OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 25 OCTOBER 1983 [1]

Mr President,
Members of the Court,

1. This reference for a preliminary ruling concerns the rules of Community law relating to agricultural policy and, in particular, Regulation (EEC) No 804/68 of the Council on the common organization of the market in milk and milk products. The Court is asked essentially to determine whether the Member States retain any, and if so which, residual powers where the Community institutions have created a common organization of the market in a given sector of trade. It is appropriate to state at once that the case gives rise to considerable difficulties. The questions submitted by the national court concern points of law which the Court of Justice has not clarified in full and, what is more, they refer not to specific provisions of national law but to the entire Netherlands system of rules on the production of, and trade, in cheese.

The facts may be summarized as follows: Jongeneel Kaas BV, a limited liability company having its registered office in Bodegraven in the Netherlands and 14 other undertakings also established in the Netherlands instituted proceedings before the Arrondissementsrechtbank [District Court], The Hague, against the State of the Netherlands and the Stichting Centraal Orgaan Zuivelcontrole [Central Agency for the Inspection of Dairy Produce, hereinafter referred to as "the Central Agency"], a body which supervises dairy production. In their action they sought a declaration that various national laws and regulations concerning the quality of cheese products and the inspection thereof were void, or at least an interim order suspending their operation. The plaintiffs — all of whom are undertakings exporting or in any event trading in cheese and, more generally, cheese products manufactured in the Netherlands — contested that the above-mentioned rules were in breach of Community law and were detrimental to their business interests. By order of 14 September 1982, the President of the Arrondissementsrechtbank stayed the proceedings and requested the Court under Article 177 of the EEC Treaty to give a preliminary ruling on the following questions:

(a) Must Regulation (EEC) No 804/68 be interpreted as preventing a Member State such as the Netherlands from unilaterally adopting, with the purpose of promoting sales of cheese and cheese products, rules concerning the quality of those products, such as those contained in the following legislation which is at present in force in the Netherlands: the Landbouwkwaliteitswet [Law on Standards in Agriculture] of 8 April 1971 (Staatsblad p. 371); the Landbouwkwaliteitsbesluit Kaasprodukten [Royal Decree on Standards in Agriculture: Cheese Products] of 2 December 1981 (Staatsblad, p. 726); the Landbouwkwaliteitsbeschikking Kaasprodukten [Ministerial Order on Standards in Agriculture: Cheese Products] of 28 December 1981, (Nederlandse Staatscourant No 251); the Keuringsreglement Centraal Orgaan Zuivelcontrole kaasprodukten [Regulation on Inspections: Cheese Products] adopted by the Central Agency and approved by the Ministerial Order of 2 June 1982 (Nederlandse Staatscourant, No 105); and the Heffingenreglement [Regulation on Levies] Centraal Orgaan Zuivelcontrole, adopted by the Central Agency and approved by the Ministerial Decree of 15 June 1982 (Nederlandse Staatscourant, No 118)?

(b) If Question (a) is answered in the negative, must Articles 30 and 34 of the EEC Treaty be interpreted as preventing a Member State such as the Netherlands from unilaterally adopting, with the purpose of promoting sales of cheese and cheese products, rules concerning the quality of those products, such as those contained in the legislation listed in Question (a)?

(c) If Question (b) is also answered in the negative, must the regulation

1 — Translated from the Italian.

mentioned in Question (a) and the articles mentioned in Question (b) be interpreted as preventing a Member State such as the Netherlands from adopting rules according to which only persons affiliated to an inspection agency are permitted to manufacture cheese products on a commercial basis, as provided in Article 12 of the Landbouwkwaliteitsbesluit Kaasprodukten?

(d) Do general legal principles, in particular the principle of proportionality, to which the plaintiffs refer, have direct effect in a case such as this?

