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 %

ad valorem imposed in Ireland in 1979 on certain agricultural products was incompatible with Community law.

Although that duty was described by the legislation imposing it as "a duty of excise", and although it is described by the learned judge, in the questions that he has referred to this Court, as "a tax", Counsel have, in the proceedings in this Court, referred to it as "the levy". I propose, for the sake of clarity and brevity, to do the same.

The plaintiffs in the first action are an association of Irish dairy farmers, the Irish Creamery Milk Suppliers Association (or "ICMSA"), and six individual Irish farmers, including the President and Deputy President of the Irish Farmers' Association suing on behalf of all the members of that association. The plaintiffs in the second action are three Irish slaughterhouse owners and a company called McMonagle (Livestock Exporters) Limited ("McMonagle"), which is engaged in the export of live cattle from Ireland. The defendants are differently described in the two actions but are in effect, in both, the Government of Ireland.

The levy was imposed by a series of orders made by the Government of Ireland and of regulations made by the Irish Revenue Commissioners on 30 April 1979, and one amending order made by the government on 24 July 1979. Those orders and regulations are listed in paragraph 1 of a schedule to the judgment of Barrington J. in each case.

The products on which the levy was imposed were live cattle (of the bovine species), fresh milk, three kinds of cereals, namely wheat, oats and barley, and sugar beet. The levy was payable on domestic products only, not on imports. In the case of cattle it was payable on those that had been in Ireland for 14 days or more. There were certain exemptions, for instance for cattle described as "reactors", i.e. those affected with brucellosis, leucosis or bovine tuberculosis; for the first 5 000 gallons of milk produced by a particular farm and delivered to a particular dairy; and for beet grown in specified areas in the west of Ireland. The levy was charged at the point at which the product was delivered for processing in Ireland, to a slaughterhouse, dairy, mill or sugar factory, or at which it was exported in its unprocessed state. The person accountable for the levy was the proprietor of the premises to which the product had been delivered for processing, or the exporter, as the case might be. The burden of the levy was however meant to be borne by farmers, so that there were provisions entitling the person accountable to withhold the amount of the levy from the price payable to the seller of the product or to recover it from him. The levy was assessed on the "chargeable value" of the product, which, in the case of fresh milk, live cattle and cereals was defined as the price which the product would fetch on a sale in the open market between a buyer and a seller independent of each other, and, in the case of sugar beet, as the price actually paid.

The levy was, as I have said, temporary. It was payable on live cattle and fresh

milk from 1 May 1979 to the end of 1979 and on cereals and sugar beet from 1 August 1979 to the end of 1979.

In a note on the background to the imposition of the levy that the Irish Government sent to the Commission on 2 October 1979, it said this:

"Up to this year the government financed out of general taxation the full cost of providing education, research, and advisory services to farmers. The cost of these services is now about IRL 30 million a year . . . No government has found it feasible to recover the cost of such services by way of direct charges or fees collected from those who utilize or benefit from these services. The cost must be met therefore from some form of taxation.

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."

That account of the history of the matter, and particularly what it said about the taxation of Irish farmers, was vigorously disputed by Counsel for the plaintiffs at the hearing before us. They asserted that the levy had been imposed in response to protests by other taxpayers, who complained that they were over-taxed as compared with farmers. As to that it is fair to say that the Irish Government in its observations to this Court, whilst repeating the substance of what it had said to the Commission, mentioned those protests. It is manifestly not for this Court to adjudicate between the parties on that controversy. In my opinion, the only point connected with it that is material for our purposes is that, as is common

ground, the proceeds of the levy were paid into the Exchequer and were not, statutorily or otherwise, earmarked for any particular expenditure.

The first action, that in which the ICMSA and others are plaintiffs, came before Barrington J. by way of an interlocutory motion in September and October 1979. At that stage no defence had been served but affidavits had been filed from which it was apparent that certain facts were in dispute between the parties, in particular facts about the characteristics of and conditions prevailing in the Irish market for agricultural products and the consequent effects of the imposition of the levy. By the motion the plaintiffs sought (i) a reference to this Court and (ii) an injunction restraining the defendants from continuing to charge the levy pending the determination of the case. The latter claim presented, in the event, no difficulty because the government gave an undertaking that, if the levy should eventually be held to be invalid, payments made in respect of it would be refunded. Most of the argument before the learned judge centred on whether there should or should not be a reference to this Court. It was submitted on behalf of the government that a reference at that stage would be premature and that it should not be ordered until after the facts had been determined, so as to avoid the possibility that, after the facts had been determined, it might be thought that further questions of Community law arose, which would open up the "highly undesirable" possibility of more than one reference in the same case. Barrington J., however, rejected that submission. He took the view that the fundamental question that had to be decided in the action was whether the levy was valid or invalid in law on the day on which the legislation imposing it was passed. That was, in his view, a pure question of Community law, the answer to which did not depend on any facts about the situation in Ireland being proved or disproved.

