OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 13 December 1989 *

Mr President,
Members of the Court,

1. Once again, the Court is being asked to give a preliminary ruling on a number of questions concerning the validity and interpretation of various provisions of Community law concerning the additional levy on milk.

2. Those questions were raised in proceedings which certain milk producers in the Liège and Belgian Haute Ardenne regions instituted before the tribunal de première instance (Court of First Instance), Verviers, against the dairies to which they are affiliated, the Office national du lait et ses dérivés and the Belgian State, for the repayment of certain sums which the dairies had withheld from them by way of the additional levy on milk from the price of milk delivered by the producers.

3. The plaintiffs in the main proceedings claim that the Community legislation and, consequently, the national rules adopted for its implementation, on the basis of which those levies were collected, are illegal either because they are contrary to the prohibition of discrimination between Community producers laid down in Article 40(3) of the EEC Treaty (first and second questions), and/or disregard the Community-wide character of the common agricultural policy (third question), or else because they take no account of 'structural and natural disparities between the various agricultural regions', as required by Article 39(2)(a) of the EEC Treaty (fourth question).

4. The relevant legislation is well known to the Court and the provisions relevant to this case are set out in detail in the Report for the Hearing. For the exact wording of the questions raised I would also refer to the Report for the Hearing.

I — The first two questions

5. Council Regulation (EEC) No 856/84 of 31 March 1984, [1] which inserted Article 5c in the Community legislation on the common organization of the market in milk and milk products, [2] leaves Member States with a choice between two different formulas for implementing the additional levy on milk which it introduces.

6. Whereas under Formula A (the producer formula), the levy is payable by the milk producer once the quantities of milk and/or milk equivalent delivered to a purchaser exceed the annual reference quantity allocated to him, under Formula B (the purchaser formula) it is payable, as the Court held in its judgment of 28 April 1988 in Case 61/87 *Thevenot* [1988] ECR 2375

* Original language: French.

1 — OJ 1984, L 90, p. 10.

2 — Regulation (EEC) No 804/68 of the Council of 27 June 1968 (OJ, English Special Edition 1968 (I), p. 176).

'only in so far as the purchaser's reference quantity has been exceeded'.

It follows that

'in the context of Formula B, producers may take advantage within the 12 months concerned of individual reference quantities not used by other producers affiliated to the same creamery subject to those quantities being transferred to the national reserve of the Member State concerned in the cases provided for under the rules' (paragraph 12 of the judgment in *Thevenot*).

7. Does the absence of such 'inbuilt offsetting' between producers under Formula A, for which Belgium has opted, lead to discrimination between Community producers which is prohibited by Article 40(3) of the Treaty? That is the thrust of the first question.

8. The second question seeks to ascertain whether Article 1(1) of Regulation (EEC) No 857/84,[3] in the version which was in force between 2 April 1984 and 31 March 1987, is also contrary to the principle of non-discrimination inasmuch as it provides that the additional levy is to be applied at the rate of either 75% or 100% of the target price for milk, according to whether a Member State opts for Formula A or Formula B.

9. In my view, the first two questions must be dealt with as one. The difference in the rate was expressly provided for in order to take account of the differences between the two formulas implementing the levy scheme which form the subject-matter of the first question. The two rates thus form an integral part of the two formulas provided for.

10. That approach seems to me to be the one also taken by the national court which, whilst asking two separate questions, relies on the same reasons for both.

11. I would point out, to begin with, that the Council itself evidently took the view that unless different rates had been fixed, the application of the two formulas would have given rise to discrimination.

12. The Council was aware of the fact that

'when the levy is charged to the purchaser, its application does not necessarily cover all the quantities of milk delivered by each producer and exceeding a quantity corresponding to that adopted in order to establish the purchaser's reference quantity'.

