JUDGMENT OF THE COURT (SECOND CHAMBER)
8 NOVEMBER 1977 [1]

Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof (preliminary ruling requested by the Finanzgericht Berlin)

'Levies — Milk products — Bulgarian cheese of sheep's milk'

Case 26/77

Agriculture — Common organization of the markets — Milk products — Cheese of sheep's milk — Importation from third countries — Levy — Fixing — Detailed rules — Special system of Article 8 of Regulation No 823/68 — Preferential treatment — Importer — Absence of vested interest — Needs of the common organization of the markets and the common commercial policy — Freedom of action on the part of the Community

The preferential treatment from which at a given time certain milk products, in particular cheese of sheep's milk imported from third countries, have benefited in application of a special system fixing the levies gives an importer no vested right to the maintenance of the advantages which he has thereby gained. The Community must always, without prejudice to any undertakings into which it may have entered with regard to third countries, reserve its freedom to determine the conditions of importation for agricultural products originating in third countries, having regard to the common organization of the agricultural markets and the needs of its commercial policy.

In Case 26/77

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court) Berlin for a preliminary ruling in the action pending before that court between

BALKAN-IMPORT-EXPORT GMBH, Berlin,

and

HAUPTZOLLAMT (Principal Customs Office) BERLIN-PACKHOF

1 — Language of the Case: German.

on the interpretation and the validity of provisions in regulations of the Council and Commission on the computation and fixing of the levy on a milk product,

THE COURT (Second Chamber)

composed of: M. Sørensen, President of Chamber, P. Pescatore and A. Touffait, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following:

JUDGMENT

Facts and issues

The facts, procedure and observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

On 28 July 1976, in fulfilment of a long-term exclusive dealing agreement concluded with the Bulgarian State trading undertaking Rodopa-Impex, Balkan-Import-Export GmbH, whose registered office is in Berlin, imported 14 460 kg of cheese of sheep's milk coming under subheading 04.04 E I (b) (4) of the Common Customs Tariff from Bulgaria into the Federal Republic of Germany.

By notice dated 30 July 1976 the Hauptzollamt Berlin-Packhof demanded from Balkan-Import-Export GmbH besides monetary compensatory amounts and import turnover tax a levy of DM 27 585 34 calculated on the basis of 59·25 units of account per 100 kg.

On 18 August 1976 the company brought an action without preliminary proceedings for a partial annulment of that notice.

It takes the view that the levy demanded of it is excessive since it is based on too low a free-at-frontier price. A correct application of Community law, in particular of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176), of Regulation No 823/68 of the Council of 28 June 1968 determining the groups of products and the special provisions for calculating levies on milk and milk products (OJ, English Special Edition 1968 (I) p. 199), as amended by Regulation No 467/75 of the Council of

27 February 1975 (OJ No L 52, p. 10), and of Regulation No 1073/68 of the Commission of 24 July 1968 laying down detailed rules for determining free-at-frontier prices and for fixing levies in respect of milk and milk products (OJ, English Special Edition 1968 (II), p. 359), would in the present case have led to a levy of only DM 9 306·39 on the basis of 39·25 u.a. per 100 kg.

By order dated 10 February 1977 the IIIrd Senate of the Finanzgericht Berlin stayed the proceedings and submitted the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

1. Has the plaintiff under Community law, in spite of non-alignment of the free-at-frontier offer prices for Kashkaval and cheese of sheep's milk for the 1976/77 milk year, a claim that the levy in respect of goods imported by it on 30 July 1976 should be calculated at a rate of DM 126·41 per 100 kg and not as demanded by the defendant at a rate of DM 190·77 per 100 kg?
2. In the event of Question 1 being answered in the negative:
   Is the fixing of free-at-frontier prices under Article 14 of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176) for products under tariff subheadings 04.04 E I (b) (3) and (4) of the Common Customs Tariff a preference rule within the meaning of Article 14 (6) of the aforesaid regulation or a rule fixing the levy within the meaning of Article 14 of the aforesaid regulation?
3. In the event of its being a normal levy rule:
   Have the Commission and the Council of the European Communities infringed Article 14 of the aforesaid regulation in conjunction with Articles 2 to 7 of Regulation (EEC) No 1073/68 of the Commission of 24 July 1968 laying down detailed rules for determining free-at-frontier prices and for fixing levies in respect of milk and milk products (OJ, English Special Edition 1968 (II), p. 359) in that, although aware of the movement of offer prices for products under tariff subheadings 04.04 E I (b) (3) and (4) of the Common Customs Tariff, when fixing prices for the 1976/77 milk year in amendment of Article 8 of Regulation (EEC) No 823/68 of the Council of 28 June 1968 determining the groups of products and the special provisions for calculating levies on milk and milk products they failed to fix the minimum price for the said products at at least 150 and 135 u. a. respectively?
4. If there is held to be a special (preference) rule:
   (a) Are free-at-frontier prices for the said products to be fixed only by agreement with the third countries concerned or has the plaintiff under Article 14 of Regulation (EEC) No 804/68 and the subsequent regulations thereto a right to ask the Commission to align the free-at-frontier prices?
   (b) Does Regulation (EEC) No 1073/68 apply also in fixing free-at-frontier prices under Article 14 (6) of Regulation (EEC) No 804/68 and Article 8 of Regulation (EEC) No 823/68?
   (c) Were the Council and the Commission obliged in fixing prices for the 1976/77 milk year to raise the free-at-frontier prices for products under tariff subheadings 04.04 E I (b) (3) and (4) of the Common Customs Tariff to at least 150/135 u. a.?

