applying at subsequent stages of the distribution process, they jeopardize the objectives and functioning of that common organization.

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Mackenzie Stuart Bosco

Delivered in open court in Luxembourg on 6 November 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 20 SEPTEMBER 1979 [1]

Mr President,
Members of the Court,

I — The five cases which gave rise to the present references to the Court for a preliminary ruling relate to criminal proceedings initiated by the Belgian Openbaar Ministerie [Public Prosecutor's Office] against certain manufacturers of compound feeding-stuffs, all established in West Flanders, who are accused of having infringed Articles 1 and 12 of the Ministerial Order of 22 December 1971 requiring notification of price increases, by having on three occasions introduced price increases in the course of 1973 without first informing the Minister for Economic Affairs. In each of those cases, which have been referred to you by five judgments delivered by the Hof van Cassatie of Belgium, delivered on the same day and registered at the Court of Justice on 2 February 1979, the question which has been referred to this Court is formulated in identical terms.

Unlike the *Grosoli* case on which the Court delivered its judgment on 12 July last, and which concerned price controls in relation to beef and veal at the retail stage, and the *Buijs* case (5/79) on which the Court will shortly deliver its judgment and which concerns the freezing of prices of milk feed for calves at the production and wholesale stages, these cases concern a compulsory system of notification of price increases.

1 — Translated from the French.

That system, which in theory is more flexible than that which the Court had to consider in the *Dechmann* case (judgment of 29 June 1978 [1978] ECR 1573), recalls the French system of controlled freedom and the system applied in the Netherlands as regards pricing policy. The problem is once again the compatibility of intervention on the national level with the existence of a single market, the main feature of which should be the free movement of goods and freedom of competition under equal conditions. In the present case, the question of how far Community law impinges upon the powers retained by Member States with regard to prices is complicated by the existence of provisions conferring upon the Community authorities the power to fix the producer price of certain agricultural products.

II — It is a well-established principle that it is not for the Court to pronounce on the compatibility of rules of internal law with the provisions of Community law in the course of proceedings introduced under Article 177 of the Treaty. However, the Court may provide the national court with all the criteria of interpretation relating to Community law in order to enable that court to assess the compatibility of such rules with the Community rule in question. Therefore we should consider the question which has been referred to the Court as asking whether and to what extent Article 30 of the Treaty leaves untouched a power whereby Member States may introduce a system which requires all producers and importers to notify any price increases which they intend to apply on the internal market to any products, raw materials, foodstuffs and merchandise and to any services at the latest two months before such increases take effect.

As is usual in this kind of case, in order to enable the national court to protect any rights which the parties involved may have, the Treaty provisions must be compared with a quite specific set of national rules. Since those rules were explained in great detail in the factual part of the judgment I shall limit myself to recalling the following points:

The objective of the Ministerial Order of 22 December 1971, subsequently amended and supplemented on several occasions, is to be found in a series of texts (see in particular the Ministerial Order of 2 September 1966) the terms of which it merely repeats. Although it does not impose a strict price freeze, the express or tacit requirement of approval and the length of the waiting period before that approval is obtained lead to a similar result. This restraining effect on prices and the discretionary power enjoyed by the Minister for Economic Affairs to delay application of the increase by six months (Article 5 of the Ministerial Order) have led certain commentators to conclude that the true object of the system established was to freeze prices.

Although the defendants in the main action did not declare the increase which they made and consequently Article 5 of the Ministerial Order was not applied to them, the general effects of the system in question were summarized in the following manner by the Hof van

Cassatie of Belgium, whose pronouncements are binding:

1. The rules do not differentiate between products which are imported and those which are not; they therefore, in theory, apply "equally to domestic and imported products", according to the phrase used in Directive No 70/50 of the Commission of 22 December 1969, on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty.

2. However, they give the Minister the power to prevent, or at least to delay beyond *acceptable* limits, the passing on of the *immediate* effects of increases in the prices of *imported* products.

3. In the case of undertakings such as those managed by the defendants in the main action, they necessarily cause such delay as a result of the prescribed administrative procedure.

III — In its observations the Commission accepts the fact that this type of measure does bring about discrimination in so far as it prevents the manufacturer from passing on in his selling price the "additional costs and charges necessarily involved *in importation*" in the same manner as users of *domestic* raw materials. The fact is that when a price increase is notified in respect of such domestic raw materials — this being something which becomes known immediately in business circles — the manufacturer who uses such raw materials may, in his turn, submit notification of an equivalent increase in his own prices immediately; he can effectively pass on the increase in the prices of raw materials in the selling price of his product, so that his profit margin remains constant, whereas, owing to the manner in which the Minister makes use of Article 5 of the ministerial order, the sale of products manufactured from foreign raw materials, subject as they are to sudden and unforeseeable price increases, is made either impossible or more difficult than the sale of the same products manufactured from identical but domestic raw materials. In reality that measure is capable of being applied and has in fact, according to the Hof van Cassatie, been applied differently to domestic products and to imported products, within the meaning of Article 2 (3) (c) of Directive No 70/50 of the Commission. This kind of "veiled discrimination" clearly amounts to a measure having equivalent effect.