2. In order to grasp the nature of the dispute it is indispensable to examine the essential features of the Netherlands legislation, which, according to the plaintiff undertakings, is contrary to Community law and is therefore unlawful as against them. I would point out that the system in question is extremely complex, partly because it is arranged on four levels each of which is superior to the one below, and partly because the provisions at each level are superimposed on one another and overlap. To give a lucid summary of the system is no easy matter.

At the apex of the pyramid is the Landbouwkwaliteitswet of 8 April 1971 (Staatsblatt 1971, pp. 5761 and 371). That law entirely reformed the system of rules hitherto contained in the Landbouwuitvoerwet [Implementing Law on Agriculture] adopted in 1938 (Staatsblad 600) which authorized the Netherlands Government to regulate the quality of certain agricultural and fishery products intended for export. There is a recital in the preamble to the Landbouwkwaliteitswet 1971 which is relevant to this case to the effect that in order to "promote sales it is desirable to adopt general rules on the quality of agricultural and fishery products". In the dairy products sector, the rules thus provided for were embodied in four subordinate measures: the Royal Decree of 2 December 1981 and the Ministerial Order of 28 December 1981, both concerning the quality of cheese products, and two regulations concerning the inspection of those products and the tax aspects, adopted by the Central Agency and approved by the Ministerial Order of 2 June 1982 and the Ministerial Decree of 15 June 1982 respectively.

The Royal Decree of 2 December 1981, which forms the second level of the pyramid, contains a series of provisions on the preparation of cheese products. Its purpose is to take the place of the rules hitherto in force (in particular those based on the Kaasmerkenwet [Law on Cheese Stamps] of 1911 and on the Landbouwuitvoerwet of 1938) and its legislative structure is based on two main principles: certain provisions lay down the minimum quality requirements which cheese products manufactured in the Netherlands must comply with, whilst others establish a two-fold system of inspections.

Articles 3 to 6 fall within the first group. Article 3 provides that "cheese products must possess the colour, aroma, taste and specific consistency of their variety" (paragraph (1)). Article 4 sets out the criteria which the packaging of those products must satisfy. Article 6, which is the cornerstone of the new system, determines the content of the implementing provisions which are to be adopted by the relevant minister. In particular, it provides that such im-

plementing provisions must regulate (a) the origin, form, finish, dimensions and weight of the cheese products, the characteristics of the industrial establishments and the means of transport, the raw materials and additives which may be used, the methods of preparation and processing, the use of machinery, tools and equipment, and the quality of packaging materials and how they are to be used; (b) the various categories in which the cheese products are to be classified; (c) the rules for processing the raw materials from which the products in question must be made. It is those factors in particular which, once implemented and developed in great detail by ministerial instruments (the Decree of 28 December 1981 consists of 172 articles!) had a considerable impact on the interests of undertakings operating in the cheese sector and gave rise to the main dispute.

The provisions of the second group, that is to say those relating to inspections, are set out mainly in Articles 10 to 14. Article 10 provides for the establishment of an *ad hoc* body, namely the Central Agency to which reference has already been made and whose task is to ensure compliance with the rules on quality by manufacturers of, and dealers in, cheese products. Those manufacturers and dealers must be members of that body (Article 12) if they wish to carry on business on an industrial scale. However, Articles 8 and 9 may also be regarded as relating to inspections, albeit from a different point of view. Those articles make is possible for the system already in force in other sectors of trade to be applied to cheese products by authorizing the adoption by ministerial order or decree of stamps, marks and inspection documents for the varieties of cheese defined by reference to the criteria specified in Article 6. Clearly, any product which bears a given stamp must fulfil the specific requirements for which the stamp was established (see Article 9 (1)).

The rules contained in the three groups of provisions to which I have referred have binding force. That is clear from Article 2 which prohibits

(a) the commercial manufacture of cheese products in disregard of the rules on preparation referred to in Article 6 (1) or in establishments lacking the facilities prescribed by the same article (paragraph (1) (a));

(b) the transportation of such products in disregard of the provisions of Article 6 (paragraph 1 (b)); and

(c) the marketing of such products in disregard of Articles 3, 4, 5, 6 (a) and (b)) (paragraph (6)).

