OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 10 November 1993 *

Mr President,
Members of the Court,

1. This case concerns a reference from the Finanzgericht Düsseldorf for a preliminary on the interpretation and validity of Article 12(2) of Commission Regulation (EEC) No 1371/84 of 16 May 1984 [1] — in its original version and as subsequently amended and renumbered as Article 12(4) by Regulation (EEC) No 3005/85 of 29 October 1985 [2] — and on the interpretation and validity of Article 15(4) of Commission Regulation (EEC) No 1546/88 of 3 June 1988. [3] The questions submitted arose in a dispute between Milchwerke Köln/Wuppertal eG, the plaintiff, and the Hauptzollamt Köln-Rheinau, the defendant.

Background

2. In order to contain the increase in milk production, Council Regulation (EEC) No 856/84 of 31 March 1984 [4] inserted Article 5c in Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products. [5] Article 5c provides *inter alia* that:

'During five consecutive periods of 12 months beginning on 1 April 1984, an additional levy payable by producers or purchasers [6] of cows' milk shall be introduced.'

3. The facts of the case should be viewed against that background. The plaintiff is the universal successor of Milchversorgung Rhineland eG (hereinafter 'Rhineland'),

* Original language: Dutch.

1 — Regulation laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p. 11).

2 — Regulation amending for the tenth time Regulation (EEC) No 1371/84 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1985 L 288, p. 10).

3 — Regulation laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12)

4 — Regulation amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1984 L 90, p. 10).

5 — OJ, English Special Edition (1968) I, p. 176.

6 — The terms 'producer' and 'purchaser' are defined in Article 12(c) and (e) of Council Regulation (EEC) No 857/84 of 31 March 1984, cited in footnote 8 below.

which merged with it and which purchased milk from approximately 6 000 affiliated dairy producers who were also its members. Before the merger, an authorized signatory of Rhineland (known as 'D') intentionally caused the reference quantities of many of those producers to be miscalculated, with the result that those producers had to pay lower additional levies and Rhineland was able to process a larger quantity of milk.

It transpired from an external audit which began at the end of 1988 that, in all, incorrect reference quantities had been calculated in 309 cases. Criminal proceedings were instituted against 'D' and other officers of Rhineland. Furthermore, the Hauptzollamt revoked the reference quantities of all the producers whose reference quantities had been set at too high a level, and retroactively fixed new reference quantities in lieu. [7]

4. The Hauptzollamt claimed from the plaintiff, by notices of assessment dated 12 and 14 June 1991, a total of DM 5 975 480.49 by way of unpaid additional levies. By decision of 19 December 1991 on the objection lodged by the plaintiff, the Hauptzollamt reduced that amount to DM 5 849 307.47 but dismissed the remainder of the objection as unfounded.

On 31 December 1991 the plaintiff brought an action against the Hauptzollamt's decision before the Finanzgericht, which submitted a number of questions to the Court for a preliminary ruling. Before I consider those questions, I, however, propose to review the applicable legislation in somewhat greater detail.

Legislation

Council regulations

5. Article 5c of Regulation No 804/68 introduces not only an additional levy on cows' milk (paragraph 2 above) but also lays down that each of the Member States is to collect the levy within its territory in accordance with one of two formulas set out in that article. Germany has opted for formula A,

7 — A number of producers who did not succeed in obtaining a retroactive increase in their reference quantities on account of special circumstances have brought an action before the Finanzgericht against the Hauptzollamt's decision. However, it is not those cases — a number of which have, according to the order for reference, already been dismissed by the Finanzgericht — which led to the submission of the questions now before the Court.

according to which the additional levy is payable only by milk *producers*:

'*Formula A*

— A levy shall be payable by every milk producer on the quantities of milk and/or milk equivalent which he has delivered to a purchaser and which for the 12 months concerned exceed a reference quantity to be determined.'

Formula B, according to which the additional levy is payable by *purchasers* of milk, is not at issue in this case.

6. On the same date as Regulation No 856/84, that is to say on 31 March 1984, the Council issued Regulation (EEC) No 857/84 adopting general rules for the application of the levy referred to in Article 5c of Regulation No 804/68 in the milk and milk products sector. [8] Article 9(1) of Regulation No 857/84 originally provided as follows:

'Where formulas A and B are applied, the levy shall be collected:

(a) by means of quarterly payments on account calculated on the basis of quantities of milk or milk equivalent which, for each person liable, exceed, for the relevant quarter, the cumulative reference quantity calculated at the end of the corresponding quarter of the reference calendar year chosen by the Member State;

(b) by a final account for each person liable, calculated after the end of the 12-month period concerned, on the basis of the actual excess during this same period beyond his annual reference quantity.'

