the national court in deciding at what stage in the proceedings pending before it a question should be referred to the Court for a preliminary ruling.

2. A temporary national duty intended to be borne by agricultural producers as part of an incomes policy dividing tax burdens among the various sectors of the working population, but applied in the form of an indirect tax on the value of certain agricultural products subject to common organizations of the markets at the time of their delivery for processing, storage or export and payable either by the exporter or by the processing or storage undertaking, who are entitled to recover the amount of the duty from the producers, is not, in principle, incompatible with the provisions of the EEC Treaty on agricultural policy, or with Community rules on the common organization of the markets.

   Such incompatibility would, however, exist if and in so far as the duty had the effects of impeding the proper functioning of the machinery established as part of the relevant common organizations for the formation of common prices and to regulate market supplies.

   It is for the national court to decide whether, and if so to what extent, the duty which it is called upon to consider in fact has such effects.

3. Even if it is applied to livestock exported on the hoof when they are delivered for export, a national duty does not fall within the prohibition of charges having an effect equivalent to customs duties on exports if it is also applied, systematically and in accordance with the same criteria, to livestock which are not being exported, at the time of their delivery for slaughter.

In Joined Cases 36 and 71/80,

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Ireland for a preliminary ruling in the action pending before that court between

IRISH CREAMERY MILK SUPPLIERS ASSOCIATION AND OTHERS

and

GOVERNMENT OF IRELAND AND OTHERS

and between

MARTIN DOYLE AND OTHERS

and

AN TAOISEACH AND OTHERS

on the interpretation of the EEC Treaty, in particular of Articles 9, 11, 12, 16, 17 and 38 to 46 and of Article 177 thereof and of the Council regulations on the common organization of the markets in cereals, milk products, beef and veal and sugar,

THE COURT,

composed of P. Pescatore, President of the Second Chamber, acting as President, Lord Mackenzie Stuart and T. Koopmans (Presidents of Chambers), A. O'Keeffe, G. Bosco, A. Touffait and O. Due, Judges,

Advocate General: J.-P. Warner
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to 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

A — Facts and procedure before the national court

1. In April 1979 the Government of Ireland adopted a number of orders imposing a temporary excise duty of 2% on the chargeable value of the following products:

(a) fresh milk (from 1 May to 31 December 1979);

(b) live domestic bovine animals (from 1 May to 31 December 1979);

(c) cereals (wheat, oats and barley) (from 1 August to 31 December 1979);

(d) sugar beet (from 1 August to 31 December 1979).

Subject to certain exceptions, the duty was applicable at the time of delivery to national products delivered for processing, storage or export. The duty did not apply to imported products except for imported bovine animals which had been in Ireland for more than 14 days, which were regarded as domestic cattle.

The exceptions related to the first 5 000 imperial gallons of milk, contaminated animals and sugar beet cultivated in certain counties and delivered to a specified refinery.

The duty, which was paid to the Revenue Commissioners, was payable either by the exporter or the processing undertaking (slaughterhouses, creameries, sugar factories and mills) or by the storage undertaking as follows: by the owners of premises at the end of each month, and by exporters in principle before exportation was carried out.

As regards milk, cattle and cereals, the chargeable value was regarded as being the price which the product would fetch on a sale in the open market between a buyer and a seller independent of each other. For sugar beet on the other hand the chargeable value was to be taken to be the actual price paid by the buyer.

If the exporter or the owner of the processing undertaking had bought the product he might in principle either deduct from the price payable to the seller a sum equal to the amount of the duty or recover that amount as a contractual debt. If the person accountable for the duty did not become the owner of the product, for example because he was merely rendering a service, he might recover the amount of the duty from the owner of the product.

As regards the collection of the duty imposed on exporters, the latter could opt for the use of the form and procedure laid down by Council Directive 78/453/EEC of 22 May 1978 on the harmonization of provisions laid down by law, regulation or administrative action concerning deferred payment of import duties or export duties with reference to monetary compensatory amounts. As regards owners of undertakings, they were required to apply to the Revenue Commissioners for a licence which was granted them on certain conditions such as, for example, the duty to provide certain information for checking purposes.

2. Irish agricultural producers and their associations submitted a complaint to the Commission. In addition, together with certain processing undertakings and a cattle exporter they brought two actions against the Government of Ireland and other Irish authorities. These were the actions which gave rise to the references for a preliminary ruling from the High Court of Ireland.