As I have already said, the provisions of the Royal Decree of 2 December 1981, which give effect to the Landbouwkwaliteitswet, constitute in their turn the legal basis for the adoption of more detailed provisions which are set out in the Ministerial Order of 28 December 1981. That order also relates to the quality of cheese products and regulates in particular the raw materials to be used for the production of cheese (Articles 3 to 10), national cheese stamps (Articles 11 to 17), creamery cheese (Articles 18 to 83), farm-house cheese (Articles 84 to 100), white cheese including the type manufactured with the addition of foodstuffs and beverages (Articles 101 to 116) ground cheese and ground processed cheese (Articles 137 to 152) and, the re-exportation of cheese products manufactured outside the Netherlands (Article 166). Those rules are extremely detailed and constitute a substantial innovation in relation to the previous system.

Finally, the fourth level of the pyramid consists of the regulations adopted by the Central Agency. The first regulation, approved by the Ministerial Order of 2 June 1982, concerns the detailed rules for the carrying out of inspections intended to ensure compliance with the rules to which I have referred. The second regulation was approved by the Ministerial Decree of 15 June 1982. The undertakings which were members of that agency (that is to say, in practice, all the undertakings operating in the cheese sector) are subject under the provisions of that regulation to levies which are proportionate to the volume of production and are intended to cover inspection costs.

3. So much for the Netherlands system. As far as Community law is concerned, Article 30 and 34 of the EEC Treaty are clearly relevant as is Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products, including cheese. The provisions of that regulation contain the instruments of the common agricultural policy which are incorporated in the relevant market organization in accordance with the objectives of Article 39 of the EEC Treaty.

The regulation includes provisions on, for example, the annual determination of intervention prices for Grana-Padano and Parmigiano-Reggiano cheeses (Article 5 (1) (e)), the introduction of the threshold price (Article 4) and of levies (Article 14), the grant of aids for private storage (Article 8 (3)), the adoption of specific intervention measures for stores cheeses (Article 9 (1)), the introduction of other intervention measures where surpluses build up or are likely to occur (Article 12), the compulsory use of import or export licences in trade with non-member countries (Article 13), the payment of refunds on exports to non-member countries (Article 17 (1)), inward processing arrangements which may be prohibited in whole or in part (Article 18), a system of rules to regulate free movement in trade with non-member countries (Articles 18) and in intra-Community trade (Article 22) and the power to adopt protective measures (Article 21).

4. The purpose of the first two questions referred to the Court ((a) and (b)) is to establish whether the Netherlands rules which I have attempted to summarize are compatible with the relevant Community legislation. The national court wishes above all to ascertain whether they are contrary to Regulation No 804/68 and, if not, whether they are in breach of Articles 30 and 34 of the EEC Treaty. In Question (a), in particular, the national system is described in great detail as if the national court were asking the Court of Justice to review it *per se* and, if that were the case, the Court would have no choice but formally to declare the reference inadmissible. The Court is in fact confronted with a reference for a preliminary ruling under Article 177 and not (contrary to appearances at certain stages of the written and oral procedure) a direct action by the Commission against the Netherlands for an infringement of the Treaty and secondary Community legislation.

Even so, it is not possible for the sake of form to dismiss the fact that, if only because of the scope and extreme complexity of the national legislation to which the questions refer, the reference before the Court is very much *sui generis*. In its reference, the national court seeks in effect a substantial appraisal of the relevant Netherlands legislation, or at any rate of the principles underlying it. There is no need, however, to embark

upon a detailed examination of the individual provisions of that legislation or in particular of those which contain general rules but confine themselves to the implementation of some aspect thereof.

