The position of the Member States and of their national authorities which are parties to litigation in relation to the reimbursement of Community revenue avoided or of sums improperly paid has not been affected by the consequences of the attribution to the Community of own resources.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
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Delivered in open court in Luxembourg on 4 April 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 2 APRIL 1974 [1]

Mr President,
Members of the Court,

I can be quite short in describing the facts underlying the three criminal cases referred by the Court of Appeal of Brussels, which really only involved one crucial legal point and which were therefore rightly joined.

Several persons were accused in the proceedings of having understated levies to the Administration of Taxes and of having obtained export refunds by fraud. In Cases 178 and 179/73 cereal products allegedly exported to third countries were in fact exported by the accused to Member States and reimported into Belgium, as a result of which they had wrongfully obtained the payment of export refunds. In Case 180/73 we are concerned with the importation of beef into Belgium, in relation to which incorrect returns had been made so as to avoid the payment of levies.

The Belgian and Luxembourg States as part of the criminal proceedings made claims for the repayment of export refunds and for the payment of levies, due to them as a result of the conduct alleged against the accused; this they are entitled to do under Article 3 of the Belgian code of criminal procedure.

The present reference is concerned with the admissibility of these claims. The Court of Appeal of Brussels — doubtless

1 — Translated from the German.

encouraged by objections on the part of two of the accused — desires to know whether the transition to the financing of the common agricultural policy from the Community's own resources, which commenced with Regulation No 25 of the Council of 4 April 1962 and which for the present concluded with the Decision of the Council of 21 April 1970, has an effect on the position in substantive law and in procedure on the position of the Belgian and Luxembourg States in civil claims tacked on to criminal proceedings. It therefore seems necessary, before going more fully into the two references, to trace the development of the system of agricultural financing by the European Agricultural Guidance and Guarantee Fund up to the time when it assumed its present shape.

During the *first phase from 1 July 1962 to 30 June 1967* the Fund only refunded a part of the Member States' expenses as specifically laid down in the Regulation, and this only under specific conditions (Regulation No 25 of the Council of 4. April 1962, OJ 1962, p. 991 and Regulation No 130/66 of the Council of 26 July 1966, OJ 1966, p. 2965). Thus in the case of exports to third countries, the export refunds paid by a Member State were only financed where and to the extent that the exports of the relevant product by the Member State exceeded the imports. The contribution by the Fund was calculated on the basis of the rate of refund applicable to the Member State having the lowest average refunds. This system was a consequence of the form of the organizations of the market at that time, which placed the payment of export refunds within the discretion of the legislator of the particular State. The purpose was to prevent Member States being able arbitrarily to increase their share of contributions from the Fund by means of changes in the rate of refund.

During the first phase the Fund was maintained by the financial contributions of Member States. The amount was to a large extent made up of contributions calculated pursuant to the scale provided for in Article 200 (1) of the EEC Treaty and to a lesser (but up to 30 June 1965 growing) extent on the basis of the net imports of agricultural products effected by each Member State from third countries. Regulation No 130/66 (OJ 1966, p. 2965) changed the division of the financial contributions from Member States for the period from 1 July 1965 to 30 July 1967. A scale expressed in percentages, and deviating from Article 200 of the EEC Treaty, was laid down and the relationship between contribution and the amount of the net imports was allowed to drop.

During the *second phase* of agricultural financing, *extending from 1 July 1967 to the end of 1970,* the expenses incurred by Member States were to an increasing extent borne by the Fund. Thus the refunds paid in respect of exports to third countries were now calculated on the basis of the gross exports, i.e. whether the Fund became liable for them was no longer dependent upon the Member State showing an export surplus. However, during the second phase also, the calculation was on the basis of the lowest average amount of the refund of a Member State (Article 8, Regulation No 130/66).

The financing of the Fund continued to be by contributions from Member States. To the extent of 90 % these consisted of levies raised by Member States upon imports from third countries, together with — if these should prove insufficient — a partial amount calculated according to a fixed scale. The *third phase* was introduced by the important Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ L 94, 28. 4. 1970, p. 19), as well as by Regulation No 729/70 of the Council of the same date (OJ L 94, 28. 4. 1970, p.

13). Under their provisions the Fund shall in principle finance the totality of export refunds granted in accordance with Community rules within the framework of the organizations of the market and the totality of the interventions intended to stabilize the agricultural markets (Articles 2 and 3 of Regulation No 729/70). The necessary credits were made available to the Member States in order to affect the necessary payments therefrom (Article 4 of Regulation No 729/70).