The order of the Finanzgericht Berlin was registered at the Court on 23 February 1977.

Written observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC were submitted on

25 April 1977 by the Commission of the European Communities, on 28 April 1977 by Balkan-Import-Export GmbH, the plaintiff in the main action, and on 3 May 1977 by the Council of the European Communities.

After 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.

The plaintiff in the main action was nevertheless requested to supply certain figures to the Court before the opening of the oral procedure. These were given on 6 July 1977.

By order dated 22 June 1977 the Court assigned the case under Article 95 (1) of the Rules of Procedure to the Second Chamber.

II — Written observations submitted to the Court

Balkan-Import-Export GmbH, the plaintiff in the main action, makes in essence the following observations:

First question

In support of its action for annulment the plaintiff in the main action limited itself to explaining why, in its view, the levy demanded conflicted with the Community law applicable; in connexion with the formula for calculating the levy it took as the basis a minimum price of 150 u.a. instead of 130 u.a., which gave a levy rate of DM 126·41 instead of the rate of DM 190·77 which was applied. It accordingly claims a particular rate of levy.

Second question

(a) The levy on cheese of sheep's milk is determined by Article 8 of Regulation No 823/68 as amended by Regulation No 467/75. Regulation No 823/68 is based on Regulation No 804/68 and in particular Article 14 (6) tereof. Article 8 of Regulation No 823/68 was therefore adopted as a 'special provision for fixing the levies' within the meaning of Article 14 of Regulation No 804/68.

(b) As a special rule in relation to levies Article 8 of Regulation No 823/68 does not, however, represent a preference rule in favour of a particular country of origin. Article 14 (6) of Regulation No 804/68 does not state what is 'special' in the fixing of the levies; Article 8 of Regulation No 823/68 is applied as against all third countries to products of Group 11. The 'special nature' cannot reside in the fact that the levies are not calculated on the basis of the difference between the threshold price and the free-at-frontier price of the pilot product. That principle, which is laid down in Article 14 (3) of Regulation No 804/68, is the very basis of Article 8 of Regulation No 823/68. The special nature could perhaps be seen in the fact that the free-at-frontier offer prices were fixed for a longer period; there can be no objections to this, providing that the free-at-frontier offer prices which are fixed are aligned as far as possible with the actual free-at-frontier offer prices.

Third question

There are good reasons for thinking that Article 8 of Regulation No 823/68 is a special provision within the meaning of Article 14 (6) of Regulation No 804/68. For the rest this question is covered by Question 4 (c).

Fourth question

(a) Under Regulation No 1073/68 the Commission must take account of all information known to it either direct or through Member States. In exercising its discretion with regard to fixing free-at-frontier offer prices it must have regard according to objective criteria to all information supplied to it, even by the importer concerned, relating to the actual offer prices which apply.

The levies within the meaning of Article 8 of Regulation No 823/68 are also fixed according to objective criteria, namely according to the difference between the threshold price and the free-at-frontier offer price. A Community citizen who takes the view that the objective price criterion of the free-at-frontier offer price has not been correctly assessed is entitled by reason of the direct applicability of the rate of levy to apply to the Commission for the price factor to be aligned with the actual position. Article 14 of Regulation No 804/68 and Article 8 of Regulation No 823/68 do not require any application on the part of third countries or any agreement with them. The Commission fixes the levies independently within the framework of the special provisions referred to in Article 14 (6) of Regulation No 804/68, according to objective price criteria. The view which the Advocate-General took in his opinion in Case 55/75, *Balkan-Import-Export* ([1976] ECR 34), to the effect that it is for the exporting country to ensure the necessary agreement between the minimum prices fixed and the actual offer prices, is not correct.