In a letter of 2 October 1979 to the Commission, the Government of Ireland gave the following explanation as regards the introduction of the duty in question:

"For historic reasons the level of prosperity and the stage of development of agriculture in Ireland has until recently lagged behind that of other sectors of the economy. This was reflected in a relatively favourable tax regime for agriculture particularly as regards income tax. Since 1972 the prosperity of agriculture has made rapid progress largely

due to the influence of the CAP and the tax system has been progressively modified to bring it into line with that applicable in other sectors with comparable incomes. While this process was not completed at the time of the 1979 budget, the government was conscious at that juncture of the fact that the agricultural sector was now in a much better position to pay for the services that were specially provided for it. In looking at means of recovering at least part of the cost from the agricultural sector rather than from taxpayers in general the government was faced with the problem that the collection of funds in the current year could not be effectively secured under any existing tax system. For that reason the agricultural excise duty was introduced as a temporary measure which would operate until the government had decided on a definitive tax system for agriculture after consultations with the farming community. Since the budget these consultations have been concluded and a definitive tax regime operating from 1980 was announced on 24 April and the levy will terminate on 31 December 1979."

3. The applicants in the main action in Case 36/80 requested Professor Denis Lucey of the University College of Cork to consider the effects of the duty in question. In his preliminary conclusions in paragraph 42 of his report Professor Lucey states that all or the vast bulk of the incidence of levy is shifted to farmers in the form of a reduction of the net price for the items concerned. He concludes more precisely that as regards cereals, sugar beet and milk, the duty of 2% is borne in the last resort by farmers although the administrative costs occasioned by the duty may be absolved by processing or storage undertakings. As regards cattle the situation is more complicated. The extent of demand at first made it possible for slaughterers for export to pass the duty on to their purchasers; however, the burden subsequently fell back on producers as a result of the operation of intervention prices, so that by reason of the duty producers did not benefit from the effective intervention price. A very considerable number of cattle were sold and slaughtered just before the introduction of the duty and in the first few weeks after its introduction exporters saw their trade decline considerably. Importation of cattle from Northern Ireland increased.

4. The actions before the High Court of Ireland are for a declaration of the incompatibility of the duty with the EEC Treaty, in particular with Community rules relating to the common organization of the markets in the products in question and for an injunction to restrain the collection of the duty.

Having regard to the fact that the Government of Ireland undertook, in the event of the Court's finding the duty to be invalid, to refund any duty paid, the national court did not deal with the question of the grant of an injunction but stayed the proceedings and ordered that the following questions should be referred to the Court of Justice for a preliminary ruling:

"1. Was the decision by the High Court, at this stage of the hearing, to refer to the European Court under Article 177 of the Treaty, the question set out in paragraph 2 below a correct exercise on the part of the High Court of its discretion pursuant to the said article?

2. Is a national tax, such as that in issue in the present case, contrary to the Treaty establishing the European Economic Community and, in particular, to Articles 9, 11, 12, 16, 17 or 38 to 46 of the said Treaty, or to any of them, or to Council Regulations Nos 804/68, 805/68, 3330/74 and 2727/75, or to any of them?"

B — Procedure before the Court of Justice

In pursuance of Article 20 of the Statute of the Court of Justice of the European Economic Community, written observations were submitted by the plaintiffs in the main action, represented by Mason Hayes & Curran, Solicitors, Dublin, in Case 36/80, and by Brian McCracken S.C., Mary Robinson and Tom Morgan, Barristers, instructed by Beatty & Healy, Solicitors, Dublin, in Case 71/80, and by the defendants in the main actions represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, and by the Commission of the European Communities, represented by R. Wainwright and H.-P. Hartvig, members of its Legal Department, acting as Agents.

On 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.

By an order of 16 September 1980 the Court decided to join Cases 36/80 and 71/80 for the purposes of the oral procedure and judgment.

II — Written observations

A — First question

The *defendants in the main actions* state that in view of the disagreement between the parties on questions of fact concerning amongst other things the operation and effects of the duty, they had asked the High Court not to refer the case to the Court of Justice for a preliminary ruling until the facts had been determined. They did this in order to avoid the possibility that after the facts had been determined it might be thought that further questions of Community law arose for reference to the Court of Justice under Article 177, thus opening up the highly undesirable possibility of more than one reference in the one case. After the decision of the High Court to request a preliminary ruling on the validity of the provisions in question before the judgment of the case, the defendants appealed against that decision. After a hearing of the appeal at which doubts arose regarding the existence of a right of appeal to a higher national court from an order for reference of a national court, the parties agreed that the appeal should be adjourned *sine die* and that what is now the first question in the order for reference of the High Court should be included in the present reference for a preliminary ruling.