That is why,

'in order to obtain equivalence of results'

under the two formulas, the Council, as we have seen, fixed the levy at a higher rate for Formula B than for Formula A (see the first recital in the preamble to, and Article 1(1) of, Regulation No 857/84).

3 — Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984, L 90, p. 13)

13. That difference in the rates, far from being arbitrary and consequently discriminatory, was in fact designed to prevent discrimination between milk producers according to whether they were subject to Formula A or Formula B. The question is therefore whether that difference was sufficient to offset the advantages likely to arise, where appropriate, under Formula B.

14. In that regard, it should be borne in mind that, as the Court has consistently held,

'when a situation necessitates the evaluation of a complex economic situation, as is the case concerning the common agricultural policy, the Community legislature enjoys a wide discretion as to the nature and scope of the measures to be taken'. [4]

15. In this case, when it was necessary to assess the difference in rates likely to counterbalance the disparities which could arise from the application of the two formulas in question, the Council was undoubtedly in a situation of that kind. Accordingly, the solution adopted by the Council could be open to criticism only in so far as the Council committed a manifest error of assessment.

16. In the absence of any experience in this area, the Council considered that a difference of 25 percentage points between the rates of levy would have the effect of placing producers in an identical situation. It assumed that, on average, overproduction by producers affiliated to a dairy would be offset by one quarter. Let us assume that there are two producers, one subject to Formula A and the other to Formula B, each of whom has exceeded his reference quantity by 20 000 litres. Let us also assume that the target price for milk is ECU 1. The producer subject to Formula A pays an additional levy equal to 75% of ECU 20 000, namely ECU 15 000. If no offsetting can take place, the producer subject to Formula B pays 100% of ECU 20 000, that is to say ECU 20 000. He is therefore treated more severely than the producer subject to Formula A. If offsetting takes place and covers one-quarter of the excess production, he pays 100% of ECU 15 000, that is say ECU 15 000, like his colleague subject to Formula A. If, on the other hand, offsetting covers one-half of his excess, he pays only ECU 10 000. Finally, in the most extreme case, if within the same dairy overproduction and under-utilization of the quotas balance each other, no additional levy is payable.

17. However, the legislation provides that all the non-utilized quantities of certain producers do not necessarily benefit the other producers affiliated to the same dairy. In that context, I would refer, for instance, to Article 4(1)(a) and (2) of Regulation No 857/84, which provides for the allocation to the national reserve of the reference quantities released where the Member States have granted compensation to producers who have undertaken to discontinue milk production definitively. Furthermore, in its judgment of 25 November 1986 in Joined Cases 201 and 202/85 *Klensch* [1986] ECR 3447, the Court held that this rule must be applied by analogy where a producer has ceased production spontaneously (paragraph 22 of the judgment).

18. The view can therefore be taken that it is only purely short-term falls in deliveries

4 — See, in particular, the judgment of 17 May 1988 in Case 84/87 *Erpelding* [1988] ECR 2647, paragraph 27.

by certain farmers which can benefit other producers affiliated to the same dairy, and it was not a priori unreasonable to assume that such falls could correspond to approximately one-quarter of deliveries.

19. As is clear from Special Report No 2/87 of the Court of Auditors on the quota/additional levy system in the milk sector (Official Journal C 266, 5.10.1987, p. 1, at p. 7), however, it would seem that in many cases offsetting covered more than one-quarter of the overproduction. Accordingly, the difference in rates on its own did not make it possible to ensure equal treatment in all the cases envisaged between farmers subject to Formula A and those subject to Formula B, not even within that category.

20. However, Council Regulation (EEC) No 590/85 of 26 February 1985 [5] amending Regulation No 857/84 inserted a fresh provision in the latter regulation, Article 4a, which permits offsetting to take place between different Member States, regardless of the formula applied by them. That provision authorizes Member States to

'allocate the non-utilized reference quantities of producers or purchasers to producers or purchasers in the same region and, if necessary, in other regions'.