(b) Regulation No 1073/68 of the Commission is based in particular on Article 14 (7) of Regulation No 804/68. Although it does not apply to a decision of the Council adopted on the basis of Article 14 (6) of Regulation No 804/68, it is binding on the Commission in the exercise of its right to make proposals to amend Article 8 of Regulation No 823/68. This applies at least where the levy is calculated on the basis of the difference between the threshold price and the free-at-frontier offer price. In this case the Commission has to have recourse to the objective criteria laid down in Regulation No 1073/68 for fixing free-at-frontier prices and more especially to have regard to the actual trend in prices on the representative markets, such as the Bulgarian market.

The Commission does not deny that it would have to fix the free-at-frontier offer price according to objective criteria even if Regulation No 1073/68 did not apply to the fixing of such prices in the context of Article 8 of Regulation No 823/68.

(c) The Commission and Council may exercise their discretion in aligning free-at-frontier offer prices on the actual offer prices. However, in exercising this discretion the Commission must take account of the trend in actual offer prices and have regard to the effects on the levies of raising threshold prices. In fixing the prices for the 1976/77 marketing year the Commission did neither, although it knew that offer prices had increased since 1975 and that threshold prices had increased 173·80 u.a. on 1 February 1975 to 194 u.a. per 100 kg on 16 September 1976. Since, moreover, the fixed minimum price had remained the same, this had led to a continual increase in the levies, which had increased from 170·80 u.a. in January 1974 to 202·05 u.a. in November 1976. That increase had a very negative effect on the plaintiff's turnover figures for cheese of sheep's milk.

In spite of several applications by Balkan and the particulars advanced in support of those applications, the Commission took no measures to align minimum prices in the context of decisions as to prices for the 1976/77 marketing year. The result was an actual increase in the tax on imported cheese of sheep's milk.

The Commission was accordingly guilty of a misuse of powers:

The levy on cheese of sheep's milk is calculated according to objective criteria, *inter alia* the free-at-frontier offer price. That price has increased to more than 160 u.a. per 100 kg. Retention of a minimum price of 115 u.a. is accordingly not justified according to objective criteria.

In fixing the levy the Commission ought to have had regard not only to the

increase in actual offer prices but also the not inconsiderable increase in threshold prices. Contrary to the existing practice of preserving a balance between increased offer prices and increased threshold prices, the Commission proposed in its decisions with regard to prices for 1976/77 that threshold prices be increased twice without readjusting the free-at-frontier offer prices for cheese of sheep's milk despite their increase in real terms.

According to Article 33 of Regulation No 804/68 the Commission must take account of the objectives set out in Article 110 of the EEC Treaty in fixing the levies. The Commission disregarded that obligation by not proposing to the Council any alignment of minimum prices with actual offer prices.

The plaintiff in the main action calculated its claim on the basis of a minimum price of 150 u.a.. That price is based on Article 8 of Regulation No 823/68. In accordance with that provision the Commission ought, at its discretion, to have raised the free-at-frontier offer price for the 1976/77 milk marketing year to a minimum of 150 u.a. in order to take account of the actual increase in prices and the increase in the threshold prices.

The *Council* observes that in framing the questions and the grounds therefor the Finanzgericht Berlin largely followed the observations and submissions as to the law contained in the claim and accordingly committed various errors.

The case in the main action is concerned only with cheese of sheep's milk of subheading 04.04 E I (b) (4) and not with kashkaval of subheading 04.04 E I (b) (3). Since the levy rules for those two groups of articles are not completely identical the Court should answer the questions referred to it only in so far as they relate to cheese of sheep's milk.

The questions referred for a preliminary ruling suffer from a defective conceptual distinction between the two levy systems which the basic Regulation No 804/68 on milk and milk products offers as alternatives.

The 'general' system for calculating the levy is laid down in the second subheading of Article 14 (3) of that regulation, which provides that 'If it is not fixed by special provision, the levy on the products in any one group shall be equal to the threshold price for the pilot product less the free-at-frontier price'. That system employs the concept, provided for in the first subparagraph of Article 14 (3) of Regulation No 804/68 and introduced by Regulation No 823/68 on the basis of the first indent of Article 14 (6) of Regulation No 804/68, of groups of products, consisting of a 'pilot product' and its 'assimilated products' which have 'sufficiently comparable characteristics for trade purposes'.

The criteria for calculating the levy, een for an assimilated product, are the threshold price fixed annually by the Council in respect of the pilot product and the Community free-at-frontier price of the pilot product. The actual Community free-at-frontier offer price of the assimilated product itself is as a rule irrelevant for calculating the levy on that product.

The second subparagraph of Article 14 (3) of Regulation No 804/68 allows the levy on individual products to be fixed by 'special provisions'. In practice only 'assimilated products' are involved. It is the Council which is responsible for adopting such provisions on a proposal from the Commission. It has a wide discretion limited only by the general objectives of the basic regulation and the relevant provisions of the Treaty on which that regulation is based.

