REPORT FOR THE HEARING
in Case C-17/91 *

I — The contested national legislation, the main proceedings and the questions submitted for a preliminary ruling

1. The Belgian Law of 24 March 1987 on animal health (Moniteur Belge of 17 April 1987) aims, as is stated in Article 2, 'to combat animal disease in order to promote public health and the economic welfare of livestock farmers'.

2. Article 32(2) of the Law provides as follows:

'A "Fund for Animal Health and Livestock Production" (hereinafter "the Fund") shall be set up in the Ministry of Agriculture. The purpose of the Fund shall be to contribute towards the financing of compensation, allowances and other benefits for combating animal disease and improving the hygiene, health and quality of animals and animal products.

The Fund shall be financed by:

1. Compulsory contributions from natural and legal persons who raise, process, transport, handle, sell or trade in animals;

...'.

3. Under the fourth subparagraph of this provision, the King, on the advice of the Council of the Fund, is to determine in an order adopted in the Council of Ministers the amount of the compulsory contributions, the procedures for their collection and the penalties for non-payment of the contributions in question.

4. The ninth subparagraph of that article provides that:

'If the compulsory contribution is collected from persons who process, transport, handle, sell or trade in animals, it shall, on every transaction, be passed back up to the stage of the producer ...'

5. Pursuant to the fourth subparagraph of Article 32(2) of the Law in question, the Royal Decree of 11 December 1987 (Moniteur Belge of 23 December 1987), which entered into force on 1 January 1988, fixes the amount of the compulsory contributions and the procedures for their collection.

* Language of the case: Dutch.

6. Articles 2 and 3 of that royal decree fix the amount of the compulsory contribution per head of beef cattle, calf and pig slaughtered or exported, imposed on the slaughterhouses and exporters respectively in order to finance the Fund.

7. The first paragraph of Article 4 of the royal decree provides:

> 'The compulsory contributions imposed on slaughterhouses and exporters are to be recovered by them from the supplier of the animals who, if appropriate, shall recover them from the seller up to the stage of the producer'.

The second paragraph of that provision requires the contribution to be shown separately on the invoice of the slaughterhouse or exporter.

8. Finally, Article 6 provides:

> 'If the slaughterhouse or the exporter fails to pay the amount of the compulsory contributions plus interest to the Fund after two reminders have been issued, the amount of the compulsory contribution payable shall be doubled. This increase in the compulsory contribution may not be recovered from the supplier of the animals'.

9. Article 3 of the Royal Decree of 8 April 1989, amending the Royal Decree of 11 December 1987, deletes the phrase 'who, if appropriate, shall recover them from the seller up to the stage of the producer,' in the first paragraph of Article 4.

10. The undertakings Georges Lornoy en Zonen NV, Jos Theys NV, Van Lommel PVBA, and Staf Lornoy en Zonen NV, trade in calves. Since they had to pay the contributions in question in order to avoid incurring the pecuniary penalties provided for in Article 6 of the Royal Decree of 11 December 1987, they brought an action against the Belgian State before the Tribunal de Première Instance (Court of First Instance), Turnhout, in order to have the sums paid reimbursed, claiming that the contributions in question were contrary to Articles 12, 13 and 95 of the EEC Treaty. Those contributions, according to the undertakings, were also levied on calves imported into Belgium, while the Fund's resources were used solely for the benefit of Belgian producers.

11. According to the Belgian State, the contested contributions formed an integral part of a general system of charges and applied equally to imported and domestic products. They were not levied by reason of a border having been crossed. Furthermore, the resources of the Fund were for the benefit of all the products of the Belgian food industry, irrespective of whether they were produced from imported or Belgian livestock. Moreover, the monitoring and combating of animal diseases were also for the benefit of both Belgium and the exporting country and prevented meat of lower quality being exported.