That possibility, which allows Member States to offset on a regional and interregional basis, was initially provided for only for the first 12 months of the system's operation (from 1 April 1984 to 31 March 1985) but has been extended several times since and is at present valid for the entire duration of the system's operation.

5 — OJ 1985, L 68, p. 1.

21. It is true that it was not introduced until the end of the first marketing year, that is to say at a time when, according to the plaintiffs in the main proceedings, the producers to whom Formula A was applied could in any event no longer take advantage of it by increasing their production, which they had reduced in the meantime.

22. However, that argument is untenable since Article 4a gave no assurance that any overproduction could be offset. Moreover, offsetting under Article 4a was initially introduced only because during the first year of the new system's operation the adjustment which it required each producer or purchaser to make had been rendered more difficult

'by belated notification of the individual reference quantities, due to difficulties generally encountered with regard to the implementation of the system in the various Member States' (see the end of the first recital in the preamble to Regulation No 590/85).

Article 4a was therefore intended to benefit all producers or purchasers who, for the aforesaid reasons, had not yet sufficiently adjusted their production to the reference quantities fixed.

23. That provision was renewed and, in the end, maintained in force definitively as a result of the production reductions decided upon after the first year of the system's operation and the efforts which those reductions continued to call for on the part of farmers (see, in particular, the first recital in the preamble to Regulation (EEC) No 774/87 of the Council of 16 March 1987,

Official Journal 1987, L 78, p. 3). Accordingly, contrary to what seems to be the plaintiffs' view, the purpose of Article 4a was not to authorize an increase in the quantities produced but to take account of the difficulties which certain producers might encounter in reducing their production in keeping with their reference quantity.

24. Nevertheless, the fact remains that, as a result of the introduction of Article 4a, each Member State was able, as from the establishment of the system of reference quantities, to offset the non-utilized reference quantities of some producers against the overproduction of others. Such offsetting was designed to permit the elimination of the disadvantages to which Formula A could give rise in certain situations by comparison with Formula B, notwithstanding the difference in the rates of additional levy.

25. Subsequently, moreover, the Council found that the difference in rates was no longer justified since

'the possibilities for compensation between quantities produced and quantities not used are now comparable for both formulas' (second recital in the preamble to Council Regulation No 774/87 of 16 March 1987, amending Regulation No 857/84, Official Journal 1987, L 78, p. 3).

26. It is also worth noting that, by another regulation adopted on the same date, the Council laid down certain provisions as regards Formula B whose aim was to penalize more severely producers who exceeded their reference quantities. Article 1 of Council Regulation (EEC) No 773/87 of 16 March 1987 amending Regulation No 804/68 (Official Journal 1987, L 78, p. 1) enhances the dissuasive effect of the system by changing the manner in which the levy payable by a dairy is passed on to producers who have exceeded their reference quantity, and it authorizes the Member States to provide that, even where the quantities delivered to a dairy are equal to, or lower than, the dairy's reference quantity, the levy is to be payable in its entirety by all producers who have exceeded their reference quantities by at least 10% or by at least 20 000 kg. That represents another attempt by the Council to accord equal treatment to all milk producers. However, Regulation No 773/87 could not be applied until the final accounts for the 1986/87 marketing year had been drawn up.

27. Let us therefore return to Article 4a: it is quite clear that if a Member State did not avail itself of the possibilities offered by that provision, it was because it decided not to do so. At the hearing, however, the Belgian Government stated, without being contradicted, that Belgium had in fact exercised the option in question.

28. We can therefore safely assume that, as a result of the introduction of Article 4a (which, I repeat, could be applied retroactively to the first marketing year in which the system was in operation), the Community rules cannot, in themselves, be regarded as discriminating between producers subject to Formula A as against those subject to Formula B since, in both cases, the quantities produced in excess may be offset against partly unused quotas. Those rules are not therefore contrary to Article 40 of the Treaty. Moreover, past experience has shown that in Belgium farmers have had to bear, on average, only an additional levy equal to 15.6% of the target price for milk.