The Fund, in the same way as the complete budget of which it forms a part, is, from 1 January 1971 to be partially, and from 1 January 1975 completely, financed from the Communities' own resources. As long ago as 1 January 1971, the total revenue from agricultural levies was entered in the budget of the Communities (Article 3 of the Decision of 21 April 1970).

For the purpose of raising the Community resources and therefore also the levy, Article 6 of the Council Decision provides:

'1. The Communities' resources referred to in Articles 2, 3 and 4 shall be collected by the Member States in accordance with national provisions imposed by law, regulation or administrative action which shall, where necessary, be amended for that purpose.

Member States shall make these resources available to the Commission'.

The *first question in the reference,* to which I shall now come, refers to the legal position as it existed prior to 1971. It reads:

'1. Are the provisions of Regulation No 25 of the Council of the European Communities of 4 April 1962 and the provisions modifying the same or carrying it into effect, and especially Article 2 of the said Regulation, particularly having regard to the method of calculation of the contributions of Member States to the European Agricultural Guidance and Guarantee Fund defined by Article 7 of the said Regulation, whereby a portion of these contributions arises from charges levied by Member States upon imports from third countries, to be interpreted as meaning that as from the coming into effect of Regulation No 25, the Community, if necessary jointly with the Member State concerned:

(a) was the party directly interested and, if applicable, directly injured in connexion with the payment of expenditure incurred and the collection of revenue arising from the common agricultural policy;

(b) in the event of it not being possible generally to answer the first part of this question in the affirmative, ought not the answer nevertheless to be in the affirmative to the (limited) extent that the net imports of each Member State from third countries and therefore the charges imposed are decisive, under the provisions of Article 7 aforementioned, for the computation of the Member States' contribution towards the European Agricultural Guidance and Guarantee Fund, it thus being clearly shown that the Community from the beginning possessed a certain right, at any rate a partial right, to the levies imposed by Member States'.

In my opinion the first part of the question asks in essence whether Regulation No 25 and the consequential Regulations have resulted in a limitation of the position of Member States as parties in cases before the national courts concerning the payment of levies, and whether therefore the Member States no longer have any particular *locus standi,* such as the existence of an entitlement to legal protection.

The answer must be in the negative. Prior to the Council Decision of 21 April 1970 the levies amounted to the Member State's own revenue. No provision of positive law limited the right of Member States to collect these and in this connexion also to institute legal proceedings. This in no way altered by the — certainly correct — conclusion that the Community since 1962 had a great interest in the system of levies, since already at that time it constituted a substantial part of the agricultural policy, the financing of this policy having been by means of the financial contributions of the Member States. We are here dealing with the general interest of the Community in Member States performing their obligations under Community law, an interest the safeguarding of which was by Article 155 of the EEC Treaty especially entrusted to the Commission. The Treaty provides several means for ensuring the observance of this Community interest; under certain conditions an action against the Member State concerned is possible.

This interest of the Community does not however confer upon its institutions rights that are directly exercisable in proceedings before the national courts. It follows that it cannot result in limiting the legal rights which under their own national law Member States enjoy in these legal proceedings.

Accordingly the question of the Court of Appeal of Brussels under 1 (a) ought to be answered in the negative. In relation to 1 (b), the alternative, the Court however also desires to know whether possibly a negative answer [1] is appropriate to the extent that the charges imposed are decisive for the computation of the Member States' contribution to the Fund.

In this connexion it must first of all be said, as it has been said by the Commission, that under Article 7 of Regulation No 25, during the first phase it was not the charges imposed but the net imports that affected the size of the Member States' contributions. Between these two quantities there was however no connexion since the rates of levy differed for the different States.

Something fundamentally different applies to the second phase, where under Article 11 (1) of Regulation No 130/66 the financial contributions from the Member States were calculated partly in proportion to the levies in relation to third countries collected by each Member State. However, it is questionable whether this created a financial interest on the part of the Community, since the shortfall in the Fund, arising from levies not raised by Member States, must have resulted in an increase in contributions which Member States had to pay according to a fixed scale under Article 11 (3) of the Regulation. A supplementary claim on the part of the Community upon the Member States concerning levies raised at too late a date does not arise, at any rate to the extent that accounts had been settled in the meantime.

