OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 21 June 1990 *

Mr President,
Members of the Court,

1. The Vredegerecht for the judicial district of Brasschaat has asked the Court a question on the validity of two Commission Regulations, Regulation (EEC) No 2324/88 and Regulation (EEC) No 3779/88, [1] both of which were adopted pursuant to the Court's judgment of 29 June 1988 in Case 300/86 *Van Landschoot* v *Mera* [1988] ECR 3443, 3456.

2. This new reference for a preliminary ruling arises from the same dispute as that which had given rise to the proceedings in Case 300/86. I shall give a brief outline of the circumstances of the case. On 16 September 1986, Mr Landschoot, the owner of a mixed farm engaged in the cultivation of cereals and breeding of livestock, sold to NV Mera, a processing undertaking, a quantity of cereals (4 925 kg), paying the co-responsibility levy thereon (equal to BFR 1 242). Seven days later Mr Van Landschoot purchased from Mera animal feed containing a virtually identical quantity (4 575 kg) of cereals of the same quality as those previously sold.

Taking the view that the levy he had borne at the time of sale of the cereals was unlawful, Mr Van Landschoot instituted proceedings against Mera, in which he sought reimbursement of the amount paid. The court hearing the case accordingly submitted a question to the Court of Justice on the validity of the system involving the application of the co-responsibility levy established by Commission Regulation (EEC) No 2040/86. [2]

3. In its judgment the Court declared the second subparagraph of Article 1(2) of that regulation invalid 'in so far as it exempts from the co-responsibility levy the first-stage processing of cereals carried out on the producer's own agricultural holding by means of the machinery of the farm, provided that the products of the processing are used on that holding, but does not provide for such exemption for first-stage processing carried out off the producer's agricultural holding or by means of machinery which does not form part of the agricultural installations of the farm, where the products of the processing are used on that farm'.

4. Following that judgment, the Commission adopted two measures. First of all, it altered the scope of the levy by means of Regulation No 2324/88, according to which the levy is payable in respect of the quantities of cereals 'placed on the market', where 'placing on the market' means 'sales (including barter operations) by producers' (see Article 1 of Regulation No 2324/88). On the other hand, 'producers who have first-stage processing operations carried out by a third party with a view to the

* Original language: Italian.

1 — OJ 1988 L 202, p. 39 and OJ 1988 L 332, p. 17.

2 — OJ 1986 L 173, p. 65.

subsequent use of the processed product on their holdings' are exempted from the levy (second recital in the preamble to Regulation No 2324/88).

Secondly, in adopting Regulation No 3779/88, the Commission remedied the consequences of the discrimination established by the Court in its judgment in Case 300/86 by providing that the charges unduly paid by producers were to be reimbursed by means of an appropriate procedure.

With that end in view, Article 1(1) of Regulation No 3779/88 provides as follows:

'The competent agencies designated by the Member States shall reimburse before 30 June 1989 to producers, on application by the latter, the amounts of co-responsibility levies withheld:

(i) on processing operations on the producer's account as referred to in the second sentence of Article 1(2) of Regulation (EEC) No 2040/86, the product obtained from which has been used on the holding of the producer for animal feed;

(ii) on operations for the processing of cereals delivered or made available to an undertaking by a producer (work under contract) for subsequent utilization on his holding by 26 July 1988 pursuant to Article 1(2) of Regulation (EEC) No 1432/88'.[3]

To summarize, therefore, the situation is as follows.

A producer of cereals may seek reimbursement pursuant to Regulation No 3779/88 and, more generally, is exempted from the levy by Regulation No 2324/88 where the cereals have been processed on his account by a third party and have then been used on his holding as animal feed.

On the other hand, there is no right to reimbursement and, in general, the levy is payable, where the producer has *sold* the cereals, and therefore 'placed [them] on the market', even though he has subsequently purchased animal feed produced from cereals of the same quality as those previously sold.

5. The Vredegerecht is now asking the Court whether that difference of treatment is lawful.

Before considering the substance of the question submitted by the national court, it is advisable to define its ambit.

To begin with, it should be noted that the claim for reimbursement of the levy which forms the subject-matter of the dispute in the main proceedings was submitted in a procedure governed by national law and not under the appropriate 'Community' procedure referred to in Regulation No 3779/88.

In that regard, I believe only two observations are called for.