29. Any differences of treatment which may occur notwithstanding the existence of different rates and notwithstanding the application of Article 4a could arise only from the differing degrees to which, depending on the area, individual quotas have been either under-utilized or exceeded. Those are objective factors beyond the control of either the Community authorities or the national authorities. Such differences in treatment cannot be regarded as constituting arbitrary discrimination.

30. Nor should it be forgotten that the greater the extent to which a producer exceeds his quota, the more difficult he makes it for offsetting to take place and the more he himself contributes to increasing the burden imposed upon him. It may even be pertinent to raise the question whether the maxim *nemo auditur propriam turpitudinem allegans* should not be applied to a producer who has exceeded his quota.

31. For all the foregoing reasons, I suggest that the first two questions submitted by the national court should be answered in the negative, to the effect that consideration of the questions raised has disclosed no factors of such a kind as to affect the validity of the rules in question.

II — The third question

32. The third question is subdivided into two limbs. Article 3(d) of the EEC Treaty provides for the adoption of a common policy in the sphere of agriculture. That policy must be carried out with the aims, on the conditions and in accordance with the principles set out in the chapter of the Treaty dealing with agriculture. According to Article 40, the common agricultural policy must be brought into force by the end of the transitional period at the latest, particularly through common organizations of agricultural markets. Such a common organization of the markets, in the case of milk and milk products, is at present governed by Council Regulation No 804/68 (Official Journal, English Special Edition 1968 (I), p. 176).

33. Any 'renationalization' of agricultural policy is therefore out of the question. It is necessary, however, to ascertain what is meant by that term.

34. Clearly, the fact that the Community rules comprise specific measures which take account of the particular features of farming in certain regions, or in certain Member States, does not constitute a 'renationalization' measure. In the first place, Article 39(2)(a) of the Treaty expressly provides that in working out the common agricultural policy, account must be taken of structural and natural disparities between the various agricultural regions. Secondly, such distinctions between the regions, or the Member States, may be necessary precisely in order to ensure compliance with the principle of non-discrimination laid down in Article 40(3) of the Treaty which requires, according to the Court's case-law, not only that comparable situations should not be treated differently but also that different situations should not be treated in the same manner (unless such treatment is objectively justified).

35. That also holds true for those provisions of the Community regulations in question which simply authorize the Member States to derogate from some of their provisions.

36. Accordingly, none of the legislative provisions referred to by the national court should be regarded as constituting a 'renationalization' measure or as being contrary to the principle of non-discrimination between producers.

37. Three of those provisions, (referred to in points 3, 4 and 5 of the question) are generally applicable in all the Member States. The provisions in question are Articles 12(e) and 7(4) of Regulation No 857/84, as amended by Regulation No 590/85, and certain provisions of Regulations (EEC) Nos 1335/86 [6] and 1343/86.[7] Even if the first two provisions may possibly be of greater benefit to purchasers or producers established in certain Member States, they are applicable to all those who fulfil the conditions laid down and they are based on objective considerations (see the last two recitals in the preamble to Regulation No 590/85).

38. As for the two provisions referred to in points 1 and 2 of the question, they were both adopted in order to take account of the specific circumstances of Italy and Greece, as stated in the second recital of the preamble to Regulation (EEC) No 1305/85 [8] and in the third recital of the preamble to Regulation No 857/84. No attempt has been made to argue that the reasons relied upon in order to enable those two countries to qualify for the derogations in question are either incorrect or incapable of justifying those derogations. They must therefore be regarded as objectively justified and not as sources of discrimination.