As regards maximum prices fixed by a State, the Court has held (paragraph 13 of the *Tasca* judgment of 26 February 1976, [1976] ECR at p. 308; paragraph 15 of the *SADAM* judgment of 26 February 1976, [1976] ECR at p. 339) that "a maximum price, *in any event in so far as it applies to imported products,* constitutes therefore a measure having an effect equivalent to a quantitative restriction, especially when it is fixed at such a low level that, having regard to the general situation of imported products compared to that of domestic products, dealers wishing to import the product in question into the Member State concerned can do so only at a loss".

Likewise, in the *van Tiggele* judgment (judgment of 24 January 1978, paragraph 14, [1978] ECR at p. 39), the Court held, in respect of a system imposing minimum prices, that "imports may be impeded in particular when a national authority fixes prices or profit margins at such a level that imported products are placed at a disadvantage in relation to identical domestic products either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out".

On the other hand, whilst it is true that the Belgian procedure for notification of price increases does not permit the Minister to determine distribution margins, it renders it more difficult to make *individual* declarations of price increases and leads to the result that manufacturers are compelled in practice to observe the pricing policy which they have notified to the Minister under the notification procedure. It therefore tends to encourage the creation of monopoly agreements or concerted practices between manufacturers. In the present case, the five defendants in the main proceedings introduced the price increases which form the subject-matter of those porceedings as a result of "directives" issued by the Vereniging van Fabrikanten van Samengestelde Veevoeders [Compound Animal Feeding-stuffs Manufacturers' Association] "advising" them to take such action. That system reduces both the initiative to lower prices and the competitive spirit.

Lastly, whilst it is true that where the national currency is revalued, manufacturers of feeding-stuffs made from foreign raw materials can obtain those materials at prices which are comparatively more favourable than those of feeding-stuffs manufactured from domestic raw materials, the system in question encourages manufacturers to obtain their supplies of raw materials locally at high prices and thus to sell expensive products rather than cheap products, and it encourages exports to other Member States and to third countries of domestic animal products (pigmeat, for example) which are derived from imported basic products.

IV — Although it concludes that the system introduced by the Belgian authorities is "capable of hindering, directly or indirectly . . . intra-Community trade" within the meaning of the *Dassonville* judgment ([1974] ECR 837) the Commission takes the view that the rules are required for the attainment of priority objectives and that they are justified "in the general interest" and by "mandatory requirements".

The Commission refers to the judgment of the Court of 20 February 1979, *Rewe* (paragraphs 8 and 14) by its use of those terms. But I myself do not see in what manner the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer, which were invoked by the German Government in that case, can constitute "mandatory requirements" such as to justify the rules in question.

The Commission also refers to Article 2 of the Treaty, which gives the Community the task, in particular, of promoting "an increase in stability". But a reference as vague as this cannot justify every national price control measure.

Thus I prefer to conclude that the Commission is referring, as does the Government of the United Kingdom expressly in its observations, to the battle against inflation and the conjunctural policies which are the subject-matter of Article 103 of the Treaty.

However, the Court has held (paragraph 22 of the judgment in *Dechmann* of 29 June 1978, [1978] ECR at p. 1584) that Article 103 "does not relate to those areas already subject to common rules, such as the organization of agricultural markets".

The cost of the raw materials used in making the feeding-stuffs marketed by the accused in the main action represents almost 80% of their cost price. However, almost all those materials (and most of the animal products for which they are ultimately used: pigmeat, etc.) are agricultural products subject to a common organization of the market and the power which Member States have to intervene in order to control the prices of agricultural products, and the products obtained by processing them, may only be exercised on condition that they do not prejudice the objectives and functioning of the common organizations of the market.

Similarly, it cannot therefore be said that Article 103 leaves intact the power of Member States to adopt whatever measures they wish relating to price formation. It requires mutual consultation between the Member States and with the Commission and presupposes that the Council will adopt the appropriate measures and directives concerning the method of applying them. In addition, Article 103 is to be applied without prejudice to the other provisions in the Treaty, and national measures adopted as part of conjunctural policy may not erode the fundamental principle which prohibits discrimination. In any event Member States are bound, when they apply their rules on the prices of processed agricultural products, to take into account fluctuations which occur at Community level in respect of basic products and to authorize the manufacturers of processed products to pass on those fluctuations in their own prices.