5. I now turn to Regulation No 804/68. According to the plaintiff undertakings, there are in particular three groups of national rules which are contrary to that regulation, namely the rules which restrict production to certain types of cheese, those which lay down rigid requirements for the qualitative features of those types, and those which regulate the process of maturation, packaging and transport, by the imposition of other far-reaching restrictions on the freedom of Netherlands producers and traders.

I shall deal presently with those provisions of the legislation in question. Before I analyse them it is appropriate to point out — and the usefulness of this explanation will subsequently become apparent — that they do not relate to cheese imported from other Member States. That is expressly stated by Article 2 (4) of the Royal Decree of 1981 which provides that the prohibition of production and marketing "shall not apply to products subject to customs arrangements" under the general law on customs and excise, provided that such products are not "subject to the inward processing procedure referred to in the Council Directive ... of 4 March 1969, No 69/73/EEC ... as amended in the past or in the future".

To return to the plaintiff's complaints, the facts to which they refer are incontestable. Article 6 of the Royal Decree and the corresponding provisions of its implementing decree prohibit the production of cheeses which could be manufactured lawfully until 1981. That applies to diet cheese with a low salt content, Gouda with the large holes typical of the Emmental variety and "brosse Kaas". Hence that measure is highly detrimental to Netherlands undertakings which, since they are forbidden to produce cheeses which other Member States are free to manufacture (for example, the Italian types produced in Belgium), cannot expand by marketing products for which there is a demand on the part of consumers.

Furthermore, the prohibition of the production of certain types of cheese is accompanied by the prohibition of even a slight variation of the composition and process of production of the permitted types of cheese. Thus, in the case of Cheddar, in the Netherlands its moisture content may not exceed 38%, whilst in the United Kingdom it may be as high as 39%. That leads to an increase in costs for the Netherlands producer whose own Cheddar must have a 1% higher fat content. Finally, there are the requirements relating to maturation and transport. By requiring that cheese remain within Netherlands territory until it is mature, Article 64 of the Ministerial Order of 28 December 1981 prevents, once again to the detriment of the cheese manufacturers, its speedy dispatch to other Member States and its prompt marketing there.

Thus, there are no doubts whatsoever as regards the impact or, to be quite candid, the "burdensome nature" of the system. But is that sufficient to make the system incompatible with Community law? The plaintiffs are confident that it is. They would even have the Court believe that there is an absolute incompatibility by virtue of general legal principles. There are certain sectors —

according to Counsel for the plaintiffs — in which the establishment of a common market and the endowment of the Community authorities with the means for implementing an integrated system have permanently deprived the Member States of any power to intervene. The chief example of this is provided by agricultural policy in general and the market in cheese products in particular. The Member States may not interfere, at any rate in sectors in respect of which Community rules have been adopted.

I cannot endorse that argument, even in the less extreme version containing the reservation to which I have just referred. That is demonstrated precisely by those judgments which the plaintiffs rely upon in support of their argument. Thus, in its judgments of 18 May 1977 in Case 111/76 *Van den Hazel* [1977] ECR 901, 29 November 1978 in Case 83/78 *Pigs Marketing Board* [1978] ECR 2347 and 26 June 1979 in Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161, the Court held that where the Community has, pursuant to Article 40, legislated for the establishment of the common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. In other words, it is not true that the national authorities are prohibited from taking any steps for the regulation of a market where the Community authorities have already made provision for it. The reverse is true, that is to say they may intervene provided that they pursue a policy which is not contrary to rules adopted by the Community authorities.

The attitude of the Commission is more flexible. The argument put forward by its representative, which is not entirely free from ambiguity, may be summarized as follows: the objectives of Article 39 must be pursued by the instruments of agricultural policy provided for by the Treaty. Accordingly the Member States may not — except in wholly exceptional circumstances and subject to stringent conditions, as provided for by Article 43 (3) — unilaterally set up a market organization in one sector or another. From that point of view the Netherlands legislation cannot be challenged. Not even its harshest critic would be able to maintain that the Netherlands has created a genuine organization of the market in cheese products or, in other words, that the Netherlands authorites have displaced the Community authorities in a sector for which the latter have exclusive responsibility.