The defendants suggest the following answer to that question:

"(a) The time at which a national court ought to refer a question to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the EEC Treaty is a matter solely for that court, subject to any right of appeal to a higher national court which may exist under national law against the exercise or non-exercise

of the lower court's power to seek a preliminary ruling in the particular case.

(b) In deciding whether or not to seek a preliminary ruling under Article 177 of the Treaty, it is proper for national courts to consider whether the proceedings before them have arrived at a stage when either

(i) the preliminary ruling will *per se* be sufficient to enable judgment to be given; or

(ii) the preliminary ruling, while not sufficient *per se* to enable judgment to be given, is necessary therefor and the balance of convenience (including the desirability of avoiding more than one reference in the same case) requires that the preliminary ruling be obtained before the determination of the matter or matters (whether of fact or of national law) which, in conjunction with the preliminary ruling, will enable judgment to be given."

The defendants emphasize that they do not wish at this stage to bring about a withdrawal or a postponement of the reference for a preliminary ruling by the Court of Justice on the second question, but that they consider that, if the Court of Justice were to answer the first question in the manner suggested above, it would give national courts in general valuable guidance in the practical operation of Article 177 of the Treaty.

The *plaintiffs in Case 36/80* do not think it necessary for the Court to give a ruling on that question. Having regard to the manner in which it was put to the Court it does not come within the ambit of the second paragraph of Article 177 inasmuch as it is not a question which the High Court considered necessary for the purposes of its judgment. If the Court considers that it is either necessary or appropriate for it to give a ruling on that question the plaintiffs concur with the view of the *plaintiffs in Case 71/80*, namely that it is for the national court to decide on the time at which it is appropriate to refer a question to the Court of Justice.

The *Commission* takes the view that in the absence of exceptional circumstances, for example because the legal situation has yet to be defined or because of the artificial character of the national proceedings, the exercise on the part of the national court of its discretion to refer a matter to the Court of Justice is not to be questioned in these proceedings.

B — Second question

(a) After an analysis in depth of the case-law of the Court of Justice and of the price mechanism in the four sectors, the *plaintiffs in the main action in Case 36/80* claim that the imposition of the duty infringes in the first place Articles 38 to 46 of the Treaty and the above-mentioned Council regulations because it constitutes an unlawful interference with the common organizations of the market for the four products in question. Once rules have been adopted in a given sector Member States are under an obligation to refrain from taking any measure which might undermine or create

exceptions to it. According to the plaintiffs, the duty has altered the machinery for the formation of prices by lowering the upper limit represented by the target or guide price, together with the lower limit represented by the intervention price and, for sugar beet, the minimum price. If the market price for the products in question were equal to the target price producers would have received that price less 2% and, in certain cases, that is to say when the intervention price came into operation, the duty would have exposed producers to the risk of obtaining less than that price, contrary to the intention of the Council. Like target or guide prices intervention and threshold prices and export refunds or levies are linked one to another and as prices for derived products depend on the prices of the basic product, whilst the minimum price for sugar beet depends on the intervention price for white sugar, the charge adversely affected price formation in general and was of such a nature as to affect the operation of the common organization of the market, namely the free movement of the products in question and the availability of supplies as well as the standard of living of agricultural producers.

The duty thus constitutes an infringement of Articles 9, 11, 12 and 16 of the Treaty as, in its effects, it has the nature not of an internal charge but of a customs duty on exports or a charge having equivalent effect inasmuch as it was not applicable to the whole of agricultural production or to all producers and inasmuch as it drew a distinction between processing and storage undertakings on the one hand and exporters on the other. For the same reasons the imposition of the duty was a breach in addition of the principle of non-discrimination set out in Article 40 (3) of the Treaty.

The applicants also emphasize that the temporary nature of the duty does not mean that such a duty will never be reintroduced at some future time for a longer or shorter period or at a higher rate than 2%, which would have severe consequences for the agricultural community.