The government appealed to the Supreme Court of Ireland against the decision of Barrington J. to refer the case to this Court at that stage. It appears that, at the hearing of the appeal, the question was mooted whether the existence of a right of appeal to a higher national court from an order for reference made by a national court was consistent with the terms of Article 177 of the EEC Treaty. Although authority in this Court on that question (presumably including Case 146/73 *Rheinmühlen-Düsseldorf* v *EVSt* [1974] 1 ECR 139) was cited to the Supreme Court, that court was not satisfied that such a right could exist. In order to avoid the delay that would have been involved in a separate reference by the Supreme Court to this Court on the interpretation of Article 177 itself, it was agreed that the appeal should be adjourned generally and that Barrington J. should be asked to include in his order for reference a question about Article 177.

Thus it is that, by that order, two questions are referred to this Court:

"(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 at 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?"

The Council regulations there referred to are of course those establishing the common organizations of the market in milk and milk products, beef and veal, sugar and cereals respectively. The products covered by those organizations include all those on which the levy was imposed.

The second action came before Barrington J. in November 1979, also by way of an interlocutory motion, launched at a similar stage of the proceedings, by the fourth plaintiff, McMonagle, alone. The learned judge made on that motion an order referring to this Court two questions which are virtually in the same terms as the questions referred in the first action.

I will not detain Your Lordships for long on the first question. Your Lordships are clearly not thereby called upon to reconsider the ruling in the *Rheinmühlen* case. Nor did anyone contend before this Court that the question should be answered in the negative. It was common ground that, as is clear from numerous judgments of this Court, it is for the national court to decide at which stage of proceedings it should order a reference under Article 177 and that the exercise of its discretion is not, at all events in circumstances such as those of these cases, open to review by this Court. The Irish Government, however, urged us to give guidance to national courts as to the considerations that they should have in mind when deciding at what stage of proceedings to order a reference. As to that I do not, for my part, think one can go further than to say that, whilst it is usually helpful to this Court if the relevant facts have been found before a reference is made, cases do arise where it is expedient to order a reference earlier — for example where the national court cannot, without a ruling of this Court, be sure what the relevant issues of fact, if any, are.

The circumstance that Barrington J. considered that his second question was a pure question of Community law, to be decided independently of the facts that are in dispute between the parties, has, however, in my opinion, an important bearing upon the way in which this Court must approach that question. Arguments were advanced to us on behalf of the parties, more particularly on behalf of the plaintiffs, based on their respective versions of those facts. The plaintiffs not only alluded to the evidence contained in their affidavits, but put in evidence in this Court a report prepared for the Irish Farmers' Association and the ICMSA by Professor

Denis Lucey, who is Professor of Dairy and Food Economics at University College, Cork. That report is largely concerned with the results of the imposition of the levy: the revenue it raised, and its impact on farmers' incomes, on production and on markets. At the hearing Counsel for the Irish Government, whilst conceding that there were passages in Professor Lucey's report with which the Irish Government could agree, objected to use being made of it. He told us that the Irish Government considered it to be a partisan report. Counsel for the ICMSA and its co-plaintiffs went so far as to put in more evidence, consisting of certain trade statistics, at the hearing. In my opinion, all that evidence and the arguments based on it must be disregarded by this Court. Otherwise the Court would be substituting itself for the High Court of Ireland as the judge of fact in these cases, and doing so moreover in circumstances in which it had not given the Irish Government a full opportunity to lodge evidence in answer to that put in by the plaintiffs.

The learned judge's second question falls into two parts:

(i) Is a tax such as that in issue in these cases a charge having equivalent effect to a customs duty on imports or exports?

(ii) Is such a tax compatible with the provisions as to prices of the regulations governing the common organization of agricultural markets?

