OPINION OF ADVOCATE GENERAL ALBER

delivered on 11 May 2000 *

I — Introduction

1. The question raised in this reference for a preliminary ruling is whether the rules of the common organisation of the market in milk and milk products determining *inter alia* how the target price for milk is to be fixed preclude national legislation designed to promote the conclusion of inter-trade agreements between producers on the one hand and processors and traders on the other on a minimum price for milk — a price which might at times exceed the milk price fixed by the Community.

II — Facts and question referred

2. The following facts are apparent from the order for reference: the plaintiff, Cristoforo Bertinetto, is a cattle breeder and milk producer. He contracted with the defendant, Biraghi SpA ('Biraghi'), which manufactures milk products, to supply milk between April 1991 and March 1992. The price was not negotiated between Biraghi and the individual suppliers and thus did not result from an offer accepted severally by them. It was determined by the market situation, the same price being paid to all suppliers. Between April 1991 and March 1992 the price per litre of milk paid to Mr Bertinetto varied: sometimes it was the same as the Community's target price, while at other times it was even below the price set by UNALAT (on behalf of the associations of milk producers) and ASSOLATTE (on behalf of the milk-processing industry, including Biraghi) in the inter-trade agreement concluded pursuant to Italian Law No 88 of 16 March 1988 ('Law No 88/88'). [1]

3. Mr Bertinetti argued before the national court (the Pretura circondariale di Pinerolo (District Magistrates' Court, Pinerolo)) that all ASSOLATTE's members were bound by the price set in the agreement, and that it was not open to them, under any circumstances, to pay the producers less. Biraghi should therefore be ordered to make good the difference.

* Original language: German.

1 — For the text of the Law see below at III, 2.

4. Biraghi replied that the inter-trade agreements under Law No 88/88 were not binding. The law itself merely referred to the rules of private law governing a contract of supply. The price set in the agreements was not even binding on the members of the association. The action should therefore be dismissed.

5. It is the Pretore's view that — subject to the rules of the common organisation of the market in milk and milk products should these apply — the action should succeed if the inter-trade agreement did indeed require the processors to pay the price agreed by their trade association. Conversely, the action should fail if that agreement merely constituted guidance which individual association members were at liberty to disregard. In order to see which was the correct approach, the Pretore examined Law No 88/88, which had introduced and regulated the inter-trade agreements, and concluded that it contained a number of provisions suggesting that the agreements were indeed binding. Article 2(d), for example, provided that '... prices for the products [shall] be determined in advance by means of inter-trade agreements', while Article 8(3) stated that the other party was to undertake 'to pay the price resulting from the agreements'. Consequently the content of the agreement was binding on the members of the association without any further statement of intent on their part being required. The fact that the agreements were binding followed from the Law: all that was necessary was that the purchaser be a member of the association which had concluded the agreement.

6. The Pretore concluded finally that the present case might fall within the scope in particular of Article 3 of Regulation (EEC) No 804/68, [2] which governs the fixing of the target price for aggregate milk sales by producers in each milk year.

7. It pointed out that some provisions of Law No 88/88 might contravene the regulation, depending on how the latter was to be construed. Thus the Law stipulated that:

(a) the inter-trade agreements were binding (Articles 2(d) and 8(2));

(b) the agreements were to establish the minimum price, or the criteria for determining that price (Article 5(b));

2 — Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

(c) should no agreement be reached on the initiative of the parties, the Ministro dell'agricoltura e delle foreste (the Minister for Agriculture and Forestry) would, on application by either party, convene both parties (Article 4);

(d) similarly, the relevant Assessore regionale all'agricoltura (Minister for Agriculture in the Regional Government) was required to convene both parties on application by either of them in order to facilitate the conclusion of agreements (Article 7(2));

(e) the parties to the agreements were required to promote the conclusion of contracts for the sale of the products concerned, and to ensure that the contracts entered into were consistent with the agreements (Article 8(1));

(f) undertakings which entered into contracts consistent with the inter-trade agreements would enjoy preferential treatment in respect of the award of financial assistance for the modernisation and restructuring of the food and agriculture sector (Article 12).