They suggest that the answer to the second question should be as follows:

"1. In sectors covered by a common organization of the market, and especially when this organization is based on a common price system, Member States can no longer take unilateral action affecting the machinery of price formation as established under the common organizations;

2. A national levy, such as the one in issue, which by levying an amount of 2% on cereals, cattle, milk and sugar beet at the production and export stages has the effect of modifying price formation as provided for within the framework of the common organization of the markets referred to, is incompatible with Regulation No 2727/75 on the common organization of the market in cereals, with Regulation No 805/68 on the common organization of the market in cattle, with Regulation No 804/68 on the common organization of the market in milk, and with Regulation No 3330/74 on the common organization of the market in sugar;

3. A national levy, such as the one in issue, discriminates, by the manner of its application, against producers and exporters *vis-à-vis* persons producing and competing at similar levels, by its treatment of similar situations dissimilarly and is

therefore incompatible with the second subparagraph of Article 40 (3) of the EEC Treaty."

These arguments are supported by the plaintiffs in Case 71/80 who state in addition that the charge is a customs duty or a measure having equivalent effect.

(b) As regards the export of cattle the plaintiffs in Case 36/80 support the arguments of one of the *plaintiffs in the main action in Case 71/80,* namely that by reason of the particular situation on the market the duty constituted a restriction on the freedom of movement of goods and caused a distortion of the market. Maintaining that the effects of the duty were those of a charge having an effect equivalent to a customs duty on exports or, in the alternative, a measure equivalent to a quantitative restriction on exports, this plaintiff, who is himself an exporter of cattle, describes the actual effects of the duty on the export of cattle on the hoof as follows:

(1) Since the imposition of the duty no seller of cattle has been willing to sell to exporters if the amount of the duty was deducted from the price, which has had the effect of confronting exporters with the alternative either of paying the duty themselves or passing it on to their purchasers. Exporters have made their purchases in competition with purchasers on the domestic market. In the case of sales within the country the duty was imposed only on sales of cattle intended for slaughter and was due only at the moment when slaughter took place. The result was a reduction in exports and an increase in imports above all from Northern Ireland since cattle were exempted from the duty if they were slaughtered within the first fortnight following importation. The very fact that the duty was of limited duration prevented the operation of the normal market machinery, just as it was favourable to undertakings of some size inasmuch as they were able to choose between keeping the cattle until 31 December 1979 and selling it on the domestic market for fattening or breeding which, in the latter case, would not involve the need to pay the duty.

(2) The Revenue Commissioners, in collecting the amount of the duty, used the machinery laid down for the payment of export levies and thus recognized the true nature of the duty.

(c) The *defendants in the main action* emphasize in their observations the object of the duty. It was an internal tax on national production borne by the agricultural producers themselves. It affected neither the formation or stability of prices nor the availability of supplies or agricultural productivity. The Community regulations were not intended to ensure for producers a certain net income for their product and the imposition of the duty did not require that the products in question should be sold at prices below intervention prices.

With regard to the arguments put forward by the cattle exporter in Case 71/80, the defendants in the main action contend in particular that the imposition of the duty brought about a reduction in the prices obtained by Irish producers either in sales intended for slaughter or

in those intended for export. Normal market forces ensured that no divergence could have arisen from the imposition of the duty between the prices resulting therefrom on the domestic market and those on the export market, both of which are determined by the operation of market forces.

In conclusion the defendants submit that the Court should declare in answer to the second question that a national tax such as that for which Statutory Instruments Nos 152, 153, 160, 250 and 266 of 1979 provide is not contrary to the Treaty establishing the European Community or to any of the Council regulations made thereunder.

(d) The *Commission* remarks that Member States are not deprived of their powers to impose internal taxes, whether direct or indirect. Their Community obligations, however, do imply that the exercise of such powers is subject to various limits and constraints. In the first place, the Treaty prohibits Member States from imposing on products from other Member States discriminatory internal taxes or from repaying internal taxes in such a way as to amount to a subsidy on exports. Moreover, an internal tax may be prohibited in so far as it constitutes a charge having an effect equivalent to a customs duty, for example where it serves exclusively to finance activities which specifically benefit domestic products or where it is imposed on sales for export at a higher rate than on sales within the country. Finally it is not possible to exclude the possibility that an internal tax may be prohibited as being, on a detailed analysis, incompatible with the common agricultural policy, for example where the tax limits the effects of an alteration in the level of Community prices or where it is charged within the framework of a system which is incompatible with the requirements of the Treaty on the free movement of goods and with the common organization of the market.