In the first place, Regulation No 3779/88 provides for and regulates the possibility for producers to apply directly to the competent national agencies in order to obtain reimbursement of the levy unduly paid; that

3 — OJ 1988 L 131, p. 37.

option is provided for also, if not primarily, in the interest of the producers themselves and, in particular, of those who, having failed to challenge the payment of the levy before the national courts, were no longer able at the time of the judgment in Case 300/86 to take action within the proper time-limits on the basis of national legal procedures. That being so, and in the absence of express provisions in the regulation itself, the 'Community' procedure laid down by the regulation must be regarded as not *precluding* those concerned from resorting to national legal procedures with the same end in view (namely obtaining reimbursement).

Secondly, although it acts in a procedural context different from that envisaged by the regulation, the national court must, when adjudicating on the claim before it, apply the substantive provisions of Regulation No 3779/88 which determine the circumstances in which the right to reimbursement (in whichever way it is exercised) continues to exist. Hence there is no doubt that the question whether those provisions are valid is essential for the solution of the dispute in the main proceedings.

In that regard, it must be pointed out that the provision to which the national court refers in its question is the *second* indent of Article 1(1) of Regulation No 3779/88, that is to say the provision concerning the reimbursement of levies paid in accordance with the arrangements for collection introduced by Commission Regulation No 1432/88.

It is clear, however, that the question submitted for a ruling must refer to the *first* indent of the aforesaid provision, given that the levy at issue was paid in accordance with the previous arrangements for collection laid down by Regulation No 2040/86.

In any event, it seems to me that Article 1(1) of Regulation No 3779/88, whilst distinguishing between operations carried out under two different systems of charging the levy, envisages a single situation, common to both systems, in which the right to reimbursement continues to exist, namely where processing operations are carried out by a third party 'on account of' a cereal producer. In substance, therefore, the Court is called upon to rule on the validity of Article 1(1) as a whole, and not just on a part thereof (whichever part is relevant).

In addition, the question of validity necessarily extends to the provisions of Regulation No 2324/88 which, in compliance with the judgment in Case 300/86, were adopted with a view to modifying the field of application of the levy. That is apparent from the order for reference itself and is, moreover, self-evident inasmuch as the scope of the right to reimbursement must necessarily be defined in relative terms by reference to the scope of the levy, and vice versa.

To summarize, therefore, the question which the Court is called upon to consider is essentially whether the principle of equality is contravened in a situation where, pursuant to the Community legislation in force, producers whose cereals have been processed, on their account, by an industrial processor and who have subsequently used the processed products as animal feed on their own holdings are exempted from the co-responsibility levy, whilst those producers are liable to pay the levy when they *sell* the cereals to a processing under-

taking and subsequently *purchase*, for use on their own holdings, animal feed produced from cereals of the same quality as those previously sold.

6. Both parties to the dispute in the main proceedings, the national court and the Italian Government consider that exemption from the levy should be granted not only in the case of processing under contract but also where the cereals are sold and then bought back by the producer in the form of animal feed: to restrict the exemption solely to the first of those situations, on the other hand, would give rise to discrimination which is incompatible with Community law and, in particular, would be contrary to the unequivocal wording of the judgment in Case 300/86.

In the light of that judgment, the criterion for determining the scope of the exemption in question is said to be the use of the (processed) cereals on the holding on which they were produced. Instead, the type of legal and economic relationship between the traders concerned, that is to say the producer/breeder, on the one hand, and the processing undertaking, on the other, is regarded as wholly immaterial: whether that undertaking has processed the cereals 'on account of' the producer, or has purchased them and subsequently sold the processed products, the cereals are in any event used by the person that produced them and their exemption from the co-responsibility levy is therefore said to be justified.

7. The core of the argument advanced by the parties referred to above therefore consists in the assertion that the Community legislature disregarded the nature and scope of the judgment in Case 300/86. Hence it is necessary to consider first of all what criterion for exemption from the levy was laid down by the Court in that judgment, and then to ascertain whether it has been properly applied by the contested rules.

In must be borne in mind that, in its judgment, the Court stated that 'the objective of the Community regulations governing the co-responsibility levy is to limit the structural surpluses on the cereals market' and that 'this objective provides justification for imposing the levy only on the processing of cereals placed on the market, since it is only in such a case that market surpluses are increased, whilst quantities of cereals remaining in a closed circuit do not contribute to the creation of surpluses' (paragraph 11).