12. Since the Tribunal de Première Instance, Turnhout, considered that interpretation of Community law was in this case necessary to decide the dispute, it stayed the proceedings by order of 14 January 1991 and referred the following question to the Court of Justice for a preliminary ruling:

'1. Must the EEC Treaty, and in particular Articles 12, 13, 30, 92 and 95 thereof, and the applicable Community directives, be interpreted as meaning that a Member State is not prohibited from introducing a compulsory contribution for the support of a "Fund for Animal Health and Livestock Production" — in order to finance compensation, allowances and other benefits with a view to combating animal disease and improving the hygiene, health and quality of animals and animal products — first of all by imposing on slaughterhouses in that Member State for every slaughtered calf a compulsory contribution, which under the legislation is to be passed back in every sales transaction to the stage of the producer — which may and does mean that the contribution is charged to importers of calves from another Member State — and secondly by imposing on every exporter of calves the same contribution, which may also be passed back in every sales transaction to the stage of the producer?

2. If the first question is answered in the affirmative, should such a contribution — given the purpose for which it is imposed, as described above — be regarded as a charge having equivalent effect, a charge and/or financial assistance for activities which exclusively benefit the domestic product concerned, and is it consequently prohibited?

3. If the second question is answered in the affirmative, may an individual rely on the unlawful nature of this practice directly before a national court?'

13. The order for reference was received at the Court Registry on 18 January 1991.

II — Written procedure

14. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 12 April 1991 by Georges Lornoy en Zonen NV, Jos Theys NV, Van Lommel PVBA, and Staf Lornoy en Zonen NV, plaintiffs in the main proceedings, represented by L. Schuermans, of the Turnhout Bar, and by J. de Lat, of the Herentals Bar; and on 23 April 1991 by the Commission of the European Communities, represented by its Legal Adviser, R. Fischer, acting as Agent.

15. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III — Written observation submitted to the Court

Observations of the plaintiffs in the main proceedings

16. The plaintiffs in the main proceedings, the four undertakings, observe *in limine* that, by way of derogation from the budgetary

rule against the specific earmarking of the revenue of public authorities and from the rules governing public accounting, Article 32(3) of the Belgian Law of 24 March 1987 provides that '... revenue and expenditure of the Fund shall be entered in the special account of the specific section of the budget of the Ministry of Agriculture.'

17. As to the purpose of the contributions, the plaintiffs in the main proceedings also refer *in limine* to a press communiqué from the Private Office of the Belgian State Secretary for European Affairs and Agriculture, not contested by the defendant in the main proceedings, according to which 'the contributions are to help towards the financing of programmes for the improvement of the competitiveness of Belgian cattle breeding. The primary purpose of these programmes is to improve animal health, which is a necessary condition for the exportation of animals and animal products'. The protectionist motive behind the measure in question is apparent from that communiqué.

18. As to the preliminary questions, the plaintiffs in the main proceedings examine the compatibility of the disputed contribution with Article 12 et seq. and 95 of the Treaty. They observe that, according to the case-law of the Court, one and the same measure cannot be prohibited simultaneously by those two provisions (judgment in Case 10/65 *Deutschmann* [1965] ECR 469).

19. Normally, Articles 12 et seq. of the Treaty cover, according to the case-law of the Court, any charges demanded at the time of or by reason of importation and which do not fall within a general system of internal taxation applying systematically to domestic and imported products, according to the same criteria (judgment in Case 77/72 *Capolongo* v *Maya* [1973] ECR 611).

20. Nevertheless, according to the same case-law, in the interpretation of the concept of 'charge having an effect equivalent to a customs duty on imports', regard must be had to the purpose of the pecuniary charges levied. Consequently, a contribution under a general system of internal dues applying systematically to domestic and imported products according to the same criteria may nevertheless constitute a charge having equivalent effect to a customs duty on imports, where that contribution has the sole purpose of financing activities for the specific advantage of the domestic product to which it applies.