According to the Commission what is at issue here is not a customs duty on imports or a measure having equivalent effect because the charge does not apply to imported produce apart from live bovine animals which have been in Ireland for more than 14 days. The Commission takes the view that the only function of the provision regarding imported cattle is to determine which animals belong to the Irish herd and were therefore subject to the duty if subsequently sent for slaughter. Moreover, the duty was levied at the time of the delivery of the live animal to the slaughterhouse and not at the time of or by reason of the import.

Nor is the duty a customs duty on exports since it is applied to all the products concerned, both those intended for home consumption and those intended for export.

As to the relationship between the duty and the common agricultural policy the Commission takes the view that in the absence of express prohibitions in the basic regulations or appropriate harmonization there is no legal basis to prevent Member States from imposing duties on agricultural products even if they are covered by a common organization of the market. Nevertheless it is possible that an internal tax like that introduced

by the Irish Government is incompatible with the common organization of the market in so far as it affects price formation and jeopardizes the aims and objects of the common policy. However, the Commission comes to the conclusion that that does not apply in this case for the following reasons:

(1) Although there may be limitations on the powers of Member States to impose internal taxes in the context of the common organization of the market the Commission concludes from the absence of a prohibition in the regulations that the Council did not intend that these limitations should be too tightly drawn.

(2) The objective of ensuring a fair standard of living for the agricultural community which is laid down in the preambles to the regulations in question is not attained solely by the establishment of a common organization of the market. It cannot therefore be maintained that the farmers' income depends entirely on the common organization of the market or that Member States have lost all power to take measures which affect that income whether it be in the form of aids or of taxes.

(3) The duty in question does not in fact interfere with the formation of prices since it does not restrict production or the right to sell freely on to the market. Nor does it amount to a price freeze or render it impossible for the producer to obtain the price intended by the common organization of the market and it does not have the object or effect of forcing down prices or of limiting the effects of an alteration in the level of Community prices since it is in principle borne by the producer who does not enjoy a direct guarantee of a particular price level.

The Commission suggests that the answer to be given to the second question should be as follows:

"A national tax borne by the producer and levied in a general and non-discriminatory way on agricultural products supplied for processing, storage and export is to be considered as being compatible with the requirements of the EEC Treaty with regard to free movement of goods and of the regulations on the common organizations of the market in such products."

III — Oral procedure

At the sitting on 12 November 1980 the Government of Ireland, represented by R. Cook, SC, the plaintiffs in the main action in Case 36/80, represented by A. Brown, SC, the plaintiffs in the main action in Case 71/80, represented by B. McCracken, SC, and the Commission, represented by R. Wainwright, a member of its Legal Department, acting as Agent, presented oral argument.

The Advocate General delivered his opinion on 17 December 1980.

IV — Request by the Government of Ireland that the oral procedure be reopened

1. In a letter of 23 January 1981 lodged at the Court Registry on 28 January the

Government of Ireland submitted, together with its observations on the Advocate General's opinion, a request that the Court:

(a) reopen the oral procedure pursuant to Article 61 of the Rules of Procedure; or

(b) order measures of inquiry pursuant to Article 60 of the Rules of Procedure, and for that purpose:

(c) permit the observations contained in the annex to the letter arising from the Advocate General's opinion to be presented to the Court, either orally or in writing, as part of the observations of the Government of Ireland; or

(d) invite the parties, pursuant to Article 21 of the Statute of the Court and by way of an exceptional measure, to give their comments on the summary of their arguments made by the Advocate General or to suggest to the Court how the Report for the Hearing might be supplemented in the light of the oral hearing, including the document lodged at the time by the Government of Ireland, and in the light of the Advocate General's opinion.

2. The Court, meeting in the Deliberation Room on 4 February 1981, considered the contents of the letter and took the view that all the information necessary to enable it to reply to the questions referred to it in this matter was already available; it was therefore decided not to grant the requests made in the letter.

Decision

1 By an order of 25 October 1979 which was received at the Court on 28 January 1980 the High Court of Ireland referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions, one of which concerns the interpretation of the said Article 177 whilst the other seeks elucidation on the features of interpretation of Community law which it requires in order to decide whether a temporary excise duty of 2% imposed by the Government of Ireland in 1979 on the value of certain agricultural products was in conformity with that law. By an order of 29 November 1979 which was received at the Court on 6 March 1980 the same national court raised almost identical questions in another case before it.