39. Furthermore, it is difficult to see how those derogations could place those who benefit from them in an advantageous position in relation to producers established in other Member States. The derogation provided for in favour of Italy authorizes that Member State to postpone, for the first three years in which the system is in operation, the application of the first subparagraph of Article 3(3) of Regulation No 857/84 which confers on milk producers the right to obtain, on certain conditions, reference to a calendar year other than the one chosen for the determination of their reference quantities. It therefore operates, at the very most, to the detriment of Italian producers. As for Article 10 of Regulation No 857/84 which provides that in Greece, in the event of the application of Formula B, all purchasers taken as a whole are to be regarded as a single purchaser, it does not add, with regard to the relationship between countries which have chosen Formula A and those which have chosen Formula B, any new distinguishing criterion to those which are already inherent in the differences between those two formulas. Furthermore, ever since Article 4a has authorized offsetting at national level, regardless of the formula applicable, that is to say as between purchasers as well, Article 10 of Regulation No 857/84 has lost much of its usefulness since Article 4a authorizes all the Member States in which Formula B is applicable to treat all purchasers taken as a whole as a single purchaser.

40. I therefore suggest that the Court answer the third question submitted for a preliminary ruling as follows:

6 — Council Regulation (EEC) No 1335/86 of 6 May 1986 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1986, L 119, p. 19).

7 — Council Regulation (EEC) No 1343/86 of 6 May 1986 amending Regulation (EEC) No 857/84 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984, L 119, p. 34).

8 — Council Regulation (EEC) No 1305/85 of 23 May 1985 amending Regulation (EEC) No 857/84 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1985, L 137, p. 12).

'(1) Articles 3(d), 38, 39 and 40 of the Treaty and 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 not prohibiting the adoption of specific measures applicable to certain producers, in connection with the implementation of the common agricultural policy, provided those measures are objectively justified by the specific circumstances of those producers.

(2) Consideration of the third question has disclosed no factor of such a kind as to affect the validity of the relevant provisions of Council Regulations (EEC) Nos 857/84, 590/85, 1305/85, 1335/86 and 1343/86.'

III — The fourth question

41. The fourth question submitted for a preliminary ruling is also in two parts.

42. The national court begins by asking the Court in what circumstances a Member State is authorized to treat the whole of its territory as a single region for the purposes of Article 1(2) of Regulation No 857/84. More specifically, it seeks to ascertain whether a Member State is authorized to do so even where its territory does not constitute a geographical unit in which the natural conditions, structures of production and average herd yields are comparable and its territory includes less-favoured farming areas.

43. In raising that question, the Belgian court evidently starts from the premise that Formula B is more favourable to farmers than Formula A and should therefore be applied to milk producers from regions in which natural conditions are harsher and holdings are smaller.

44. We have seen that Formula B does not authorize the transfer to overproducers belonging to a given dairy of the quotas of producers who have ceased to make milk deliveries, whether they have done so in return for compensation or spontaneously. Offsetting takes place only if certain affiliated producers fail to use up their reference quantity as a result of purely short-term factors (sickness of animals, for instance).

45. On the other hand, Article 4a permits offsetting in Member States which apply Formula A, equivalent to that which can take place under Formula B.

46. Accordingly, although at the time when Regulation No 857/84 was adopted Formula B seemed more suited than Formula A to facilitating structural changes and adjustments (second indent of Article 1(2) of the regulation) or ensuring regional development and preventing desertification of certain areas (third indent of Article 1(2)), that is no longer the case since the introduction (with retroactive effect) of Article 4a.

47. Moreover, the Commission has pointed out in its observations (p. 26), without being contradicted, that since the second period in which the system was in operation all the Member States have treated the whole of their territory as a single region.

48. The only reason which may still induce a Member State to opt for Formula B rather than Formula A lies in the better facilities which it can offer for administrative purposes where, for instance, virtually all the milk producers in a geographical area are affiliated to a single dairy.

49. Although, as a result of the information which has come to light in the proceedings before the Court, the fourth question has thus become substantially devoid of interest, it must nevertheless be answered.