A contention was advanced on behalf of the ICMSA and its co-plaintiffs to the effect that, in relation to live cattle, because of the 14-day rule, the levy operated as a charge having equivalent effect to a customs duty on imports. That contention should, in my opinion, be rejected. Plainly, the object of the 14-day rule was to determine when an animal should be treated as having joined what the Commission called "the Irish herd". Once it had become part of that herd it would be liable to the levy if and when taken to the slaughterhouse. It was not, however, liable to the levy because of its importation. Indeed if taken to the slaughterhouse within 14 days of its importation it would be exempt from the levy.

A much more powerful contention, which was the main contention put forward on behalf of McMonagle, was that, again in relation to live cattle, the levy operated as a charge having equivalent effect to a customs duty on exports, the reason being that whilst, within Ireland, the levy was payable only on cattle sold for slaughter, it was payable on exports whatever the purpose for which the cattle were sold: whether for slaughter, fattening, breeding or milk-production. The striking example was given of a young pedigree bull, which no-one would buy except for breeding purposes. If sold within Ireland he would be free of levy, if exported he would be subject to it. I can see no escape from the conclusion that, to that extent, the levy operated as a charge having equivalent effect to a customs duty on exports — consider Case 51/74 the *van der Hulst* case [1975] 1 ECR 79, where the Court held that "an internal levy may have equivalent effect to a customs duty on exports if it falls more

heavily on export sales than on sales inside the country". The Irish Government sought to escape from that conclusion by saying that cattle sold within Ireland for fattening, breeding or milk-production would all eventually end up at the slaughterhouse and attract the levy. Whether that is so in fact may be doubted. Some animals die on farms or are put down because they are diseased, without ever going to a slaughterhouse. At all events, it has been held over and over again by this Court that, in order for a tax not to constitute a charge having equivalent effect to a customs duty on imports it must be imposed on domestic products and on imports according to the same criteria — see for instance Case 87/75 *Bresciani* v *Amministrazione Italiana delle Finanze* [1976]1 ECR 129 and Case 132/78 *Denkavit Loire* v *France* [1979] ECR 1923. That principle must likewise apply, in my opinion, in relation to exports.

I turn to the second part of the question.

On that, the submission of the plaintiffs is essentially that such a levy as is here in question constitutes an interference or potential interference with the price formation machinery established by the common organizations of agricultural markets and is therefore unlawful.

I need not, I think, rehearse the details of that machinery. They are familiar to Your Lordships and, moreover, were carefully analysed by the ICMSA and its co-plaintiffs in their written observations and by the Commission in its written observations in both cases.

The plaintiffs point to Article 39 of the Treaty, setting out the objectives of the common agricultural policy, and in particular to objective (b) in that article: "to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture." The plaintiffs submit that that is one of the objectives that the Council pursues, and is bound to pursue, when, annually, it fixes guide prices and target prices for agricultural products. Therefore, the plaintiffs say, it is incompatible with the system for a Member State to impose on those products a tax designed to reduce the prices received by farmers for them.

The plaintiffs also point to the numerous judgments of this Court in which it has held that, once the Community has, pursuant to Article 40 of the Treaty, legislated for the establishment of the common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure that might undermine or create exceptions to it — for recent instances see Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347 and Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161 (a case to which I shall have to come back). The plaintiffs point to judgments of the Court where it has specifically held that national measures undermining the price formation machinery of common market organizations were unlawful. They gave as examples the judgments in Case 60/75 *Russo* v *AIMA* [1976] 1 ECR 45 and Case 52/76 *Benedetti* v *Munari* [1977] 1 ECR 163, where it was held to be incompatible with a common market organization for a Member State to buy

a product covered by that organization on the world market and resell it on the Community market at a price lower than the target price; and the copious line of authorities about national price controls of which the earliest was Case 31/74 the *Galli* case [1975] 1 ECR 47 and the latest have been Cases 95 and 96/79 *Procureur du Roi* v *Kefer and Delmelle* [1980] ECR 103, the principle established by which is that national legislation controlling or fixing prices of products subject to a common market organization is lawful only in so far as it does not jeopardize the aims or functioning of the common organization and, in particular, its price system. Notably in point, I think, in that line of authority, is Case 10/79 the *Toffoli* case [1979] ECR 3301, where the Court emphasized the importance of the role of the target price and the fact that the intervention system was designed to affect market forces in such a way that producers could obtain a price "in the region of the target price"; and where the Court accordingly held incompatible with the common organization of the market in milk and milk products any attempt by a Member State to fix directly or indirectly the producer price for milk.