But even if one were to assume a financial interest on the part of the Community in the levy payments, this would not have cut down the rights of Member States as regards their participation in proceedings; in particular it would not have done away with their need for legal protection. For Article 11 (2) of Regulation No 130/66 did not transfer 90 % of the levies to the Community but only made the levies in fact collected by Member States the basis of calculation for this part of the financial contributions, as is clearly shown by Article 11 (1). Member States continued to remain directly liable to the Community; their interest therefore lay in the first place in their revenue being properly received and in their expenditure being justified. Since Regulations Nos 25 and 130/66 are directly applicable in the Member States,

1 — Translator's note: The question in fact refers to an affirmative answer.

the latter were obliged to ensure that individual cases were properly dealt with, especially so since they had effects upon the Community budget; in exercise of their administrative authority they were able and obliged to check and ensure the revenue upon the basis of which, in accordance with a provisional scale, they had to make their financial contributions. They naturally remained entitled, therefore, to assert their claims also in legal proceedings.

I can now turn to the *second question*. It reads:

'2. Are the provisions of Regulation No 729/70 of the Council of 21 April 1970 and the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Community's own resources, and the provisions for carrying these into effect, to be interpreted as meaning that as from the coming into effect of the said provisions:

(a) all the sovereign powers relating to their own revenue and expenditure concerning the common agricultural policy of the Community were transferred from the Member States to the Community, so that (1) the Community alone is henceforth competent to take legal action in relation to the said revenue and expenditure (2) any authority of Member States to assist the Community in the collection or payment thereof can no longer be considered as the Member States' *own* authority (possibly shared with the Community) but as an authority exercised *for and on behalf of* the Community?

(b) if the answer to question (a) above be in the affirmative, does this not then equally apply by reason of the direct effect of the transfer of sovereign powers referred to in (a), to demands in legal proceedings made after the date of coming into effect of the said provision or pending at that date in relation to facts occurring or rights coming into existence prior thereto?'

I shall first examine this question in the light of the Community's own resources resulting from the levies and then answer it in relation to the expenditure financed by the Agricultural Fund, i.e. especially in relation to the refunds.

As regards the levies, i.e. the revenue, it is appropriate to make a distinction — well known to us from tax law — between beneficial authority (Ertragshoheit) and administrative authority (Verwaltungshoheit).

The beneficial authority, i.e. the entitlement to the proceeds of levies, belongs, under the Council Decision of 21 April 1970, without a doubt to the Community. This emerges from the wording of Article 2 of the Decision, pursuant to which the levies constitute 'own' resources, i.e. not belonging to any other legal entity 'to be entered in the budget of the Communities'.

Now as regards the question of beneficial authority, I do not think it necessary to enter into the principles of the carrying into effect of Community law by Member States. Certainly, it can take different forms in law. Which legal form we are dealing with must be deduced from the relevant Regulations.

In the present case it is Article 6 of the Council Decision that is decisive: pursuant to this the Community resources referred to in Articles 2, 3 and 4 shall be collected by the Member States in accordance with national provisions laid down by law, regulation or administrative action, which shall, where necessary, be amended for that purpose. Member States therefore possess all rights attaching to the collection of Community resources. Only a supervision of the collection of revenue on the part of the Commission may, pursuant to Article 6 (2), be introduced, and this was in fact provided

for by Regulation 2/71 of the Council. As against this, it is not possible for Community institutions to give instructions to the administrations of Member States concerning the collection of Community resources. One cannot therefore speak of Member States acting in hierarchical subordination, on the basis of powers possessed by the Community. Rather, they act on the basis of their own sovereign rights, in a way similar to that in which, in federal States, the individual State independently fulfils in exercise of the powers conferred upon it the administrative tasks transferred to it. Looking at the matter in this way, we can leave aside the question whether these sovereign rights were (as is argued by the representative of the Belgian and Luxembourg Governments) never lost by the Member States, or whether, as one also might suspect, they were by means of the Council Decision first transferred to the Community as a component part of the authority to levy taxes in relation to the revenue referred to in Article 2 and then in the same breath, were by Article 6 transferred back to the Member States.

We shall now have to examine the question whether the administrative authority includes the right of Member States to appear before the courts in connexion with the collection of levies.