2 According to the case-files the duty in question was imposed from 1 May to 31 December 1979 on fresh milk and live bovine animals, and from 1 August to 31 December 1979 on certain cereals, namely wheat, oats and barley, as

well as on sugar beet. Subject to certain exceptions, mainly of a social nature, the duty was applicable to such products at the time of delivery for processing, storage or export. It did not apply to imported products except for imported bovine animals which had been in Ireland for more than 14 days, which were regarded as Irish cattle. The duty, paid to the Revenue Commissioners, was payable either by the exporter or by the processing or storage undertaking. As it was intended to be borne by producers, the government orders which introduced the duty provided that exporters and undertakings were entitled to recover the amount of the duty from the producers.

3 Two associations of Irish agricultural producers, together with a number of processing undertakings and a cattle exporter, brought actions against the Government of Ireland before the High Court for a declaration that the duty was incompatible with Community law. Considering that the principal issue in the actions concerned the interpretation of Community provisions, the national court decided to refer a question to the Court of Justice for a preliminary ruling without first examining the parties' differences on matters of fact, in particular as regards the way in which the duty operated and its effects. As the Government of Ireland argued that a reference to the Court was premature at that stage in the procedure, the High Court included in its orders of reference to the Court an initial question concerning the interpretation of Article 177 of the Treaty.

First question

4 The first question raised by the High Court of Ireland is worded as follows:

"Was the decision by the High Court, at this stage of the hearing, to refer to the European Court under Article 177 of the Treaty, the question set out in paragraph 2 below a correct exercise on the part of the High Court of its discretion pursuant to the said article?"

5 Before an answer is given to that question it should be recalled that Article 177 of the Treaty establishes a framework for close cooperation between the national courts and the Court of Justice based on the assignment to each of different functions. The second paragraph of that article makes it clear that it is for the national court to decide at what stage in the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling.

6 The need to provide an interpretation of Community law which will be of use to the national court makes it essential, as the Court has already stated in its judgment of 12 July 1979 (Case 244/78 *Union Laitière Normande* [1979] ECR 2663) to define the legal context in which the interpretation requested should be placed. From that aspect it might be convenient, in certain circumstances, for the facts in the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice so as to enable the latter to take cognizance of all the features of fact and of law which may be relevant to the interpretation of Community law which it is called upon to give.

7 However, those considerations do not in any way restrict the discretion of the national court, which alone has a direct knowledge of the facts of the case and of the arguments of the parties, which will have to take responsibility for giving judgment in the case and which is therefore in the best position to appreciate at what stage in the proceedings it requires a preliminary ruling from the Court of Justice.

8 Hence it is clear that the national court's decision when to make a reference under Article 177 must be dictated by considerations of procedural organization and efficiency to be weighed by that court.

9 The reply to the first question which has been raised should therefore be that under Article 177 the decision at what stage in proceedings before it a national court should refer a question to the Court of Justice for a preliminary ruling is a matter for the discretion of the national court.

Second question

10 The second question reads as follows:

"Is a national tax, such as that in issue in the present case, contrary to the Treaty establishing the European Economic Community and, in particular, to Articles 9, 11, 12, 16 and 17 or 38 to 46 of the said Treaty, or to any of them, or to Council Regulations Nos 804/68, 805/68, 3330/74 and 2727/75, or to any of them?"

11 The purpose of this question from the High Court is to elicit the features of interpretation of Community law necessary in order to decide whether the duty is compatible with Community law, and in particular with the provisions of the Treaty prohibiting charges having an effect equivalent to customs duties, with those relating to the common agricultural policy and with the regulations of the common organization of the markets in the sectors covering the products subject to the duty. Since all the products chargeable are subject to Community rules on the common organization of markets it is appropriate to consider the duty first in relation to those rules.

12 In the observations which they submitted to the Court the associations of agricultural producers, the plaintiffs in the main action in Case 36/80, maintained, first, that the duty constitutes an unlawful interference with the common organization of the markets in question in so far as the latter attempt to guarantee a certain price for producers. If the amount of the duty is to be borne, as intended by the Government of Ireland, by agricultural producers, the latter will receive a net price lower than the price envisaged by the Community authorities when they fixed the target or guide price, the intervention price or the minimum price for the product in question. Such a result would be contrary to one of the objectives of the common agricultural policy which, according to Article 39 (1) (b) of the Treaty, aims to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture.