I believe that the premise of that argument is correct. To confer upon the Member States the power to establish organizations of the market where Community measures pursuing the same objective are in force would serve no purpose. But to assume that a State would go so far as to adopt legislation which would be entirely superimposed on the Community measures is unrealistic. In reality, the position is different as has been shown more than once. A State may adopt measures which are far-reaching in scope, but without going so far as to create a genuine organization of the market. The question of their legality therefore depends entirely on how the phrase "without going so far" is construed. How far can a Member State go and where is the line to be drawn? Those are in my opinion

the real questions raised by the Netherlands legislation at issue.

6. The Commission's endeavours to answer those questions are not, I fear, altogether successful. As we have seen, it rejects the idea, adopted by the plaintiffs, that the existence of a common organization of the market deprives the Member States of any residual power. In its opinion, moreover, the Member States are subject to two restrictions, that is to say their rules cannot (a) interfere with the functioning of the market or (b) jeopardize the principle of freedom of access to the market. Those statements are in my view contradictory. To prohibit a State from interfering with the functioning of the market is not to impose a restriction on it. Since any measure, even the most anodyne, interferes with the functioning of the market, the effect of the prohibition is to place the State in a position in which it may take no action and thus to deprive it with one hand of the residual power conferred upon it by the other.

The Commission, which at the outset proceeded more cautiously than the plaintiff undertakings, in the end comes to share their drastic assumptions and therefore comes into conflict with the case-law of the Court. Let me repeat the observations which I made in relation to the *Van den Hazel, Pigs Marketing Board* and *Pigs and Bacon Commission* cases (and there are other decisions, whether more qualified or less clear-cut, which may also be cited in that connection, namely the judgments of 29 March 1979 in Case 231/78 *Commission* v *United Kingdom* [1979] ECR 1447, 29 June 1978 in Case 154/77 *Dechmann* [1978] ECR 1573, 6 November 1979 in Case 10/79 *Toffoli* [1979] ECR 3301, and 18 October 1979 in Case 5/79 *Buys* [1979] ECR 3203. In principle, the Member States are not free to adopt intervention measures where there is a common organization of the market which possesses appropriate and specific powers, but that is not an absolute principle and it leaves the Member States some room for manoeuvre. A national measure which does not derogate from the Community system, does not adversely affect the common administration of the market and does not jeopardize the attainment of its objectives is lawful.

In that connection, the key words in my view are "derogation" and "adverse effect." Therefore the question is not whether State intervention has an effect on production and trade but whether its effect — for it must produce some effect — clashes with the objectives of the common organization of the market or places obstacles in the path of their attainment. In other words, far from drawing a dividing line between the powers of the Community authorities and those of the national authorities — as suggested by the Commission — the Court advocates an investigation of each individual case in order to ascertain the degree of risk to which the national measure exposes the interests of the Community.

No such problem arises, however, as regards the other limit which the Commission considers must be set to State intervention. The common organizations of the market, it claims, are founded on the principle of an open market to which every producer must

have access. Such freedom of access may not be restricted by the Member States. That contention is correct and is confirmed by the case-law of the Court (see the *Pigs and Bacon Commission* judgment, cited above, particularly paragraphs 57 and 58 of the decision). That is not, I would add, purely fortuitous. In expressing that view, the Commission shifts its reasoning from the formal (and sterile) area of competence to the substantive area (favoured by the Court) of the effects of intervention on the functioning of the market.

In conclusion, therefore, I consider that national legislation and Community law are incompatible whenever the former adversely affects the administration and objectives of the common organization of the market and that the adverse effect is *in re ipsa* where such legislation restricts access to the market for traders or their right to produce, import or export goods. I should now like to consider whether the Netherlands legislation displays those characteristics.