It is quite apparent from that part of the judgment, and from the passages that follow, that the decisive criterion for defining the scope of the exemption from the levy lies in whether or not the cereals have been *placed on the market.*

The rationale behind that criterion is equally clear. The Court has taken the view that only production which enters the commercial chain is, for that very reason, capable of affecting the overall balance of the market; it is therefore justified to apply the specific deterrent represented by the co-responsibility levy only in respect of such production. In other words, in order to qualify for exemption neither the cereals nor the processed products must be the subject of commercial transactions.

8. That being so, it is indisputable, in my view, that the contested rules constitute a faithful transposition of the criterion laid down in the judgment. There is no doubt that if the cereals are processed by an industrial processor, on account of the producer, neither the cereals nor the resultant animal feed are placed on the market. The cereals themselves remain the property of the producer throughout the processing operation until they are used, whilst the processing undertaking merely provides a service with a view to processing the cereals into animal feed.

Conversely, in the circumstances of this case (sale of cereals and subsequent purchase of animal feed), there is a twofold entry in the commercial chain: first when the farmer decides to sell cereals to a processing undertaking, transferring the ownership of the cereals and the attendant economic risk to that undertaking, and secondly when the producer then decides to purchase animal feed produced from cereals as opposed to other competing products. Two commercial transactions are involved, each independent of the other, which are effected on two distinct markets and which depend ultimately on the conditions prevailing on those markets and on the corresponding assessments made by the parties concerned. Those transactions, by their very nature, affect the overall balance of the relevant markets, first and foremost the market in cereals.

Accordingly, in so far as they limit exemption from the levy solely to consignments of cereals processed 'on account of' the producer — that is to say, the only consignments which can genuinely be regarded as 'remaining in a closed circuit' and which do not enter the normal commercial chain — the contested rules must be regarded as being quite consistent with the criterion laid down by the Court in its judgment in Case 300/86.

9. However, it would be difficult to find any justification for extending the exemption to the situation forming the subject-matter of the dispute in the main proceedings, given the objective difference which, from the point of view of the effect on the market, exists between that situation and processing 'on account of' the producer.

As stated earlier, the sale of cereals affects overall supply and is reflected in the level of prices. Hence there is a *direct* effect on market equilibrium. It is true that the subsequent purchase of animal feed containing cereals of the same quality as those previously sold may, at least in certain circumstances, produce effects of the opposite kind, inasmuch as it may help to sustain demand and prices on the market in cereals. It is equally true, however, that it cannot always be taken for granted that the purchase of animal feed is capable of 'neutralizing' altogether the economic consequences of placing the cereals on the market. The purchase of animal feed is an operation carried out on a market downstream and has only *indirect* repercussions on the market in cereals upstream, that is to say only as a result of the behaviour of, and the choices made by, industrial processors.

Hence although the sale of cereals contributes directly to the creation of surpluses, it does not follow that the purchase by the producer of animal feed produced from cereals necessarily offsets and therefore neutralizes that effect.

It seems to me, therefore, that there are objective grounds which justify provision for exemption being made only in the case of processing under contract (where the cereals do not enter the market at all), but not in the situation forming the subject of the dispute in the main proceedings where the cereals enter the normal commercial chain, even though they may subsequently be purchased and used by the same producer as animal feed.

Conversely, to provide for identical treatment in both of those situations, notwithstanding the objective difference between them, would be tantamount to defying the rationale on which the levy system is based and which entails, as is quite clear from the judgment in Case 300/86, the application of the levy solely to cereals placed on the market in order to discourage production thereof.

10. It is clear, moreover, that a different solution would also drastically affect the system of applying the co-responsibility levy. If the reasoning of the parties to the main proceedings were taken to its logical conclusion, it would have to be acknowledged that the levy is not payable, and must therefore be reimbursed, independently of the time which has elapsed between the sale of cereals and the purchase of animal feed and, in the final analysis, even where the producer purchases animal feed from a processing undertaking other than that to which he sold the cereals; in any event, he would use on his own holding cereals of the same quality as those previously placed on the market and would therefore contribute, albeit after a time, to finding an outlet for the cereals produced and marketed by himself. Such consequences clearly seem contrary to the rationale behind the levy system which, at least in its present form, aims essentially to reduce income from sales of cereals and thereby discourage the marketing of cereal production. [4]

11. In the light of those considerations, I propose that the question submitted by the national court should be answered as follows: consideration of the question raised has not disclosed any factors of such a kind as to invalidate Commission Regulations Nos 2324/88 and 3779/88.

4 — See the Opinion in Case C-8/89 *Zardi* [1990] ECR I-2515.