Since 27 May 1985, a new version of Article 9(1), introduced by Council Regulation (EEC) No 1305/85 of 23 May 1985, has been in force. [9]

8 — OJ 1984 L 90, p. 13.

9 — Regulation 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).

The new version reads as follows:

'Where formulas A and B are applied, the levy shall be collected by means of annual payments. To this end there shall be adopted, for each person liable, an account after the end of the 12-month period concerned, on the basis of actual excess during this same period beyond his annual reference quantity. Provisional half-yearly statements shall be established according to a procedure to be determined.'

The first subparagraph of Article 9(2) of Regulation No 857/84, which has not been amended, [10] reads as follows:

'Where formula A is applied, the levy shall be collected from each producer by the purchaser.'

10 — Admittedly, Article 1(7) of Regulation No 1305/85 added a second subparagraph to Article 9(2), which is not relevant for the purposes of the answer to the questions in these proceedings.

Commission regulations

7. In Article 11 of Regulation No 857/84 the Council entrusted the Commission with the task of adopting further implementing rules concerning the additional levy. The questions submitted concern three regulations adopted by the Commission on the basis of that provision. As stated earlier, those measures are Regulations Nos 1371/84, 3005/85 and 1546/88.

In its original version, Article 12(2) of Regulation No 1371/84 provided, *inter alia*:

'Purchasers as referred to in paragraph 1 shall, within 45 days of the end of each quarter, pay the competent authority the amount of any levy due. (...)'

When there was a changeover from quarterly to annual levies as a result of the adoption of Regulation No 1305/85 (paragraph 6 above), Article 12(2) had to be adapted accordingly. That was done by Article 1(7) of Commission Regulation (EEC) No 3005/85 of

29 October 1985. The new version, henceforth paragraph (4) of Article 12 of Regulation No 1371/84 as amended, provided *inter alia*:

'The purchasers referred to in paragraphs 1, 2 and 3 shall pay any levy amount due to the competent agency within 60 days following the end of each 12-month period. (...)'

In the meantime, Regulation No 1371/84 was repealed in its entirety and replaced by Commission Regulation No 1546/88 of 3 June 1988. [11] The wording of Article 15(4) of the new regulation is the same as that of the aforesaid version, except for an extension of the 60-day period referred to in that provision to 3 months:

'The purchasers referred to in paragraphs 1, 2 and 3 shall pay any levy amount due to the competent agency within three months of each 12-month period. (...)'

11 — Already cited in footnote 3.

German law

8. Although the questions submitted for a preliminary ruling are not strictly speaking concerned with German law, I shall also refer to the 'Milch-Garantiemengen-Verordnung (MGVO)' of 25 May 1985 which is in force in Germany. [12] Paragraph 3 of the MGVO, which has in the meantime been frequently amended, [13] embodies the German option in favour of formula A. Paragraph 4(1) of the MGVO provides that milk purchasers are to calculate reference quantities for producers who supply them with milk and lays down detailed rules for that purpose. Paragraphs 11(1) and (2) prescribe the manner in which purchasers are to deduct the additional levy from the purchase price payable by the producers and pay the amounts so deducted to the competent agencies.

The first and second questions

9. I shall deal with the Finanzgericht's first and second questions at the same time.

12 — BGBl. 1984, I, p. 720.

13 — According to the Commission, the most recent amendment was made on 24 April 1991 (BGBl., 1991, I, p. 1034).

Those questions read as follows:

'1. Where formula A as provided for in Article 5c(1) of Regulation (EEC) No 804/68 is applied, is the purchaser liable, under the original version of Article 12(4) of Regulation (EEC) No 1371/84, to pay the additional levy which has arisen as a result of retroactive reductions in the delivery reference quantities, where his employees were responsible for setting the delivery reference quantities and were therefore responsible for the additional levy's not having been paid in full?

2. In the same circumstances as those described in Question 1, is the purchaser liable to pay the additional levy under Article 12(4) of Regulation (EEC) No 1371/84 in the version laid down in Regulation (EEC) No 3005/85 and Article 15(4) of Regulation (EEC) No 1546/88?'

By those questions the Finanzgericht seeks in other words to ascertain whether, in a case such as this, only the producers, or the purchasers as well, are liable to pay the additional levy on milk, where it has wrongly not been collected.

Is the purchaser also liable to pay the levy?