7. First of all it seems to me that the most disputed aspects of that legislation are four in number: the prohibition of the production of cheeses not included in an exhaustive and restricted list; the prohibition of even a limited variation of the composition and the manufacturing process of the cheeses included in the list; the rules on distinctive marks and designation in so far as they are connected with the rules on quality; and compulsory affiliation of producers to the inspection agency (although the latter point is the subject of a separate question (c) submitted by the court of reference).

As far as the list is concerned I have already stated that it is restrictive. It excludes countless types of cheese such as — to give but a few examples of the many available — stored cheeses (Emmental, Gruyère), Provolone and its sub-varieties, Pecorino and the like. According to the Commission, the restricted nature of the list is open to criticism on three grounds: it conflicts with the policy pursued by the common organization of the market in cheese, which is to stimulate demand for cheese so as to enable the market to absorb larger quantities of milk products; it is in breach of the rule which prohibits discrimination on the part of common organizations of the market between Community producers (see the second subparagraph of Article 40 (3) of the Treaty); and it undermines the system of aids (storage aids and refunds) established by Regulation No 804/68 and implemented by a series of special measures.

The Netherlands Government does not of course share that view. In its opinion, the fact that to this day no Community rules have been drawn up concerning cheese products leaves the Member States some scope for action. The Netherlands exercised its powers by adopting the contested rules in order to guarantee to the consumer products which are of the highest standard and are therefore more easily marketable.

The basic premise of the argument advanced by the Netherlands is correct. It is true, in other words, that in spite of the Commission's efforts, no Community rules concerning the quality of cheese have yet been adopted and therefore it is true that the Member States retain a general power to legislate in that area.

However, it is also true that, far from resolving the problem, those considerations merely raise it afresh at a different level. Can that general power be exercised so widely as to reduce drastically the types of cheese which may be produced so as to ensure — and of this there can be no doubt — better quality? Is there no risk that such action may thus restrict the sale of Netherlands cheese and discriminate between domestic producers and producers from other Member States? I believe that those questions should both be answered in the affirmative.

The reason for this is clear. As the Commission has shown (see Annex 2 to the document lodged on 20 May 1983) the prospects of the market in cheese are encouraging. Exports to non-member countries are increasing and, within the Community, *per capita* cheese consumption is on the increase. That development is most welcome to cheese connoisseurs such as myself, but it is particularly encouraging for those whose task it is to contain the serious milk surpluses which occur in the sector in question. In the light of those factors, the argument that a policy designed to restrict the range of cheeses which may be manufactured promotes the sale of such cheeses strikes me as nonsensical. On the contrary, such a policy harms sales and thereby adversely affects the functioning of the common organization of the market.

If to all that we are to add that the charge of discrimination against Netherlands producers is so obvious as to dispense with the need for proof, it becomes self-evident that the rules relating to the list are unlawful under Community law. Therefore I do not believe any purpose is served by examining in detail the inconsistencies detected by the Commission in the machinery for the grant of refunds or aids. On closer inspection, those inconsistencies are merely different aspects of the same original defect which I have already considered at length.

8. I now turn to the second disputed aspect of the legislation under consideration, namely the further restriction which it imposes on the freedom of producers by prescribing in meticulous detail the requirements which the cheeses included in the list must comply with. Clearly, the rules relating thereto are also unlawful. That is so, however, only because they support and render more inflexible a restriction — the exhaustive and restricted list — which in itself adversely affects a specific Community interest. If there were no such restriction, those rules might be assessed in a different light. In the absence of Community legislation in this area, it is quite legitimate to suppose that national rules aimed at ensuring that cheese is of a high standard are consistent with the objectives and the functioning of the common organization of the market.

9. The third aspect which is alleged to be unlawful consists in the compulsory use of distinctive marks. According to the Commission, that requirement has an adverse effect particularly on exports to the Member States and to non-member countries. However, if the problem is viewed in those terms, Article 34 of the Treaty comes into play and the second question is based specifically on that provision. What is important at this stage, however, is to assess the compatibility of that requirement with the common organization of the market.

