements.

(...)

Article 8

1. The premium to be paid to the producer by the processor (...) shall be calculated on the basis of the weight of leaf tobacco of the variety concerned taken over by the processor and meeting the minimum quality requirements.

(...)

Article 9

1. Except in cases of *force majeure*, producers shall deliver their entire production to the first processor by 15 May (at the latest) of the year following the year of the harvest, otherwise they shall forfeit entitlement to the premium.

(...)

Article 10

An amount equal to the premium shall be paid to the producer by the processing undertaking within one month of the end of each delivery under contract. (...)

(...)

Article 12

1. The premiums paid to producers shall be reimbursed to the processors, on application, on the basis of a control certificate issued by the competent authorities after verification of all deliveries from the harvest to the processor concerned (...)'.

The quota regulation

5. Commission Regulation (EEC) No 3477/92 of 1 December 1992 laying down detailed rules for the application of the raw tobacco quota system for the 1993 and 1994 harvests [3] ('the quota regulation') contains provisions on the introduction of processing quotas and the issue of cultivation certificates; the third indent of Article 2 contains the following definition:

'*Article 2*

For the purposes of this Regulation:

(...)

— producer means any natural or legal person or group thereof who delivers raw tobacco produced by himself or by the members of the group to a processing undertaking in his or the group's own name and on his or its own account, under a cultivation contract concluded by him or in his name,

(...)'.

The specific aid regulation

6. Article 2(2) of Commission Regulation (EEC) No 84/93 of 19 January 1993 on the specific aid to be granted to producer groups

3 — OJ 1992 L 351, p. 11.

in the raw tobacco sector [4] ('the specific aid regulation') provides as follows:

'*Article 2*

2. Marketing through the group (...) shall cover at least the following operations:

— the conclusion by the group in its own name and on its own behalf of cultivation contracts for the whole of the production of the members of the group,

— the supply of the whole of the production of the members of the group,

— the preparation of the product for delivery to the processors.'

The conversion rate regulation

7. Article 1 of Commission Regulation (EC) No 3477/93 of 17 December 1993 concerning the agricultural conversion rates to be applied in the tobacco sector [5] ('the conversion rate regulation') provides as follows:

'*Article 1*

The agricultural conversion rate to be applied for conversion into national currency of the amount of the premium and the advance on the premium payment referred to in Article 3 of Regulation (EEC) No 2075/92 shall be the rate valid on 1 August of the year of harvest, as regards deliveries up to 31 December of that year, and the rate valid on 1 January of the following year, as regards later deliveries.'

The dispute in the main proceedings

8. Impresa Agricola Buratti Leonardo, Pierluigi e Livio ('Buratti') produces tobacco and is a member of the producer group Tabacchicoltori Associati Veneti Soc. coop. arl ('TAV'). In May 1993, TAV entered into a cultivation contract with the processor

4 — OJ 1993 L 12, p. 5.

5 — OJ 1993 L 317, p. 30. This regulation entered into force on the day following its publication in the OJ, 18 December 1993, but it was applied as from 1 July 1993.

Cooperativa Tabacchi Verona ('CTV'), relating to its members' total production of Bright variety tobacco for the 1993 harvest.

9. The order for reference contains no particulars of the factual circumstances surrounding the delivery of the tobacco. However, it does emerge from the written observations submitted to the Court that between August 1993 and January 1994 the members of TAV placed tobacco in a warehouse made available by CTV to TAV without charge. Delivery notes containing a series of details of the tobacco were made out at the time. The delivery notes also stated that 'the undersigned processor (CTV) hereby declares that this note does not constitute assumption of responsibility for the tobacco'. The agreement between TAV and CTV in respect of the classification of the tobacco was signed on 28 January 1994. According to CTV's VAT returns, property in the tobacco was transferred to CTV on 7 and 31 January 1994.

10. CTV paid TAV the premium on the basis of the conversion rate applicable on 1 August 1993 and, to support its selection of that conversion rate, claimed that in the case of cultivation contracts concluded with a group of producers it was not the date of 'contractual delivery' to the processor which was decisive, but the dates on which members supplied their 'contributions' to the group of producers.