10. The parties' submissions in this case are summarized as below. According to the plaintiff, the Commission and the Finanzgericht, the sums in question can be claimed only from the milk producers and not from a purchaser. Formula A requires a purchaser such as the plaintiff only to pay over to the Hauptzollamt the additional levy actually received from the producers, and that is clearly what was done. However, there is no legal basis whatsoever for requiring the plaintiff to pay an additional levy of that kind, even if the plaintiff is responsible for the fact that the amount of the additional levy collected was too low.

The Hauptzollamt agrees, with reference to Article 9(2) of Council Regulation No 857/84 (paragraph 5 above), that according to formula A the additional levy is in principle payable by the milk producer. Nevertheless the Hauptzollamt considers, as is clear from the order for reference, [14] that in certain circumstances under that formula the additional levy may also be payable by a milk purchaser. In that regard, the Hauptzollamt relies on the implementing regulations adopted by the Commission, specifically

14 — The Hauptzollamt has not submitted either written or oral observations to the Court.

Article 12(2) (Article 12(4) of the amended version) of Regulation 1371/84 and Article 15(4) of Regulation No 1546/88. According to those articles, the Hauptzollamt maintains, it should normally be sufficient for milk purchasers to pay over to the competent agencies the additional levy collected from milk producers. If, however, it is they who are responsible for the amount of additional levy collected being too low, those articles require them to make up the difference themselves.

11. I do not share the Hauptzollamt's point of view. In my view, no legal basis can be found in the aforesaid provisions of the relevant Commission regulations to support the conclusion that under formula A a milk purchaser may also be liable to pay the additional levy.

For those purposes, it is appropriate to distinguish under the system of additional levies established by the aforesaid Community regulations between persons liable to pay the levy and persons liable for payment. So far as concerns the definition of *persons liable to pay the levy*, Article 5c of Regulation No 804/68, as set out above, is crystal clear. That article introduces an additional levy 'payable by producers *or* purchasers of cows' milk' (emphasis added). Where formula A is applied, the additional levy is payable by producers; where formula B is applied, it is payable by purchasers. As stated earlier, Germany opted for formula A.

So far as concerns the definition of *persons liable for payment*, the relevant provisions of Community law are just as clear. Article 9(2) of implementing Regulation No 857/84 expressly provides that under formula A the levy is to be collected from each producer by the purchaser, while Article 12(2) — later Article 12(4) — of Regulation No 1371/84 and Article 15(4) of Regulation No 1546/88 require the purchaser to pay the amounts collected to the competent agencies. It can be inferred from the last-mentioned provisions that under formula A, again in contrast to the arrangements under formula B, [15] milk purchasers are not themselves liable to pay the levy but exclusively liable for payment.

12. Let us now turn to those provisions of the implementing regulations adopted by the Commission from which the Hauptzollamt infers that, under formula A as well, milk purchasers may in certain circumstances be *liable to pay the levy*. In addition to Arti-

15 — Compare with Article 10 of Regulation No 857/84, which concerns formula B and refers exclusively to 'a purchaser liable for the levy'.

cle 12(2) in the original version, Article 12(4) in the amended version, of Regulation No 1371/84, and Article 15(4) of Regulation No 1546/88, the Hauptzollamt also refers to Article 12(4) of the original version of Regulation No 1371/84, which is worded as follows:

'If the final account referred to in Article 9(1)(b) of Regulation (EEC) No 857/84 shows a difference between the sum of the quarterly payments on account and the levy amount actually due, the competent authority shall refund, or the liable person shall pay, this difference before 1 July following the end of the 12-month period concerned.' [16]

13. The Hauptzollamt has not put forward a single argument to substantiate the view that those provisions make purchasers not only liable for payment but also in certain circumstances — for instance as a result of a fraudulent transaction for which they can be held responsible — liable to pay the levy. Nor can I think of a single argument in support of that view. On the contrary, the passages quoted merely provide confirmation of the task imposed on purchasers by Article 9(2) of Council Regulation No 857/84 (paragraph 6 above) of collecting the levy and paying it over.

Moreover, the Finanzgericht is correct in stating that the interpretation advocated by the Hauptzollamt gives rise to special problems. The articles referred to in the previous paragraph would then impose a penalty on purchasers failing to fulfil their obligations, without stating in what circumstances that penalty is to be applied (for instance, only where there is intent or also in the case of negligence?)