In that respect, the Commission criticizes the requirement on two grounds. In so

far as it constitutes a barrier to exports, the Commission contends that the compulsory use of stamps or marks has an adverse impact on sales and is therefore contrary to the objectives of the common organization of the market. Furthermore, it adds, Article 13 of Regulation No 804/68 makes exportation to non-member countries conditional on possession of an appropriate licence, thereby ruling out by implication the possibility that exportation may be made conditional on the issue of other documents.

I am not swayed by those arguments. The second argument is unconvincing because the application for an export licence is not, as such, so comprehensive as to preclude the Member States from requiring the use of different documents. The first argument is unconvincing because the adverse impact on sales of compulsory stamps has not been demonstrated and is certainly not *in re ipsa*. Another observation which might have been made regarding the system of stamps is that by further restricting in scope the definition of cheeses which may be produced, the system helps to undermine the functioning of the common organization of the market. But in that case, what was said earlier in relation to the guarantee as to quality must also apply to that system. The unlawfulness lies not in its rules but in its propensity for strengthening the restriction — which is inherently unlawful — established by the compilation of the list.

I now propose to deal with a final problem concerning export licences. The Ministerial Decree of 15 June 1982 provides that the issue of export licences is conditional on payment of a fee. It seems clear to me that such a charge is also unlawful in so far as — which is to be determined in each individual case — it culminates in a restriction in sales. Furthermore, unless the charge is also borne by products marketed within the State, it must be regarded as incompatible with Article 12 of the EEC Treaty (see the Court's judgment of 10 March 1981 in Joined Cases 36 and 71/80 *Irish Creamery* [1981] ECR 735).

10. The second question is concerned with the compatibility of rules such as those contained in the contested Netherlands legislation with Articles 30 and 34 of the Treaty. The court making the reference makes the question conditional on the first question's being answered in the negative. I have suggested that it should be answered in the affirmative, subject however to certain qualifications. Since my suggestion may not be accepted, however, I consider it appropriate to deal with the problems raised by the national court in Question (b).

I stated earlier (in paragraph 5) that the Netherlands legislation does not apply to imported cheese. Accordingly, it cannot come into conflict with Article 30. The reference to Article 34 raises more complex issues. The contested rules apply to the production and marketing of cheese manufactured in the Netherlands, within the territory of that State, in the Member States and in non-member countries. Accordingly, the question arises whether such rules constitute measures having an effect equivalent to quantitative restrictions on exports. The Netherlands Government denies this, relying on the case-law of the Court. The Court, it points out, is concerned that there should be no discrimination between the domestic trade of a Member State and its export trade so as to confer on domestic producers an advantage over those of other Member States. The Court has therefore held that Article 34 applies only to measures which restrict patterns of exports (see the judgments of 8 November 1979 in Case 15/79

Groenveld [1979] ECR 3409, 14 July 1981 in Case 155/80 *Oebel* [1981] ECR 1993 and 1 April 1982 in Joined Cases 141 to 143/81 *Holdijk* [1982] ECR 1299).

That line of defence strikes me as well founded. Whether they are lawful or unlawful, the restrictions which I dealt with earlier apply to domestic trade as much as to export patterns. That is so as regards the exhaustive list of cheeses, the rules on quality and the system of distinctive marks. I would emphasize in particular that the latter system is also accorded uniform treatment. That deprives of its significance the Commission's reference to the Court's judgments of 16 March 1977 in Case 68/76 *Commission* v *France* [1977] ECR 515 and of 3 February 1977 in Case 53/76 *Bouhelier* [1977] ECR 197.

11. The third question is concerned with the compatibility of Article 12 of the Royal Decree of 2 December 1981 (or, for that matter, any such rule) with Regulation No 804/68 and, once again, Articles 30 and 34 of the EEC Treaty. Article 12, I would recall, reserves the industrial production of cheese exclusively to members of the inspection agency (the Central Agency) set up by Article 10 of the same decree.