11. Buratti, which in 1993 had delivered 88 529 kilos of tobacco to TAV, received from the latter a premium which also was calculated on the basis of the agricultural conversion rate applicable on 1 August 1993. Buratti, however, considers that the applicable agricultural rate was that valid on 1 January 1994, since in its view the tobacco was not delivered to the processor until January 1994. For that reason Buratti brought an action against TAV before the Pretura Circondariale, Verona, claiming the difference between the premium calculated on the basis of the conversion rate valid on 1 August 1993, as applied by TAV, and the amount as calculated on the basis of the higher conversion rate valid on 1 January 1994.

The question referred

12. By orders of 27 July 1995 and 4 September 1995, the Verona Pretura Circondariale referred the following question to the Court for a preliminary ruling:

'Is Regulation (EEC) No 3478/92, and in particular Articles 10 and 11, to be interpreted as meaning that the date to be taken into consideration for the purposes of applying the agricultural conversion rate to the processing premium is the date on which tobacco is delivered to the processor by the producer group or the date on which the product is supplied by the individual

producer to the group itself, and what constitutes "delivery under contract" within the meaning of the abovementioned provisions?'

13. Article 11(1) of the implementing regulation, referred to in the question, was repealed and replaced as from 1 July 1993 by the abovementioned Article 1 of the conversion rate regulation, which is couched in similar terms. It is clear from that article that the agricultural conversion rate to be used for converting premiums expressed in ECU into national currency is the rate applicable on 1 August of the year of harvest for deliveries up to 31 December of that year and that applicable on 1 January of the following year for deliveries thereafter.

14. Accordingly, the question on which the national court is actually seeking clarification is whether where, between the producer and the processor, the tobacco passes via a group of producers, the term 'deliveries' used in Article 1 of the conversion rate regulation must be interpreted as referring to the delivery of tobacco to the processor by the producer group or the contribution of each producer to that group. In addition, the national court wishes to establish what interpretation is to be given to the expression 'delivery under contract' used in Article 10 of the implementing regulation.

Procedure before the Court

15. Only the Commission and Buratti have submitted written observations to the Court. They have argued that it is clear, from both the letter and the spirit of the provisions concerned, that the operative date for determining the applicable conversion rate is the date on which the tobacco is delivered to the processor, whether it is delivered by an individual producer or by a group of producers. The Commission adds that the term 'delivery under contract' used in Article 10 of the implementing regulation is a concept of Community law, the meaning of which is not to be determined by reference to national law. In its view, those expressions refer to the physical delivery of tobacco to a processor pursuant to a cultivation contract. Buratti claims that 'delivery under contract' means physical delivery carried out pursuant to the obligation to deliver under a cultivation contract by the producer or group of producers who signed the cultivation contract and who thus were under an obligation to deliver the tobacco.

Appraisal

16. The question referred arises out of a dispute between a group of producers and one of its members in respect of the amount of premium paid by the group to the producer. The national court's actual question, however, is concerned with the calculation of the premium as between a processor and a group

of producers. The national court probably considered that that question was relevant to the case which it has to determine because it takes the view that the amount of the premium paid by the processor to the group of producers in this case determines the amount of the premium paid by the group to the producer.

17. I would point out in this connection that the starting point for the basic regulation is indeed the situation in which the raw tobacco is delivered to a processor by the producer. Accordingly, Articles 5 and 6 of the basic regulation state that the premium is to be granted on condition that the tobacco is delivered under a cultivation contract concluded between the producer and a processor. Nevertheless, it is clear from Article 12 of that regulation that the intention was to encourage producers to form groups which may take charge of delivery to processors: it provides for the grant of specific aid of 10% where the cultivation contract is concluded between a processor and a group of producers. Where a group of producers is interposed between the producer and the processor, those provisions of the regulation which use the term 'producer' must therefore be construed as referring to the producer or to the group of producers, not only because of the definition of the parties to a cultivation contract laid down in Article 2(2) but also because of the definition of producer in the third indent of Article 2 of the quota regulation as including groups of producers as well.