21. In its case-law, the Court added that the time at which the duty in question is charged on the imported product is not relevant in view of the nature of a national measure imposing a charge having equivalent effect and that, apart from the purpose of the revenue from the duty in question, the taxed product and the product benefiting from that charge must be the same (judgment in Case 77/76 *Cucchi* v *Avez* [1977] ECR 987).

22. The plaintiffs in the main proceedings claim that all those conditions laid down in the case-law of the Court are met in the present case. The revenue from the contribution is indeed used for combating, in Belgium, brucellosis and swine fever or to compensate losses suffered by Belgian breeders as a result of these diseases, and would not benefit in any way foreign breeders, who, nevertheless, have to bear part of the economic

burden represented by the contribution because of the pay-back system provided for in the Belgian legislation.

23. The revenue from the contribution is, furthermore, intended for programmes for promoting the production and export of Belgian animals, thus compensating for the levying of the charge.

24. The situation would be totally different if the contribution in question applied to every operation at slaughterhouses, the revenue from which was used exclusively for the promotion of hygiene in Belgian slaughterhouses. In that case, the benefits would not only be for domestic producers. Such a charge would be compatible with the Treaty on condition that the contribution were in proportion to the service actually provided. The plaintiffs in the main proceedings observe in this respect that, in the present case, a contribution relating to hygiene has, more often than not, already been levied in the country of origin on the animals imported on the hoof into Belgium, which clearly shows the double-taxation nature of the contribution in question.

25. The plaintiffs in the main proceedings finally observe that the Belgian Government cannot base an argument on the case-law of the Court according to which certain charges on consumers, applied to domestic and imported products, are compatible with the Treaty despite the fact that the products to which they apply are mainly imported (judgment in Case 90/79 *Commission* v *France* [1981] ECR 283), since the contested contribution in the present case is a charge on production and not on consumption. Likewise, since the disputed contribution cannot constitute a form of tax on income, the Belgian Government cannot rely on the judgment of the Court in Cases 36/80 and 71/80 (*Irish Creamery Milk Suppliers Association* [1981] ECR 735).

26. With regard to the interpretation of the concept of internal taxation within the meaning of Article 95 of the Treaty, the plaintiffs in the main proceedings observe that, according to the case-law of the Court, it may be necessary to take into account the purpose to which the revenue from the charge is put. Thus, an internal charge is liable to burden indirectly imported products more heavily than domestic products if it is used exclusively or mainly to finance aid for the sole benefit of domestic products (judgment in Case 73/79 *Commission* v *Italy* [1981] ECR 1533).

27. Consequently, the applicability of Article 95 does not require proof that the revenue from the charge in question is used exclusively for the benefit of domestic products. Thus, even if the revenue is only used in part for the promotion of domestic products, it would still constitute, to that extent, discriminatory taxation prohibited by the Treaty.

28. This distinction, however, is of no practical interest so far as the disputed contribution is concerned, having regard to all the available evidence, from which it transpires

that the revenue from it is to be used exclusively for the promotion of domestic products.

29. Were the Court to consider that the applicability of Articles 12 or 95 is not established beyond doubt for the whole amount of the charge, the plaintiffs ask that the Court make clear in its reply to the preliminary questions that it falls to the Belgian authorities to prove before the national court that part of the revenue from the charge is for the benefit of animals from other Member States.

30. As to the third preliminary question, the plaintiffs in the main proceedings observe that, according to the case-law of the Court, Article 12 et seq. and Article 95 of the Treaty have direct effect (see the judgments in Case 26/62 *Van Gend & Loos* [1963] ECR 1 and in Case 57/65 *Lütticke* [1966] ECR 205, respectively).

Observations of the Commission

31. The Commission makes the preliminary point that, following its request, the Belgian Government informed it, by letter of 6 July 1989, that the budget of the Ministry of Agriculture forecast for 1988 that the Fund would serve towards financing programmes with a view to eradicating classical swine fever and with a view to combating brucellosis in implementation of Community directives. The Belgian Government also pointed out that, at the time when the revenue from the charge was allocated, no distinction was made according to the source of the charge, whether it came from the slaughter of domestic or imported animals.