13 Whilst the parties to the main action express differing views on the precise reasons which led the Government of Ireland to introduce the duty, they agree that it forms part of an incomes policy which is designed to divide up the tax burden between the various sectors of the working population. As the Government of Ireland and the Commission correctly argue, nothing in the common organization of markets is opposed, in principle, to such a national policy. According to Article 39 (2) (c) of the Treaty, in working out the common agricultural policy account shall be taken of "the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole". The common agricultural policy is not intended, therefore, to shield those engaged in agriculture from the effects of a

national incomes policy. Moreover, the fixing of common prices within the framework of the common organization of markets does not serve to guarantee to agricultural producers a net price independently of any taxation imposed by the national authorities, and the very wording of Article 39 (1) (b) shows that the increase in individual earnings of persons engaged in agriculture is envisaged as being primarily the result of the structural measures described in subparagraph (a).

14 It follows that a national tax such as that at issue in the present case is not, in itself, contrary to the Community rules on the common organization of markets. That conclusion is not altered by the mere fact that for administrative reasons the tax was levied through the intermediary of exporters and processing or storage undertakings.

15 Nevertheless, the methods used to implement a national incomes policy which includes, among other persons, agricultural producers would be incompatible with the Treaty and with the rules on the common organization of markets if these methods interfered with the functioning of the machinery employed by those organizations in order to achieve their ends. The real problem posed by the duty in question in relation to those rules is therefore whether, apart from the taxation of the incomes of agricultural producers envisaged by the Government of Ireland and precisely because of the basis of its assessment and the way in which it is collected, it has produced other effects capable of obstructing the functioning of the machinery established by the organizations in question.

16 On that point the plaintiffs in the main action in Case 36/80 contend that according to the consistent case-law of the Court even the potential effects of a national measure may render it incompatible with the Treaty. As far as the duty in question is concerned they place special emphasis on its potential effects on the formation of market prices and on market supply. They also support the arguments put forward by the cattle exporter who is the plaintiff in Case 71/80, that such effects have in fact appeared on the market in cattle. Owing to what the plaintiff describes as the special situation of the market in cattle in Ireland, exporters have not been able to pass the duty on to producers. Moreover, a very considerable number of cattle were sold and

slaughtered just prior to the introduction of the duty, whereas market supplies decreased subsequently, and the result was an increase in imports from Northern Ireland of cattle which were exempt from the duty if sold to a processing undertaking within 14 days of their importation. The abolition of the duty produced the opposite effects. According to the plaintiffs in the two main actions the duty thus affected the machinery for the formation of market prices, market supply and intra-Community trade, at least in the cattle sector.

17 The duty in question came into force on 1 May 1979 for milk and bovine animals and on 1 August 1979 for the other products subject to it. It was abolished for all products on 31 December of that year. Consideration must therefore be given to the trends which became apparent on the markets in question during the period for which the duty was in force and, if necessary, to the question whether such trends are to be imputed, at least in part, to the effects of the duty disregarding, however, the temporary effects produced immediately before and after the introduction and abolition of the duty in so far as those effects may be considered as the consequence of transactions effected in order to evade the duty.

18 Despite the low rate of the duty and the limited period for which it was in force, such an examination is necessary because the tax scheme at issue before the national court concerns products which, without exception, are subject to a common organization of the market and because it applies, moreover, to stages in the marketing process which coincide largely with those envisaged by such organizations.

19 It is for the national court to decide whether the charge which it is called upon to consider has in fact had effects which obstruct the working of the machinery established by the common organizations of the market. With a view to the decision which has to be made in that respect by the national court it is, however, possible to identify certain features of Community law.

20 The essential aim of the machinery of the common organizations in question is to achieve price levels at the production and wholesale stages which take

into account both the interests of Community production as a whole in the relevant sector and those of consumers, and which guarantee market supplies without encouraging over-production. Those aims might be jeopardized by national measures adopted unilaterally, which have an appreciable influence, even if unintentionally, on price levels on the national market at the same stages, or on supplies on that market. In the case of a duty such as the one in this case, the risk of such influence depends not only on its rate and the period for which it is in force, but equally on the situation on the market in question and, as regards supplies, above all on how general its effect is, that is to say, the number of agricultural products to which it applies. A short-term duty on a large number of products may be neutral in the sense that it does not alter the structure of agricultural production. On the other hand, if the duty encourages producers to replace some of the production of the goods subject to the duty by production of other goods not subject thereto, the duty is liable to create distortion on a number of markets.