If, in the *national* context, it is hardly permissible for the authorities responsible for controlling prices to establish limits with regard to one variety only of a product and for it to determine a uniform price for different products, when one of those products is subject to a higher cost price, there would seem to be no possibility at the *Community* level that the national administrative authorities may apply preferential treatment in respect of goods produced domestically. That would amount to an affront, in the guise of identical treatment, to the principle that traders must be accorded equal treatment in respect of the economic rules of the Community.

As regards the balance of payments policy (Articles 104 to 109 of the Treaty) I shall merely recall that in a judgment of 10 December 1969, *Commission* v *French Republic* and *French Republic* v *Commission,* the Court held (paragraph 17, [1969] ECR at p. 540) that "the exercise of reserved powers cannot ... permit the unilateral adoption of measures prohibited by the Treaty".

Finally, in an alternative argument, the Commission declares that the constraints and other effects which are to the disadvantage of the traders concerned are inherent in the system and do not go beyond what appears to be necessary in the interests of its proper operation. However, I have grave doubts as to this statement; the system of notification of price increases was not indispensable, nor was it the only possible system, for, since the spring of 1975, the administration has had recourse to the system of "programme contracts" [contrats de programme]. Moreover, the Court held in its judgment in *van Tiggele*, cited above, (paragraph 19, [1978] ECR at p. 40) that in the similar field of the "fixed minimum price", "the requirements that importers and traders must comply with the administrative formalities inherent in such a system may *in itself* constitute a measure having an effect equivalent to a quantitative restriction".

V — Thus the Commission admits in effect that a national system requiring prior notification of price increases which applies equally to products imported from other Member States and to those manufactured within the country itself constitutes a measure having equivalent effect *to the extent* to which it appears that "the practice followed by the responsible authorities tends to place imported products at a disadvantage in relation to domestic products. This *might* be the case, for example, where application of the price increase which has been notified is *systematically* prohibited for the maximum period of six months only in respect of imported products". As far as Community law is concerned, how the rules in question are to be viewed depends on the way in which the Minister for Economic Affairs has applied Article 5 of the ministerial order; that is to say, it is necessary to know the number and frequency of the measures of a fiscal nature and the number of occasions when notified increases have been refused approval. Thus the question whether Article 30 is applicable and whether the prohibitions which it comprises as far as Member States are concerned may be claimed will depend on examination of the practical consequences which could result from applying the domestic rules or of the risks which such application might involve.

But what court is in a position to establish whether the Belgian rules prejudice the objectives and the functioning of the Common Market for basic products used in making compound feeding-stuffs? What court can apply the concepts and use the tools which are required for evaluating the instances of incompatibility which have been cited by the Commission, based on price alterations and the frequency with which the rules in question are applied?

As I said on 13 March 1979 in my opinion on the *I.C.A.P.* case in the same sphere, "the national court . . . cannot be asked to carry out laborious inquiries involving sometimes uncertain comparisons". That would be to ask the court to rule on a problem of macro-economics concerning the functioning of the Common Market in its entirety.

As I said also in my opinion in the *Dechmann* case ([1978] ECR at p. 1594),

in my view only the Commission is in a position to supply the necessary information.

As to the question put by the Court concerning the frequency with which, between 1971 and 1975, application of notified increases was either prohibited or delayed in respect of products imported into Belgium as compared with domestic products, the prices department of the Belgian Ministry for Economic Affairs informed the Court that it does not have any statistics in this respect at its disposal and that it would be impossible to establish them *ex post facto!*

The Commission, for its part, asked by the Court to show how the selling prices for compound feeding-stuffs developed in the course of the years 1971 to 1975 for the whole of the Community, especially in 1973 and in those Member States which had not adopted measures such as those in the order in question, replied that it was not possible to make any comparison between those prices as the Community statistics were totally lacking in transparency in that respect. In the circumstances it is absolutely impossible for a national court, even a supreme court, to ascertain whether the practice followed by the responsible authorities did or did not result in placing imports at a disadvantage as compared with domestic products.

If, as Mr Advocate General Capotorti said in his opinion on the *Grosoli* case, on 27 June 1979, "this kind of inconvenience is inherent in national legal systems", the conclusion which must be drawn as far as the Community is concerned, and in the interests of certainty of the law and uniformity in its application, is that:

In relation to rules such as those contained in the ministerial order in question, Article 30 of the EEC Treaty does not confer on manufacturers of cattle feed any right which may be protected by the national courts.