Another authority that seems to me to support the plaintiffs' submission is Case 77/76 *Cucchi* v *Avez* [1977] 1 ECR 987, where the Court held that under Regulation No 3330/74, governing the common organization of the market in sugar, the Community was, in the absence of express derogation, alone competent to adopt measures limiting the effects of an alteration in the level of Community prices, with the consequence, in that case, that a charge imposed by Italian legislation on stocks of sugar held at the end of a marketing year was invalid (see paragraphs 27 to 35 of the judgment).

The Irish Government sought to meet those arguments in the first place by submitting that the levy did not affect the prices paid to farmers as a result of the operation of market forces and of the intervention system, but that its impact was only "to effect a tax deduction from the market price receivable by the producer". That seems to me, with respect, almost a play on words. Take sugar beet, for instance, for which a minimum price is fixed pursuant to Article 4 of Council Regulation No 3330/74. A deduction of 2 % from that price manifestly reduces the amount that the Council intended the beet producer to receive and does so none the less for being called a "tax". The thwarting of the intention of the Council is perhaps less blatant in the case of products for which there is no fixed minimum price, but only a target or guide price. It seems to me, however, just as real. The target price is the price that the common market organization aims to achieve for producers. Suppose that that aim had actually been attained in Ireland in 1979, so that market prices equalled the target prices. The levy would then have reduced Irish producers' receipts to 2 % below the target prices.

In connexion with target prices, the Irish Government paid me the compliment of citing a passage from my opinion in the *Galli* case. It must however be borne in mind that the Court did not follow me in that case and that the Court law as developed by the Court in the subsequent "price control" cases is different from what I then thought it to be.

Then the Irish Government submitted that, given the object of the levy, which was to tax producers, the imposition of the levy was within the powers reserved to Member States under the Treaty to tax those within their jurisdiction. As was pointed out by the Commission, however, there is no doubt that the Treaty and legislation enacted thereunder by the Council do restrict Member States' taxing powers. Apart from such obvious examples as the provisions of the Treaty relating to customs duties and charges having equivalent effect, and as Articles 95 to 98 of the Treaty, the directives of the Council on the harmonization of "the laws of Member States concerning turnover taxes" preclude Member States from maintaining in force or introducing any system of turnover tax other than the common system of VAT (see especially Directives 67/227/EEC of 11 April 1967 and 77/388/EEC of 17 May 1977). No-one of course questions the right of Member States to impose income taxes on farmers, whether assessed on their profits or on the annual value of their land, but the levy here in question was not such a tax: it was a tax on specific kinds of agricultural products, imposed at the point of sale, regardless of the personal circumstances of the farmer making the sale. As Counsel for the ICMSA and its co-plaintiffs convincingly, in my opinion, argued at the hearing, if Member States are in principle allowed to impose such a tax, it follows that they may impose it at any rate and for any length of time, and that they may vary the rate from time to time. There is no legal criterion by reference to which their power can be limited in those respects. On that footing it would be open to each Member State, each year, after the Council had fixed the common prices for the ensuing year, to counteract the decision of the Council as it chose, so that in the end there need be no common prices.

Arguments were addressed to us about the co-responsibility levy on milk introduced by Council Regulation (EEC) No 1079/77, and with the validity of which the Court was concerned in Case 138/78 *Stölting* v *HZA Hamburg-Jonas* [1979] ECR 713. It was common ground, and indeed it is clear from the preamble to that regulation, that the object of that levy is to restore the balance between the supply and the demand for milk and milk products, in other words that it is a market management measure. It was also common ground that the levy functions in the same way as the levy that is the subject of these proceedings. But the parties drew different conclusions from

those premises. In my opinion the only conclusion that can properly be drawn is that the imposition of such a levy is now a matter within the exclusive competence of the Community.

The Commission appears to have shrunk from reaching the conclusion that the levy here in question was incompatible with Community law mainly for fear of the consequences of such a conclusion "bearing in mind", as it put it, "that there exist in all Member States fiscal and parafiscal measures which are used to generate funds for a wide range of agricultural services". The Commission referred us in that connexion to paragraph 464 of its 1977 Report on the Agricultural Situation in the Community, which reads:

"In several Member States, certain types of aid are financed by parafiscal charges on agricultural products. This is the case in France, where revenue from such charges amounts to about 98 million ECU, The Netherlands (48 million ECU) and Denmark (19 million ECU).