8. The Pretore accordingly seeks a preliminary ruling from the Court on the following question:

'Does Article 3 of Regulation No 804/68 of the Council of 27 June 1968 preclude the Italian State from regulating by statute the terms of inter-trade agreements designed to fix milk prices in advance in accordance with the procedures and legal consequences provided in Law No 88 of 16 March 1988?'

III — Legal background

1. *Community law*

Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products ('Regulation No 804/68')

9. Article 3 governs the fixing of the target price for milk. It provides *inter alia*:

'1. Before 1 August of each year a target price for milk shall be fixed for the

Community in respect of the milk year beginning in the following calendar year.

...

2. The target price shall be that price which it is aimed to obtain for the aggregate of producers' milk sales, on the Community market and on external markets, during the milk year.

3. ...

4. ...'

2. *National law*

Law of 16 March 1988 containing rules relating to inter-trade agreements and contracts in respect of the cultivation and sale of agricultural products [3]

'Article 1

1. The purpose of this Law laying down the rules governing inter-trade agreements is to encourage the development of agricultural production, and to promote an organisation of the agricultural markets consistent with the objectives and guidelines of national plans in the food and agricultural sector.

...

Article 2

1. Inter-trade agreements shall

(a) regulate agricultural production so that it meets domestic and external demand, and a balanced and stable market situation is achieved;

...

(d) establish in advance either the prices for the products in question, or the criteria whereby those prices are determined, in order to enable cropping plans to be formulated.

...

3 — GURI No 69 of 23 March 1988.

Article 5

1. In order to ensure that the aims of this Law are attained, the inter-trade agreements shall... determine *inter alia*:

...

(b) the minimum price, or, in the case of an agreement extending over a number of years, the criteria for determining that price, particular regard being had to changes in production costs, and to the rules and time-limits for the settlement of amounts due and, where appropriate, payments on account;

...

Article 8

...

3. The other party shall undertake

...

(b) to pay the price resulting from the agreements.

...

Article 12

1. When financial assistance is granted for the modernisation and restructuring of processing and commercial undertakings in the food and agriculture sector, undertakings which have concluded cultivation and sales contracts in line with the inter-trade agreements shall enjoy preferential treatment.

2. Subject to the priority criteria set out in the legislation in force at the time, when financial assistance is granted for agriculture, agricultural producers who are members of an association and who conclude cultivation and sales contracts in line with the inter-trade agreements shall enjoy preferential treatment.'

10. The Pretore's summary of the other material provisions of Law No 88/88 is set out above, at paragraphs 5 and 7.

IV — Submissions of the parties

11. Biraghi argues that Regulation No 804/68 precludes any provision of national law intended to fix a uniform price for milk, by any method. [4] However, that is precisely what Articles 4 and 7 of Law No 88/88 seek to achieve: the reason provision was made for the parties to be convened by the Minister was so as to facilitate the conclusion of an inter-trade agreement. Article 12 of the Law should be viewed in the same context: the reason signatories to an inter-trade agreement are to receive preferential treatment in respect of the award of financial assistance for modernisation and restructuring is in order to encourage the parties concerned to conclude such an agreement and hence establish a uniform price.

12. The Italian Government points out that Law No 88/88 does not provide for public authorities to exert any influence directly, or to determine prices. Nor is there any direct link between an inter-trade agreement within the meaning of Law No 88/88 and the establishment of the target price pursuant to Article 3 of Regulation No 804/68. The target price should not be thought of as a single, Community-wide market price, but rather as a lower limit beyond which the intervention machinery of the common organisation of the market in question would be activated. By contrast, market prices are determined by market trends. Studies have revealed considerable variations in trade prices among Member States. It follows that there is no conflict between Law No 88/88 and Regulation No 804/68.

13. The Commission points out that, according to the Court's case-law, Member States may not promote or encourage the formation of producer prices in respect of products for which there is a common organisation of the market. Thus Member States would be in breach of Regulation No 804/68 if they intervened in the establishment of prices in such a way as to set prices which differed from the Community target price, as that would ultimately disturb the common market. Moreover, any State involvement in price-formation is liable to distort competition in the common market. National provisions which favour agreements between undertakings conflict with the Community's competition rules and infringe Articles 5 and 85 of the EC Treaty.