On this basis the Council adopted Articles 2 to 8 of Regulation No 823/68, which are special provisions of a very varied nature for a number of assimilated products belonging to different groups of

products. It was not until the adoption of Regulation No 2307/70 of the Council of 10 November 1970 amending Regulation No 823/68 (OJ L 249, p. 13) that there was a special provision for cheese of sheep's milk. The objective of that special provision was to permit a reduction in the levy on cheese of sheep's milk in relation to the levy rate calculated according to the general system in respect of the pilot product, 'account being taken of the typical characteristics' of those cheeses. That provision was subsequently several times adjusted to the market and price trends, without there being any alteration in its structure and basic effect (the reduction of the levy). It applied in the summer of 1976 as amended by Regulation No 467/75. Article 2 of that regulation provides that where products falling within subheading 04.04 E I (b) (4), originating in and coming from third countries, are imported into the Community at a price of not less than 115 u.a. per 100 kg the levy per 100 kg of product shall be equal to the threshold price less 130 u.a. In the summer of 1976 the threshold price was 189·25 u.a. per 100 kg. The levy rate of 59·25 u.a. applied to Balkan-Import-Export GmbH was calculated on that basis.

First question

(a) The application of Community law to individual cases is reserved to the national court; the question cannot therefore be answered by the Court in the form in which it is put.

(b) The Finanzgericht Berlin asks the question whether, as the plaintiff in the main action believes, for the calculation of the levy applicable to cheese of sheep's milk for the 1976/77 marketing year fixed amount of 150 u.a. should have been deducted from the threshold price instead of the 130 u.a. provided for in Article 2 of Regulation No 467/75.

To this extent Balkan's argument is based on the general levy system, although in the present case special provisions apply. It is asking for application of the principle: levy = threshold price of the pilot product less the free-at-frontier price of the assimilated product.

The levy is intended, however, to raise the price of a product applying outside the Community to the desired level within the Community. As the difference between these two levels it must be calculated in respect of the same product. Logically, therefore, the second subparagraph of Article 14 (3) of Regulation No 804/68 relates to the threshold price and the free-at-frontier price of the pilot product. In so far as the legislature, for reasons of administrative simplicity and because of 'sufficiently comparable characteristics for trade purposes', related 'assimilated products' to those levels for the levy, it simply intended to stress that the levy applicable to those products must be equal to that applied to the pilot product; on the other hand, it basically left the possibility open for actual free-at-frontier offer prices to fluctuate more or less widely below or above those of the pilot products.

It is incompatible with the system to calculate the levy for an assimilated product as being the difference between the threshold price of the pilot product and the actual free-at-frontier offer price of the assimilated product.

The significant point is that the special levy rules for cheese of sheep's milk have been completely divorced from the concept of the 'free-at-frontier price' within the meaning of Article 14 (3) of Regulation No 804/68. The amount of 130 u.a. laid down in Article 2 of Regulation No 467/75, which is to be deducted from the threshold price in calculating the levy, has no legal connexion with the free-at-frontier price which has been established. The same applies to the 'minimum price' of 115 u.a. laid down by the said provision. The 'free-at-frontier price' is therefore as

irrelevant to the calculation of the levy in question here as the free-at-frontier offer price actually paid by the plaintiff in the main action or the usual market price ruling outside the frontiers of the Community.

The characteristic feature of the 'special provisions' falling within the Council's legislative power is that they may derogate from the general principle (levy = threshold price less free-at-frontier price), the extent of the derogation being left to the Council's discretion. The Council is also at liberty to influence the price of a product within the Community by special rules relating to the levy applicable to a particular product, providing that in doing so it does not depart from the guidelines laid down in the basic regulation or from Articles 39, 42, 43 and 110 of the EEC Treaty. The Council has no reason for thinking that it exceeded its powers when originally adopting the special provisions, when subsequently amending them or even by abstaining from making the amendments alleged to have been necessary.

The special rules for cheese of sheep's milk and the frequency and extent of their subsequent adjustments were influenced not only by the 'typical characteristics' of that cheese but also by the interests of the Community's commercial policy towards certain producing countries. Such considerations often lead in Community law to the reduction of certain rates of levy otherwise applicable under general provisions. Where the Council deliberately refrains subsequently from adjusting special provisions of that kind to price variations, the reasons is that the Community has, from the commercial point of view, less interest in making concessions to the producing third country.

Moreover, the difference between the levy fixed for cheese of sheep's milk by the general system and the reduced amount applicable under the special provision of Regulation No 467/75 did not diminish during the period preceding the summer of 1976 but remained constant at about 60 u.a.