In this analysis no account has been taken of expenditure on social security as the relevant information supplied by the Member States is not homogeneous."

Leaving aside contributions to social security funds, no question as to which arises here, the answer to the Commission's fear lies, I think, in the judgment of the Court in Case 2/73 *Geddo* v *Ente Nazionale Risi* [1973] 2 ECR 865. In that case the Court drew a distinction between, on the one hand, an internal tax levied on sales of domestically produced goods of a particular kind designed to supply a fund to finance aids to domestic producers of such goods and, on the other hand, a tax designed to reduce the export refunds on such goods (see paragraph 6 of the judgment). Although Articles 92 to 94 of the Treaty were not discussed, it is, in my opinion implicit in the judgment that the lawfulness of a tax of the former kind depends on the lawfulness of the aids that it is designed to finance, and is therefore a matter that can be dealt with only under those articles. A tax of the latter kind, however, is unlawful because it is contrary to the provisions of the regulation providing for export refunds.

The decision in *Pigs and Bacon Commission* v *McCarren* (already cited) is, save possibly in one respect, consistent with that view. The Court held that the levy there in question was unlawful to the extent to which it was designed to finance the export bonus, because to that extent it was, as was the bonus itself, contrary to the provisions of the Regulation establishing the common organization of the market in pigmeat. It is clear to my mind that the lawfulness of the balance of the levy, i.e. the part of it that was designed to finance the promotional activities of the Pigs and Bacon Commission, depended on the lawfulness of those activities themselves under Articles 92 to 94 of the Treaty. The Court, however, declined to answer the questions that had been referred to it by the High Court of Ireland on Articles 92 to 94. It did so on the ground that "recourse to the provisions of Articles 92

to 94 of the Treaty cannot modify the requirements flowing, for the Member States, from observance of the rules relating to that common organization" (paragraph 21 of the judgment). That proposition was plainly right, but it was not, in my opinion, sufficient in itself to render answers to the questions on Articles 92 to 94 unnecessary. I think that, probably, the Court overlooked (though I had pointed it out in my opinion, at p. 2201) that one of the arguments put forward on behalf of the defendant in reliance on Article 93 (3) would, if accepted, have led to the conclusion that the whole of the levy, not just the part of it destined to finance the bonus, was unlawful. If that is the correct explanation, then the decision in the case is consistent with the view I have expressed.

I should perhaps underline, in view of some observations that were made by Counsel for the Commission at the hearing about the good faith of the Irish Government, that the distinction I draw does not rest in any way on the motives of the government or of the members of the legislature of the Member State concerned. The reason why I do not think that the levy in question here can be assimilated to the levy in the *Geddo* case is that the proceeds of it were paid into the Irish Exchequer, and not into a fund to provide aids for Irish farmers, the operations of which would be amenable to review under Articles 92 to 94.

Counsel for the Commission also suggested at the hearing that the levy might be held lawful because it was "across the board". That seems to me as uncertain a test as the duration of the levy or the rate at which it is imposed. In any case I do think that one can describe as "across the board" a levy that is charged only on a limited number of products.

In the result I am of the opinion that, in answer to the questions referred to the Court by the High Court of Ireland, Your Lordships should rule that:

(1) Article 177 of the EEC Treaty leaves it to the discretion of the national court or tribunal concerned to decide at what stage of the proceedings it should refer a question to the Court of Justice;

(2) A national tax charged on all exports of live cattle from the Member State concerned but charged, within that State, only on the delivery of such cattle for processing is, to that extent, a charge having equivalent effect to a customs duty on exports prohibited in trade between Member States by Articles 9, 12 and 16 of the Treaty and in trade with third countries by Article 20 (2) of Regulation No 805/68;

(3) A national tax charged on specified agricultural products at the point of delivery for processing or of export, and of which the proceeds are paid into the national Exchequer of the Member State concerned without being earmarked for aids the operation of which is susceptible of review under Articles 92 to 94 of the Treaty, is, to the extent to which such products are the subject of a price system under any regulation establishing a common organization of the market, incompatible with that system and hence unlawful.