4 — If the inter-trade agreements were consequently unenforceable, the action before the national court would be dismissed.

V — Assessment

14. The compatibility of national provisions on the fixing of milk prices with the common organisation of the market in milk and milk products has already been considered by the Court on a number of occasions; the relevant Italian legislation, in particular, has been examined by the Court several times. [5]

15. In those cases the Court first considered the fundamental characteristics of the Community rules. Article 3(1) of Regulation No 804/68 stipulates that a target price for milk shall be fixed for the Community each year. Article 3(2) defines the target price as that price which it is aimed to obtain for the aggregate of producers' milk sales, on the Community market and on external markets, during the milk year.

16. There are no direct intervention measures for milk; support for the price of milk is achieved primarily by means of the system of intervention prices for a number of processed products listed in Article 5 of Regulation No 804/68. The purpose is to ensure that the target price for milk is achieved in the conditions set out in Article 3 — that is, in a manner which is consistent with the laws of the market within the Community

17. In order to achieve that objective, the regulation also contains a system of rules for protection at the Community's frontiers, consisting of levies to offset the difference between the threshold and the free-at-frontier price of particular milk products; it also provides for export refunds to be paid. The latter are calculated on a uniform basis for the whole Community, though they may be differentiated according to the third country of destination.

18. One of the principal objectives of that organisation is to ensure that milk producers can obtain a price for such products in the region of the target price. The mechanisms introduced by the regulation to achieve that end are under the exclusive jurisdiction of the Community. [6]

19. The question before the Court in *Toffoli* [7] was whether Italian Law

5 — Judgments in Case 10/79 *Toffoli* v *Regione Veneto* [1979] ECR 3301; Case 166/82 *Commission* v *Italy* [1984] ECR 459; and Case 225/86 *Commission* v *Italy* [1988] ECR 2271. For examples of the Court's case-law on unilateral measures by Member States fixing the prices of agricultural products see also *inter alia* the judgments in Case 31/74 *Galli* [1975] ECR 47; Case 5/79 *Buys* [1979] ECR 3203; and Joined Cases 16/79 to 20/79 *Joseph Danis* [1979] ECR 3327.

6 — See *Toffoli* (cited in footnote 5 above), paragraph 11.

7 — Cited in footnote 5, above.

No 306/75 — subsequently replaced by Law No 88/88, the subject of these proceedings — was compatible with Regulation No 804/68. The Court described the legal position at the time in the following terms: the relevant law, which included provisions governing the establishment of the producer price for milk, stipulated that the production and sale of milk by producers' associations was to be subject to the rules and procedures laid down by the association; in addition, members of an association were obliged to sell their milk through it. The producer price for milk, for whatever use the milk was intended, was fixed for each agricultural year and for each region by means of collective negotiation with the participation of the relevant trade parties. The agreements reached between the parties were published and were then binding on them. If no such agreement was reached within 30 days of the start of the agricultural year the producer price for milk was fixed by a commission appointed by decree of the President of the region. That commission's decision was likewise published and was binding on the parties.

20. The question referred to the Court was whether Regulation No 804/68 prevented the Italian State from conferring by law the power to set the producer price for milk on its administrative authorities.

21. The Court proceeded from a consideration of the objectives of the organisation of the market; it held that 'in sectors covered by a common organisation of the market, *a fortiori* when that organisation is based on a common price system, Member States can no longer take action, through national provisions taken unilaterally, affecting the machinery of price formation at the production and marketing stages established under the common market organisation. It follows that national legislation designed to promote and encourage, by any method, the establishment of a uniform producer price for milk, by agreement or by authority, at the national or regional level is, by its nature, outside the bounds of the powers given to Member States and runs contrary to the principle established by Regulation No 804/68, in particular Article 3 thereof, of attaining a target producer price for the milk sold by Community producers during the milk year on the Community market and on external markets'. [8]

22. The Court accordingly held, in answer to the question referred, that 'it is incompatible with the common organisation of the market in milk and milk products established by Regulation No 804/68...