The first question should therefore in any case be answered in the negative.

Second question

In the case of the rules for the levy on cheese of sheep's milk contained in Article 8 of Regulation No 823/68 it is a question of fixing the levy according to special provisions within the meaning of the second subparagraph of Article 14 (3) and the second indent of Article 14 (6) of Regulation No 804/68.

Third question

Since this question is asked only in the event of Article 8 of Regulation No 823/68 being a rule under the general levy system it does not arise.

Moreover, the question seeks a declaration that the institutions of the Community have failed to fulfil their obligations; the question relates neither to the validity nor to the interpretation of a legal measure within the meaning of Article 177 of the EEC Treaty.

Fourth question

(a) Any amendment of the levy on cheese of sheep's milk laid down in Article 8 of Regulation No 823/68 is the responsibility of the competent institutions of the Community. Neither the producing countries outside the Community nor private persons have any right to request such amendment.

(b) In so far as the levy on cheese of sheep's milk was fixed by Article 8 of Regulation No 823/68, Regulation No 1073/68 dose not apply.

(c) This question cannot be dealt with in the context of a reference for a preliminary ruling.

The *Commission* submits that the Finanzgericht Berlin has not been able completely to escape the influence of the factural misconceptions and terminological errors contained in the statement of claim. It therefore explains the outlines of the levy rules in question as they appear in particular from Regulations Nos 804/68, 823/68 and 1073/68.

First question

The rules for calculating the levy do not place on the Commission or on the Council an obligation to calculate the amounts of levy on cheese of sheep's milk on the basis of the purchase or offer prices actually paid by the plaintiff in the main action.

The cheese of sheep's milk imported by the plaintiff in the main action falls within Group 11, as an assimilated product. The levy normally payable under Article 14 of Regulation No 804/68 is calculated according only to the market factors and free-at-frontier prices of the pilot product of that group ('Gouda'-type cheese) and not according to the difference between the threshold price for that group and the import prices for cheese of sheep's milk paid by the plaintiff in the main action.

The levy rules contained in Article 8 of Regulation No 823/68 applicable since the entry into force of Regulation No 2307/70 to those cheese products are completely unaffected by the said import prices. A long-term standard rate is levied which is directed to the need to protect the Community market. Continual adjustment of that amount to fluctuations in the import prices paid by the plaintiff in the main action is not provided for, is not required and has so far not been undertaken.

The minimum prices provided for in Article 8 indicate only the level of import prices which is regarded as necessary to protect the Community market. They leave the exporting countries complete freedom to fix higher returns and prices on exports.

There is no trade agreement between Bulgaria and the Community which requires the Council to adjust the values laid down in Article 8. In any case, the plaintiff in the main action could not derive personal rights from any such obligations.

The submission by the plaintiff in the main action of a misuse of powers does not support a claim that the levies should be reduced:

Article 8 is an instrument of common trade policy towards third countries by which the Community can take account of the wishes of particular exporting countries. It is not a provision enabling the Community to meet obligations which it may have towards individual importers the fulfilment of which such importers may require by judicial means. In exercising its discretion in deciding whether and to what extent the importation of Bulgarian cheese of sheep's milk should be favoured by a preferential levy the Council has to balance the trade policy interests of the Community against the objectives pursued by the common agricultural policy and does not have to subordinate its policy to the commercial interests of a particular importer.

There is no ground to support a claim of misuse of powers. The situation on the market for milk products has not improved in recent years; the continual increase in home production of cheese of sheep's milk has not been matched by a corresponding expansion of outlets. Because of the increasing difficulties in the exportation of cheese of sheep's milk originating in the Community the Commission has not attempted to give

additional encouragement to the importation of already very cheap Bulgarian cheese of sheep's milk.

Even if a misuse of powers in the fixing of the prices and amounts referred to in Article 8 rendered the levy imposed on the plaintiff in the main action invalid that would not have the result that the levy would then necessarily have to be calculated on the basis of the import prices actually paid. If, for legal reasons, the special rule contained in Article 8 did not apply then the amount of levy fixed according to Article 14 (3) of Regulation No 804/68 would apply.

Second question

As an assimilated product, no free-at-frontier prices were fixed for the cheese of sheep's milk imported by the plaintiff in the main action. The levy on products of Group 11 corresponds to the threshold price of the pilot product less its free-at-frontier price. That is the normal levy rule provided for in Article 14 (3) of Regulation No 804/68.

Third question

The levy provided for in Article 14 (3) of Regulation No 804/68 applies only 'if it is not fixed by special provision'. Article 8 of Regulation No 823/68 is such an exclusive special provision. The system provided for thereby has nothing to do with the 'free-at-frontier prices', which are the basis of the normal levy.