18. Although Article 1 of the conversion rate regulation lays down that it is the date of delivery of raw tobacco by the producer to the processor which determines the conversion rate to be applied, it must none the less be interpreted, where a group of producers is interposed between producer and processor, as referring to the date on which the tobacco was delivered by the group of producers to the processor. Furthermore, this is also the upshot of the wording in Article 2(2) of the specific aid regulation, which refers respectively to: 'the conclusion by the group in its own name and on its own behalf of cultivation contracts for the whole of the production of the members of the group' and of 'the supply of the whole of the production of the members of the group (...) for delivery to the processors'. The term 'delivery' employed in the singular in Article 10 of the implementing regulation and in the plural in Article 1 of the conversion rate regulation must therefore be interpreted as referring to the delivery of raw tobacco by a group of producers to a processor. It does not, however, mean the contribution of raw tobacco by one producer to the group.

19. Moreover, this is borne out by the fact that Article 10 of the implementing regulation uses the term delivery 'under contract' in specifying the time-limit for payment of the amount equal to the premium. The contract in question can only be the cultivation contract referred to in Articles 5(c) and 6(1) of the basic regulation and in Article 2(2) and (3) of the implementing regulation,

which is concluded between a group of producers and a processor.

20. Although the expression delivery 'under contract' is used in Article 10 of the basic regulation (and only there), this must be because that article prescribes the time-limit for the payment of the amount equal to the premium. If the expression 'under contract' had not been employed, this might have created the false impression that the premium had to be paid even if the goods delivered did not comply with the terms of the cultivation contract. The expression therefore merely makes it clear that the processor need not pay premiums in respect of defective goods.

21. If, therefore, in order for entitlement to the premium to arise a 'delivery' must be 'under contract', the question could arise whether the term 'delivery' should also be interpreted as delivery as defined in the law of contract. To my mind, however, it is inconceivable that the Community rules intended to leave the parties free to determine the time for payment of the premium by an agreement as to the date of delivery. Delivery clauses in sales agreements, for example, frequently provide for delivery to take place when goods are handed over to a carrier, that is to say, long before the purchaser (processor) takes possession of the goods, on which processing is conditional. If the term 'delivery' were to be construed as referring to the rules on the sale of goods, which have not yet been harmonized at Community level, the organization of the market might be implemented differently from one Member State to another. According to Article 189 of the Treaty, regulations have general application, are binding in their entirety and are directly applicable in all Member States: to my mind, it would be contrary to that article for the time for payment of the premium to vary from Member State to Member State. The same date for application of conversion rates should be used in each Member State. The concept of delivery must therefore be a concept of Community law, its definition independent of national law.

22. If the delivery of raw tobacco is the event which gives rise to the processor's obligation to pay the amount corresponding to the premium, the most logical solution, I believe, is that suggested by the Commission, which is to interpret the concept of 'delivery' as the transfer of possession in the goods to the processor. It is my opinion that that concept must also include those cases in which the tobacco is in a situation which may plainly be equated to a transfer of possession and in which it would be formalistic to treat differently, for example, delivery to a sub-contractor undertaking to process the tobacco for the processor. Since the date of transfer of possession in that sense will generally coincide with the extinction of the right of the vendor (the producer or the group of producers) to block delivery of the goods, that interpretation will ensure that the premium is not paid until after the tobacco is at the disposal of the processor, which is the necessary condition in order for the processing to confer added value on the tobacco, so that by selling the product the processor may obtain a sufficient return to cover the purchase price that it has had to pay to the producer or to the group of producers.

Conclusion

23. For those reasons, I propose that the Court give the following answer to the question referred by the Pretura Circondariale di Verona:

Where the processor has concluded a cultivation contract with a group of producers, the expressions 'delivery under contract' and 'delivery' used respectively in Article 10 of Commission Regulation (EEC) No 3478/92 of 1 December 1992 laying down detailed rules for the application of the premium system for raw tobacco and in Article 1 of Commission Regulation (EC) No 3477/93 of 17 December 1993 concerning the agricultural conversion rates to be applied in the tobacco sector must be interpreted as referring to the time when possession of the raw tobacco which is the subject-matter of that contract is actually transferred to the processor.