21 The question which has been referred to the Court also concerns the provisions prohibiting charges having an effect equivalent to customs duties. The doubts which have been expressed by the national court in that part of the question are due to the fact that the duty, although not applied to products by reason of their importation, was charged on the occasion of their delivery, not merely for processing or storage, but also for exportation. According to the files on the cases that problem arises in practice solely in the case of animals. It is therefore from that aspect that the Court is replying to that part of the second question.

22 On that point the cattle exporter who is the plaintiff in Case 71/80 states that in the case of the exportation of live bovine animals for purposes other than their immediate slaughter, the duty was charged on the animals solely by reason of their export, whereas animals which were not exported were exempt from it up to the time of their delivery for slaughter.

23 It is appropriate to point out in this respect that in so far as it may be established that application of an internal duty falls more heavily on sales for export than on domestic sales the duty has an effect equivalent to a customs duty on exports. This would not be so, however, in the case of a duty which

is applied systematically and in accordance with the same criteria to animals, in the words of the Government of Ireland, " at the point of withdrawal from the national herd, whether for export or for slaughter".

24 On all those grounds, the reply to the second question should be as follows:

— A temporary national duty intended to be borne by agricultural producers as part of an incomes policy dividing tax burdens among the various sectors of the working population, but applied in the form of an indirect tax on the value of certain agricultural products subject to common organizations of the markets at the time of their delivery for processing, storage or export and payable either by the exporter or by the processing or storage undertaking, who were entitled to recover the amount of the duty from the producers, was not, in principle, incompatible with the provisions of the EEC Treaty on agricultural policy, or with Community rules on the common organization of the markets.

— Such incompatibility would, however, exist if and in so far as the duty had the effect of impeding the proper funtioning of the machinery established as part of the relevant common organizations for the formation of common prices and to regulate market supplies.

— It is for the national court to decide whether, and if so to what extent, the duty which it is called upon to consider has in fact had such effects.

— A duty such as that described above, even if it is applied to bovine animals exported on the hoof when they are delivered for export, does not fall within the prohibition of charges having an effect equivalent to customs duties on exports if it is also applied, systematically and in accordance with the same criteria, to bovine animals which are not being exported, at the time of their delivery for slaughter.

Costs

25 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable; as 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 national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Ireland by orders of 25 October 1979 and 29 November 1979 hereby rules:

1. **Under Article 177 of the EEC Treaty the decision at what stage in proceedings before it a national court should refer a question to the Court of Justice for a preliminary ruling is a matter for the discretion of the national court.**

2. **A temporary national duty intended to be borne by agricultural producers as part of an incomes policy dividing tax burdens among the various sectors of the working population, but applied in the form of an indirect tax on the value of certain agricultural products subject to common organizations of the markets at the time of their delivery for processing, storage or export and payable either by the exporter or by the processing or storage undertaking, who were entitled to recover the amount of the duty from the producers, was not, in principle, incompatible with the provisions of the EEC Treaty on agricultural policy, or with Community rules on the common organization of the markets.**

3. **Such incompatibility would, however, exist if and in so far as the duty had the effect of impeding the proper functioning of the machinery established as part of the relevant common organizations for the formation of common prices and to regulate market supplies.**

4. **It is for the national court to decide whether, and if so to what extent, the duty which it is called upon to consider has in fact had such effects.**

5. **A duty such as that described above, even if it is applied to bovine animals exported on the hoof when they are delivered for export, does not fall within the prohibition of charges having an effect equivalent to customs duties on exports if it is also applied, systematically and in accordance with the same criteria, to bovine animals which are not being exported, at the time of their delivery for slaughter.**

Pescatore Mackenzie Stuart Koopmans

O'Keeffe Bosco Touffait Due

Delivered in open court in Luxembourg on 10 March 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber
Acting as President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 17 DECEMBER 1980

My Lords,

These cases were described by Counsel for the Commission at the hearing as important and difficult. I agree with him.

They come before the Court by way of references for preliminary rulings ordered by the High Court of Ireland (Barrington J.) in two actions that are pending before that court. In those actions the plaintiffs claim that a temporary excise duty at the rate of 2 %