50. Like the Belgian and Greek Governments, the United Kingdom, the Council and the Commission, I consider it to be clear from the actual wording of the first subparagraph of the provision in question that the Member States *may* treat the whole of their territory as a single region even if the natural conditions, production and yield are not comparable throughout such territory. The part of the sentence which lists those conditions refers only to the *part* of its territory which the Member State intends to treat as a distinct region.

51. I therefore suggest that the first limb of the fourth question should be answered as follows:

'Article 1(2) of Regulation (EEC) No 857/84 must be interpreted as meaning that a Member State is authorized to treat all of its territory as a single region even if the natural conditions, structures of production and average herd yields are not comparable throughout its territory.'

52. In the second limb of the fourth question, the national court asks whether the aforesaid provision so interpreted is valid, particularly in the light of Article 39(2) of the Treaty and the Council Directives on mountain and hill farming and farming in certain less-favoured areas. Once again the tribunal de première instance implicitly starts from the premiss that one of the two formulas is more attractive to milk producers than the other and that those who live in a less-favoured area should normally be eligible for the most favourable formula.

53. As is clear from all the foregoing, Article 1(2) of Regulation No 857/84 is not the only provision to be taken into consideration, and the rules as a whole make it possible to avoid unequal treatment of a discriminatory nature according to whether a Member State chooses Formula A or Formula B.

54. In those circumstances, the application of only one of the two formulas to the whole of a Member State's territory cannot be regarded as an infringement of Article 39(2)(a) which provides that, in working out the common agricultural policy, account is to be taken, in particular, of 'structural and natural disparities between the various agricultural regions'.

55. Furthermore, it should be noted that Council Directive 75/268/EEC of 28 April 1975 on mountain and hill farming and farming in certain less-favoured areas (Official Journal 1975, L 128, p. 1) pursues a purpose quite different from that of the Community rules concerning the additional levy on milk. Its purpose is to enable Member States to establish a specific aid scheme for the benefit of agricultural

holdings located in certain less-favoured areas listed in accordance with Community criteria under a Community procedure. Accordingly, the fact that certain parts of a Member State's territory are recognized as less-favoured farming areas within the meaning of that directive does not mean that they must necessarily constitute distinct regions for the purposes of Article 1(2) of Regulation No 857/84.

56. However, the Commission is right to emphasize that, through a number of its provisions (Articles 2(2) and (3), 3(1), 4(1) and 4a) authorizing the Member States to take account, in fixing the reference quantities, of the specific state of milk production in certain regions, the regulation permits certain advantages to be granted to less-favoured areas in connection with the application of the levy system as well.

57. The second limb of the fourth question must therefore be answered in the negative.

Conclusion

58. The questions submitted by the tribunal de première instance, Verviers, should therefore be answered as follows:

'(1) Consideration of the first two questions has disclosed no factor of such a kind as to affect the validity either of Article 5c(1) of Regulation (EEC) No 804/68 of the Council or of Article 1(1) of Council Regulation (EEC) No 857/84 in the version in force between 2 April 1984 and 31 March 1987.

(2) Articles 3(d), 38, 39 and 40 of the Treaty and 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 not prohibiting the adoption of specific measures applicable to certain producers, in connection with the implementation of the common agricultural policy, provided those measures are objectively justified by the specific circumstances of those producers.

Consideration of the third question has disclosed no factor of such a kind as to affect the validity of the relevant provisions of Council Regulations (EEC) Nos 857/84, 590/85, 1305/85, 1335/86 and 1343/86.

(3) Article 1(2) of Regulation (EEC) No 857/84 must be interpreted as meaning that a Member State is authorized to treat all of its territory as a single region even if the natural conditions, structures of production and average herd yields are not comparable throughout its territory.

Consideration of the fourth question has disclosed no factor of such a kind as to affect the validity of Article 1(2) of Regulation (EEC) No 857/84, which must be read in conjunction with the other provisions of the system.'