Quite apart from the fact that the Council is not compelled, in the exercise of its legislative competence, to observe the detailed rules adopted under powers delegated by it to the Commission, the application of Article 8 of Regulation No 823/68 cannot, even on a purely logical view, infringe the rules determining the free-at-frontier prices laid down in Regulation No 1073/68.

Fourth question

This question is devoid of object.

III — Oral procedure

Balkan-Import-Export GmbH, the plaintiff in the main action, represented by Dietrich Ehle, Rechtsanwalt of the Cologne Bar, the Council of the European Communities, represented by its Legal Adviser, Bernhard Schloh, and the Commission of the European Communities, represented by its Legal Adviser, Peter Gilsdorf, in place of Peter Kalbe, presented oral observations at the hearing on 14 July 1977 and answered questions put by the Court.

The Advocate-General delivered his opinion at the hearing on 6 October 1977.

Decision

1 By order dated 10 February 1977, registered at the Court on 23 February 1977, the Finanzgericht Berlin has referred to the Court four questions for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of certain provisions of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ English Special Edition 1968 (I), p. 176), of Regulation No 823/68 of the Council of 28 June 1968 determining the groups of products and the special

provisions for calculating levies on milk and milk products (OJ, English Special Edition 1968 (I), p. 199), as amended by Regulation No 467/75 of the Council of 27 February 1975 (OJ L 52, p. 10), and of Regulation No 1073/78 of the Commission of 24 July 1968 laying down detailed rules for determining free-at-frontier prices and for fixing levies in respect of milk and milk products (OJ, English Special Edition 1968 (II), P. 359) in relation to the fixing of the levy on a consignment of cheese of sheep's milk falling within subheadings 04.04 E I (b) (3) and (4) of the Common Customs Tariff imported on 28 July 1976 from Bulgaria.

2 The parties to the proceedings have stated that contrary to the particulars given in the order making the reference for a preliminary ruling the said importation was only of products falling within subheading 04.04 E I (b) (4). It is for the court making the reference to inquire into this matter, which does not affect the answer to the questions of interpretation raised.

3 The plaintiff in the main action objects to the levy imposed by the Hauptzollamt Berlin-Packhof, believing it to be too high in view of the movement in the free-at-frontier offer price of the goods in question. In this respect it claims that the fact that the responsible Community authorities did not align the free-at-frontier offer price, on which the calculation of the levy is based, on the movement of the actual prices had the result that an unjustified burden was placed on the plaintiff and the volume of its imports adversely affected. It therefore demands that the levy be adjusted in accordance with the actual import price.

4 According to the second subparagraph of Article 14 (3) of Regulation No 804/68, which at the relevant time determined the bases of the common organization of the market in milk and milk products, the general levy system may be distinguished from the 'special provisions' laid down by the Council pursuant to Article 14 (6) in Article 8 of Regulation No 823/68 as amended at that time by Article 2 of Regulation No 467/75 (referred to hereinafter as 'Article 8 of Regulation No 823/68'). In view of the dual nature of the system it is appropriate first to consider the second question put by the Finanzgericht.

The second question, relating to the distinction between the general system and the special system

5 In substance, the second question asks whether the system applied under Article 14 of Regulation No 804/68 to products falling within subheadings

04.04 E I (b) (3) and (4) of the Common Customs Tariff is a special provision within the meaning of Article 14 (6) of that regulation or a rule under the general system laid down in the second subparagraph of Article 14 (3). To answer this question the nature of the two systems must be determined more precisely and their respective fields of application defined.

6 Article 14 (2) of the basic Regulation No 804/68 provides that a levy shall be charged on imports of the products listed in Article 1 of the said regulation. The first subparagraph of Article 14 (3) provides that, for the purposes of the application of the levy, the said products may be divided into groups and that a 'pilot product' shall be determined for each group. Those groups and pilot products were determined by Regulation No 823/68, Annex I to which lists 12 groups, five of which (Groups 7 to 11) comprise the various kinds of cheeses with the pilot products listed alongside. Consideration of the tariff headings to which Regulation No 823/68 in its original version refers shows that the kinds of cheese with which the main action is concerned originally fell within Group 11 and as such were subject to the general system. The second paragraph of Article 14 (3) of Regulation No 804/68 provides that the levy on the products in any one group shall be equal to the threshold price for the corresponding pilot product, less the free-at-frontier price. Article 14 (4) provides that the Community free-at-frontier price shall be determined on the basis of the most favourable purchasing opportunities in international trade. With regard to the action pending before the national court it should be emphasized that this rule for determining the levy based on a comparison between the frontier offer price and the price within the Community applies only to products falling within the general system.