8 — See *Toffoli* (cited in footnote 5 above), paragraph 12.

for a Member State to fix directly or indirectly the producer price for milk'.

23. That ruling was reaffirmed by the Court in its judgment of 7 February 1984 in proceedings against Italy for failure to fulfil obligations; once again, Law No 306/75 was at issue. The Court found that Community law had been infringed, since the Italian legislation provided for a uniform producer price for milk to be established by a committee appointed by decree of the President of the region in question. [9] The Court went on to state that Community law prohibits any legislative measure which provides for any intervention whatsoever on the part of a public, national or regional authority with a view to promoting and encouraging the establishment by agreement of a uniform producer price for milk. [10]

24. Thus national legislation designed to promote and encourage, *by any method*, the establishment of a uniform producer price for milk, by agreement or by authority, at the national or regional level, is incompatible with Regulation No 804/68.

25. It is therefore necessary, in the present case, to consider whether Italy has directly or indirectly established the producer price for milk and thereby infringed Regulation No 804/68.

26. In its order, the referring court has set out a number of factors which in its view suggest that the public authorities may have promoted or encouraged the establishment of a uniform producer price, at least indirectly. Thus it refers to the fact that the inter-trade agreements are binding, and that they determine either the minimum price, or the criteria according to which it is to be established. Should they reach no agreement on their own initiative, there is provision for the parties, on application by either, to be convened by the Minister for Agriculture and Forestry. Similarly, the Minister for Agriculture in a regional government must, on application by either party, convene both in order to facilitate the conclusion of inter-trade agreements. The parties to those agreements must promote the conclusion of contracts in respect of the sale of the products concerned, and must check that the contracts concluded are consistent with the agreements. Finally, undertakings which have concluded contracts in line with the agreements are to receive preferential treatment in respect of the award of financial assis-

9 — See Case 166/82 (cited in footnote 5 above), paragraph 24.
10 — See Case 166/82 (cited in footnote 5 above), paragraph 25.

tance for the modernisation and restructuring of the food and agriculture sector.

27. It follows from the foregoing that, while the State does not fix the producer price for milk directly, it at least promotes the conclusion of the relevant inter-trade agreements. By concluding the inter-trade agreements the parties qualify for favourable treatment in the form of financial aid which would otherwise be denied them. Moreover, the fact that the inter-trade agreement is binding, together with the fact that the parties are formally convened by the public authorities, suggests that the State is involved indirectly in the establishment of producer prices.

28. However, since any establishment of the prices in question — by any method — runs counter to the principle set out in Regulation No 804/68, and more particularly in Article 3 thereof, that the producer target price is to be the price which it is aimed to obtain for the producers' milk sales on the Community market and on external markets, it must be concluded that national legislation to that effect is incompatible with the common organisation of the market in question.

29. I should point out finally that it is for the national court to establish the facts of the case, and to determine, and in particular to interpret, the provisions of national law governing the case before it.

30. My conclusion is therefore that provisions of national law whereby a Member State promotes or encourages the conclusion of inter-trade agreements concerning the establishment of producer prices for milk are incompatible with the common organisation of the market in milk and milk products established by Council Regulation No 804/68 of 27 June 1968. As the agreements in question are, by virtue of Law No 88/88, binding on the parties to them, and as in addition provision has been made for those parties to enjoy preferential treatment in regard to the award of financial assistance, the question of whether or not the Member State itself was directly involved in fixing the producer prices is no longer material.

VI — Costs

31. The costs incurred by the Italian Government and the Commission, which have submitted observations to the Court, are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the referring court, the decision on costs is a matter for the latter.

VII — Conclusion

32. In the light of the foregoing, I propose that the Court answer the question referred as follows:

Article 3 of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products precludes legislative provisions such as those contained in (Italian) Law No 88 of 16 March 1988, which prescribe, in respect of the conclusion of inter-trade agreements, that it shall be the task of the parties to those agreements to establish milk prices according to a procedure laid down in the Law, and with the legal consequences ensuing therefrom.