32. By letter of 20 October 1989, the Commission informed the Belgian Government that it was initiating the procedure provided for in Article 93(2) of the EEC Treaty against financing from the Fund (the relevant communication was published in OJ No C 24 of 1 February 1990, p. 12). The Commission's objections were based on the fact that support from the Fund was financed by charges at the slaughtering stage, which also affected imported products, and that this form of financing had a protective effect. By letter of 20 November 1989 the Belgian Government contested the position adopted by the Commission.

33. With regard to the preliminary questions, the Commission considers that the first two are so closely linked that they should be answered jointly.

34. The first question gives an inaccurate picture of the aim and current activities of the Fund, which are limited to the eradication of classical swine fever and to combating brucellosis, in implementation of Belgium's obligations under Council Directive 80/1095/EEC of 11 November 1980 laying down conditions designed to render and keep the territory of the Community free from classical swine fever (OJ 1980 L 325, p. 1), and Council Directive 64/342/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine (OJ, English Special Edition 1963-1964, p. 164).

35. That question therefore concerns internal taxation, within the meaning of Article 95 of the Treaty, which is imposed on bovine animals, calves and swine, imported and domestic, at the time of their slaughter, but the revenue from which is intended for the most part — and even exclusively at the material time in the present case — for the financing of aid exclusively for the benefit of those same domestic products.

36. The Commission states that, in the light of the case-law of the Court (in particular the judgments in Case 47/69 *France* v *Commission* [1970] ECR 487 and in Case 73/79, above), the application of the charge in question to the slaughter of animals from other Member States is incompatible with Article 95 of the Treaty, and that financing from the Fund with a view to combating certain animal diseases in domestic livestock is incompatible with the common market, within the meaning of Article 92, so long as the charge in question is also imposed on livestock imported from other Member States.

37. The soundness of those two conclusions is immediately apparent merely from the aim of the system of aids, which is not such as to contribute to the improvement of the health of livestock in other Member States. As regards the aim of those aids, which consists in the performance by Belgium of its obligations under certain Community directives, the Commission emphasizes that those same obligations are also addressed to the other Member States with regard to their own livestock, and that, furthermore, where cattle and calves are exported to other Member States, the Member States are obliged to respect a number of veterinary health rules, including the issue of a health certificate.

38. The disputed contribution is also incompatible with Articles 95 and 92 of the Treaty where the Fund is used also to finance aids for the improvement of the quality of native livestock and of domestic meat products.

39. It is irrelevant, for the purposes of the two conclusions reached by the Commission, that the disputed contribution must be passed back, according to the Belgian legislation, on each transaction up to the producer stage.

40. With respect to the application of the disputed contribution also at the time of the exportation of the animals concerned, the Commission is of the opinion that there is no reason to consider it incompatible with Community law (judgment in *Irish Creamery*, above).

41. The Commission therefore proposes that the answer to the first two questions should be as follows:

'Where internal taxation is imposed on the production, processing or marketing of a product and where the revenue from such taxation is allocated exclusively or mainly to the financing of aid for the exclusive benefit of the domestic products concerned, the direct or indirect imposition of that taxation on products from other Member States is contrary to Article 95 of the EEC Treaty.

The direct or indirect imposition of taxation on products from other Member States also has the effect that the aid financed by means of that taxation must be considered incompatible with the common market under Article 92'.

42. With regard to the third question, the Commission considers that, since Article 95 of the Treaty is directly applicable, the incompatibility of the contested contribution with that provision may be directly relied upon before the national court (judgment in Case 17/81 *Pabst and Richarz* [1982] ECR 1331). The incompatibility with the common market of aid financed by means of that contribution may be relied upon before the national court only after the Commission has established such incompatibility by a decision adopted in conformity with Article 93(2) of the Treaty (judgment in *Capolongo*, above).

C. N. Kakouris

Judge-Rapporteur