7 On the authority of the basic Regulation No 804/68, Article 8 of Regulation No 823/68 in the version applying at the time of the importation in question provides for a special system for fixing the levy in relation to certain third countries in so far as the products fall within certain tariff headings, including subheadings 04.04 E I (b) (3) 'kashkaval' and (4) 'cheese of sheep's milk'. Having regard to a misunderstanding on the part of the plaintiff in the main action to which the Council and Commission have rightly drawn attention it should be stressed in this connexion that that system (in contrast to the general system based on a comparison between the import price and the threshold price) does not relate to the import price but only to a 'minimum price' as a condition of application and to the threshold price as the basis for calculating the levy. From the tariff headings expressly referred to in Article 8 of Regulation No 823/68 in the version applicable at the time of the importation in question it is quite clear that the determination of the levy on the importation of the products with which the main action is concerned is

governed not by the general system laid down by Regulation No 804/68 but by the abovementioned special system.

8 The second question must accordingly be answered to the effect that the system applicable at the time of the facts with which the main action is concerned to products falling within subheadings 04.04 E I (b) (3) and (4) of the Common Customs Tariff in the context of Article 14 of Regulation No 804/68 of the Council of 27 June 1968 constitutes a 'special provision' within the meaning of the second subparagraph of Article 14 (3) and the second indent of Article 14 (6), as subsequently defined by Article 8 of Regulation No 823/68 as amended by Article 2 of Regulation No 467/75 of 27 February 1975.

9 The third question, which arises only in the event of the products in question falling within the general system established by Regulation No 804/68, does not in consequence call for an answer.

The first and fourth questions, relating to the fixing of the levy

10 Question 1 seeks, in substance, a decision on whether the levies imposed for the 1976/77 milk year on the importation of kashkaval and cheese of sheep's milk should have been aligned on the movements in the free-at-frontier prices for those products. Question 4 (which assumes the existence of a special provision pursuant to Article 8 of Regulation No 823/68) asks at letter (a) whether the free-at-frontier prices for the said products are to be fixed only by agreement with the third countries concerned or whether, under Article 14 of Regulation No 804/68 and the subsequent regulations thereto, the plaintiff, has a right to ask the Commission to align the prices in question.

11 Article 8 of Regulation No 823/68 provides that where, on importation into the Community, the price of the products in question is not less than 130 u. a. or, where appropriate, 115 u. a. per 100 kg, as is accepted to be the case here, the levy per 100 kg shall be equal 'to the threshold price less 130 u. a.'. According to the wording of this provision, therefore, the levy is equal to the threshold price (that is to say, a price determined, in accordance with Article 4 of Regulation No 804/68, in terms of the target price for milk applicable within the Community) less a standard amount indicated by the regulation. From this it follows that the levies on the products in question, determined under the abovementioned standard procedure, are fixed without regard to the free-at-frontier price and thus without regard to any considerations which

interested third countries or an importer could put forward with regard to a price factor extraneous to the detailed rules for calculation adopted by Regulation No 823/68.

12 This part of Question 4 must accordingly be answered to the effect that under the special system of Article 8 of Regulation No 823/68, in the version applicable at the time of the facts with which the main action is concerned, the levy must be calculated on the basis of the threshold price fixed pursuant to Regulation No 804/68 without regard to the free-at-frontier price of the products subject to that special system, provided only that the requirement as to minimum prices laid down by Regulation No 823/68 is observed.

13 Question 4 (b) asks whether Regulation No 1073/68 also applies in fixing free-at-frontier prices under Article 14 (6) of Regulation No 804/68 and Article 8 of Regulation No 823/68.

14 Regulation No 1073/68 was adopted by the Commission to lay down detailed rules for determining the free-at-frontier prices used in calculating the levy in the context of the general system. It has been shown above that the free-at-frontier prices are irrelevant for the determination of the levies in the context of the special system under Article 8 of Regulation No 823/68, which, as stated, rests not on the difference between the threshold price and the free-at-frontier price of the pilot product but on the threshold price less a standard amount of 130 u. a. per 100 kg.

15 Since the provisions of Regulation No 1073/68 do not apply in fixing the levy imposed on the importation of the product in question, this part of the question is devoid of object.

16 Question 4 (c) asks, finally, whether the Council and the Commission were obliged in fixing prices for the 1976/77 milk year to raise the free-at-frontier prices for products under tariff subheadings 04.04 E I (b) (3) and (4) of the Common Customs Tariff to at least 150/135 u. a.