In my opinion, that restriction is unlawful. Experience clearly shows that production — and *a fortiori* production on an industrial scale — serves no purpose unless the manufacturer markets the goods which he produces. Thus, by prohibiting non-members from engaging in production, Article 12 also prevents them from marketing those products and, in so doing, contravenes the principle laid down by the Court in its judgment of 26 February 1980 in Case 94/79 *Vriend* [1980] ECR 327. In that case, which was concerned with the common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage (Regulation (EEC) No 234/68) the Court held that national legislation which had set up a supervisory body and prohibited any traders not affiliated thereto from marketing plants and flowers irrespective of their quality was incompatible with the rules of that common organization.

12. The fourth and final question is concerned with the general principles of Community law and, in particular, with the principle of proportionality. The national court wishes to ascertain whether that principle is directly applicable in a case such as that pending before it.

The answer to that question must be in the affirmative. The general principles elicited by the Court from the primary and secondary provisions of Community law, and in particular from those fundamental values which are common to the legal systems of the Member States, form part of the Community legal order and may therefore be relied upon by individuals before the national court which, as is well known, is also a Community court. However, that is subject to the limitation that such principles may come into operation only in cases where the application of substantive rules of Community law is involved. To be more explicit, those principles may be relied upon by individuals and will be taken into account by the courts not in any circumstances but only in cases which display some connection with the legal order of the Community.

In its judgment of 11 November 1981 in Case 203/80 *Casati* [1981] ECR 2595,

the Court clearly defined the limits within which the principle of proportionality may be relied upon in a national context. In that case it was necessary to establish the extent to which the Member States were at liberty to adopt or to retain rules of criminal law in relation to the free movement of goods and persons. The Court ruled that administrative measures or penalties must not go beyond what is "strictly necessary"; hence "a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle" to freedom of movement is unlawful (paragraph 27 of the decision). *Mutatis mutandis* that is the rule to which the court of reference will have to adhere.

13. In the light of the foregoing considerations, I suggest that the Court answer as follows the questions referred to it by the Arrondissementsrechtbank, The Hague, by order of 14 September 1982 in the case brought by the limited company Jongeneel Kaas BV, Bodegraven, The Netherlands, and 14 other companies against the Netherlands State and the Stichting Centraal Orgaan Zuivelcontrole (COZ):

1. *Question (a):* Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products must be interpreted as preventing a Member State from unilaterally adopting, with the purpose of promoting sales of cheese and other cheese products, legislation concerning the quality of those products which: prohibits the manufacture of types of cheese which are not included in a restricted list and are not manufactured in compliance with stringent requirements relating to raw materials, the manufacturing process and the means of conservation and transport prescribed for each type of cheese included in the list; requires the use of distinctive marks as a condition for marketing the products where that leads to a decline, if only potentially, in sales; makes exportation conditional on the issue of appropriate licences where that leads to a decline in sales; and makes the issue of licences conditional on the payment of fees where no similar charge is levied on products marketed within the country of production.

2. *Question (b):* Articles 30 and 34 of the EEC Treaty must be interpreted as meaning that they do not prevent a Member State from unilaterally adopting, with the purpose of increasing sales of cheese products, legislation concerning the quality of products which exhibits the characteristics described in paragraph 1 above. Such legislation does not give rise to differences in treatment between the domestic trade of that

Member State and its export trade and it does not therefore confer a special advantage on domestic products to the detriment of those of other Member States.

3. *Question (c):* Regulation No 804/68 and Articles 30 and 34 of the EEC Treaty must be interpreted as preventing a Member State from adopting legislation reserving the industrial production of cheese products exclusively to members of an inspection agency.

4. *Question (d):* The general principles of law and, in particular, the principle of proportionality have direct effect. Accordingly, they must be applied by national courts if the circumstances in relation to which they are relied upon display a connection with the Community system.