In this connexion we shall have to look at both paragraphs of Article 6 of the Council Decision of 21 April 1970, in conjunction with the provisions of Article 13 and 14 of Regulation No 2/71 of the Council of 2 January 1971 (OJ 1971, L 3, p. 1), made for the purpose of carrying the same into effect. Whilst Article 6 (1) of the Council Decision of 21 April 1970 places upon Member States the task of collecting Community resources, Article 6 (2) envisages the adoption of provisions relating to the supervision thereof. In carrying this Article 6 (2) into effect, only control functions were by Article 14 of Regulation No 2/71 transferred to the Commission. On the other hand, pursuant to Article 13 of Regulation No 2/71 Member States shall take all requisite measures to ensure that the amounts corresponding to the entitlements established are made available to the Commission; the only case where this obligation does not apply is where these amounts could not be collected for reasons of *force majeure*. It is obvious that the obligation of Member States under Article 13 of the Regulation also includes the institution of proceedings for the amounts established. Besides, under the express provisions of Article 6 (2) of the Decision of 21 April 1970 and Article 14 of Regulation No 2/71, it was laid down that the Commission should be associated in collecting the Community resources and such association was limited to measures of control, from which one may deduce that it was not open to it to participate in other ways, in particular by instituting legal proceedings. Accordingly these must be matters subject to the administrative authority of Member States.

Thus to define the extent of administrative authority also corresponds to the intention of the complete system governing the Community's own resources.

The Commission — which does not possess the necessary administrative infrastructure — was not to be burdened with the collection of Community resources. Rather was it the expertize of the national bodies and their closer proximity to the taxable events that was to be used for the benefit of the Community. These reasons apply with equal force to the collection of levies both through the courts and by way of administrative procedures.

Besides, to divide the responsibility for these two procedural stages would also militate against the principles of efficient administration since as from the commencement of legal proceedings, a second authority would have to familiarize itself with what consistently

are extremely difficult disputes on tax law.

As regards restitutions on third country exports, Article 8 of Regulation No 729/70 contains clear provisions. This Regulation provides that Member States, in accordance with national provisions laid down by law, regulation or administrative action, shall take the measures necessary 'to

— ...

— prevent and deal with irregularities,

— recover sums lost as a result of irregularities or negligence'.

There can therefore be no doubt that Member States may appear before the courts for the purpose of recovering refunds wrongly paid.

The question whether in appearing before the courts Member States do so in exercise of their own sovereign authority can in my opinion be left open. Admittedly it has been argued both in writing and orally on behalf of two of the accused, that where Member States appear in court in connexion with the recovery of refunds wrongly paid they do so, not in exercise of their own sovereign rights but as the executive organ of the Community, i.e. on its account. It was argued that this resulted in legal proceedings instituted by Member States before 1. 1. 1971 now having to be started afresh. However, this is not required by Community law, even if one adheres to the view that in connexion with payments pursuant to the common organizations of the market in agriculture Member States are in the position of executive organs of the Community.

Under Article 8 of Regulation No 729/70 the recovery of sums lost as a result of irregularities shall be in accordance with national provisions laid down by *national provisions of law, regulation or administrative action.* Member States are therefore in law to be in the same position as they would have been if national aids — which are of a nature similar to refunds — had been improperly paid. This refers both to the position in substantive law — such as the existence of claims arising from unjust enrichment — and to the procedural position; this means that Member States have the procedural right to take action in their own names in respect of such claims. The question whether as between the Member State and the Community it is the latter that is entitled to the amount recovered, ought to be of no consequence for the national proceedings. The fact that the Commission ought not to be a party to the national proceedings, is clear from Article 5 of Regulation No 283/72 of the Council of 7 February 1972 (OJ 1972, L 36, p. 1), pursuant to which the Commission shall be regularly informed of the progress of such proceedings and of their outcome. Accordingly there is also no requirement in Community law that the transition on 1. 1. 1971 to the final phase of the common agricultural financing should have procedural consequences upon proceedings of the kind now in progress in Brussels, which might have been pending at that date.

The more general, subsidiary question whether the Regulations that introduced the final phase of the common agricultural policy could have any effect at all upon claims arising from the common organizations of the market in agriculture during earlier phases, does not therefore have to be considered.

Summarizing my views, I suggest that the following replies be given to the questions submitted to the Court:

Neither the provisions of Regulation No 25 of the Council of 4 April 1962 and the provisions amending the same and carrying it into effect, nor the

provisions of Regulation No 729/70 of the Council of 21 April 1970, nor the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources and the provisions made in relation thereto for the purpose of carrying the same into effect, have affected the right of Member States, in their own name and in accordance with national legal provisions, to take legal rights for payment of levies wrongfully unpaid or for repayment of export refunds wrongfully paid.