17 In view of the above considerations, since the free-at-frontier prices of the products in question are in no way involved in fixing the levy in accordance with the special system of Article 8 of Regulation No 823/68, the Council and Commission had no cause to fix or amend the free-at-frontier prices for

those products, the levy on which was determined according to standard criteria on the basis of the threshold price and without any regard being paid to the actual offer price on importation into the Community. With regard to the arguments put forward by the plaintiff in the main action in this respect it must be observed that not only is what it says completely irrelevant, but that the application of the special system provided for in Article 14 of the basic Regulation No 804/68 and implemented by Article 8 of Regulation No 823/68 as subsequently amended ensures preferential treatment for the goods in question in comparison with goods falling within the general system, even after the increase in import prices stressed by the plaintiff. If the preferential margin existing at a particular time is reduced by the movement of prices in the producing country, it should be stressed that the importer has no vested right to have that advantage maintained and, without prejudice to undertakings which may have been entered into with regard to third countries, the Community must always reserve its freedom to determine the conditions of importation for agricultural products originating in third countries, having regard to the common organization of the agricultural markets and the needs of its commercial policy.

18 This part of Question 4 must accordingly be answered to the effect that, there was no obligation on the competent institutions of the Community at the time of the facts with which the main action is concerned to amend the import system applicable under Article 8 of Regulation No 823/68 to products falling within tariff subheadings 04.04 E I (b) (3) and (4).

Application to reopen the oral procedure

19 By letter dated 4 October 1977, received at the Court Registry on 6 October 1977, the plaintiff in the main action applied to have the oral procedure reopened on the grounds of two new facts which were not known at the time of the oral procedure.

On the one hand, it alleges that the Council, by Regulation No 1683/77 of 18 July 1977 amending Article 8 of Regulation No 823/68, has raised the 'minimum prices' applicable to certain kinds of cheese but left the minimum prices of kashkaval and cheese of sheep's milk unchanged. In this respect it must be observed not only that that measure was adopted after the levies in question were fixed but also that it is irrelevant to the questions referred to the Court by the Finanzgericht Berlin with regard to taking account of the free-at-frontier price as determined by Regulation No 804/68. This further submission, which rests on a misunderstanding of the principles relating to the temporal application of legal rules and on a confusion between the

functions performed in the levy system in question by the 'minimum prices' within the meaning of Article 8 of Regulation No 823/68 and the 'free-at-frontier prices' within the meaning of Regulation No 804/68, must therefore be rejected.

21 Further the plaintiff in the main action alleges that it is in possession of a copy of a letter from the Bulgarian Government to the Commission informing the latter of the movement in prices of cheese of sheep's milk and kashkaval in order to obtain an amendment of the import system. Such information might lead to a future amendment of the system in question by the competent Community authorities, but it has in any event no influence on the outcome of the action pending before the Finanzgericht Berlin. The document produced is therefore irrelevant to the present proceedings.

22 For these reasons there is no cause to accede to the application to reopen the oral procedure.

Costs

23 The costs incurred by the Commission and Council of the European Communities, which have submitted observations to the Court, are not recoverable, and since these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Finanzgericht Berlin, costs are a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the questions referred to it by the Finanzgericht Berlin by order of 10 February 1977, hereby rules:

1. **The system applicable at the time of the facts with which the main action is concerned to products falling within subheadings 04.04 E I (b) (3) and (4) of the Common Customs Tariff in the context of Article 14 of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products constitutes a 'special provision' within the meaning of the second subparagraph of Article 14 (3) and the second indent of Article 14 (6), as defined by Article 8 of Regulation No 823/68 of the Council of 28 June 1968 determining the groups of products and the special**

provisions for calculating levies on milk and milk products, as amended by Article 2 of Regulation No 467/75 of the Council of 27 February 1975.

2. **Under the special system of Article 8 of Regulation No 823/68 in the version applicable at the time of the facts with which the main action is concerned, the levy must be calculated on the basis of the threshold price fixed pursuant to Regulation No 804/68 without regard to the free-at-frontier price of the products subject to that special system, provided only that the requirement as to minimum prices laid down by Regulation No 823/68 is observed.**

3. **There was no obligation on the competent institutions of the Community at the time of the facts with which the main action is concerned to amend the import system applicable under Article 8 of Regulation No 823/68, as amended by Article 2 of Regulation No 467/75, to products falling within tariff subheadings 04.04 E I (b) (3) and (4).**

Sørensen Pescatore Touffait

Delivered in open court in Luxembourg on 8 November 1977.

A. Van Houtte
Registrar

M. Sørensen
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 6 OCTOBER 1977 [1]

Mr President,
Members of the Court

The reference for a preliminary ruling on which I have to give an opinion today is concerned with the interpretation of provisions on the imposition of levies on the importation of milk products from third countries, in this case the importation of cheese of sheep's milk from Bulgaria.

The principle of the imposition of levies on the importation of milk and milk

1 — Translated from the German.