14. If the aforesaid articles, which constitute *implementing* provisions adopted by the Commission, were interpreted in the manner suggested by the Hauptzollamt, they would then be contrary to the express wording of Article 5*c* of the *basic* regulation, No 804/68. According to that article (cited in paragraph 2), the additional levy is 'payable' under formula A by producers of cows' milk. It is settled case-law that, when an implementing regulation is capable of being interpreted, it must be interpreted in conformity with the basic regulation on which it is founded. [17] See also the recent judgment of 24 June 1993 in the *Tretter* case:

'According to the case-law of the Court, where a measure of secondary Community law has to be interpreted, it must be interpreted in so far as possible in accordance

16 — The version of Article 12 of Regulation No 1371/84 amended by Regulation No 3005/85 contains no other corresponding provisions. That makes sense, since the changeover from quarterly to annual levies rendered the final account in question superfluous.

17 — Judgments in Case 38/70 *Deutsche Tradax* [1971] ECR 145, at paragraph 10; Case 92/78 *Simmenthal* [1979] ECR 777, at paragraph 70 et seq.; Case 46/86 *Romkes* [1987] ECR 2671, at paragraph 16. For a recent example of an implementing regulation being examined in the light of a basic regulation, see the judgment in Case C-217/91 *Spain* v *Commission* [1993] ECR I-3923, at paragraphs 19 to 27.

with the provisions of the Treaty (see, *inter alia*, the judgment in Case 218/82 *Commission* v *Council* [1983] ECR 4063, at paragraph 15). Likewise, an implementing regulation must be interpreted if possible in accordance with the provisions of the basic regulation (see the judgment in Case 38/70 *Tradax* [1971] ECR 145, at paragraph 10).' [18]

15. In reply to the first two questions, I therefore conclude that Article 12 of Commission Regulation No 1371/84 of 16 May 1984 — both in paragraph (2) of the original version and in paragraph (4) of the amended version — and Article 15(4) of Commission Regulation No 1546/88 of 3 June 1988 must be interpreted as meaning that, where formula A provided for in Article 5c(1) of Regulation No 804/68 is applied, a milk purchaser may *not* be regarded as liable to pay the levy, even where, as a result of a retroactive reduction in the reference quantities on account of the misconduct of the purchaser, his officers or authorized representatives, a further amount is still payable by way of the additional levy on milk.

The obligation imposed on Member States by Community law to combat fraud

16. It may be inferred from that conclusion that under Community law as it now stands no penalties are available against Rhineland's manipulation of the figures. That cannot serve the cause of countering agricultural fraud effectively. The Hauptzollamt also refers to the matter:

'If only the amount which the plaintiff withheld from the milk money were owed and had to be paid over, the plaintiff could, in the final analysis, determine the levies to be paid over at its discretion, even where, as in this case, it had been involved in falsifying the figures. (...) The plaintiff itself is responsible for this situation and is not entitled to expect that the consequences of its action should be borne entirely by the milk producers concerned or by the community at large.' [19]

In the case-law of the Court, the need to combat fraud effectively is thus considered fundamental, especially in the agricultural sector where enormous sums in Community funds are lost as a result of fraud. In its judgment in Case 68/88 *Commission* v *Greece*, the Court accordingly considered in connec-

18 — Case C-90/92 [1993] ECR I-3569, at paragraph 11.

19 — Order for reference, p. 6.

tion with criminal or disciplinary proceedings against fraudulent traders that:

'According to the Commission, the Member States are required by virtue of Article 5 of the EEC Treaty to penalize any persons who infringe Community law in the same way as they penalize those who infringe national law. The Hellenic Republic failed to fulfil those obligations by omitting to initiate all the criminal or disciplinary proceedings provided for by national law against the perpetrators of the fraud and all those who collaborated in the commission and concealment of it.

It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.

For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.' [20]

17. It may be apparent from that case-law that Community law imposes an unequivocal obligation on Member States to provide appropriate machinery for imposing penalties and taking legal action in respect of fraudulent dealings that result in the impoverishment of the Community through the loss of revenue intended for it. Penalties must be imposed on the same conditions as those which apply to comparable and equally serious infringements of national law, and legal action in respect of infringements of Community law must be pursued as energetically as it is in respect of corresponding infringements of national law. [21]

20 — [1989] ECR 2965, at paragraphs 22 to 25. Followed in the judgment in Case C-326/88 *Hansen* [1990] ECR I-2911, at paragraph 17, and in the order in Case C-2/88 *Zwartveld* [1990] ECR I-3365, at paragraph 17.

21 — The Treaty on European Union has expressly incorporated that principle in the new Article 209A of the EEC Treaty. See also Article K1(5) of the Treaty on European Union, in which the Member States undertake to regard 'combatting fraud on an international scale' as a matter of common interest with a view to closer cooperation in the fields of justice and home affairs.

The obligation imposed on Member States by Article 5 of the EEC Treaty to take all appropriate measures to ensure the proper application of Community law applies not only in respect of criminal and disciplinary penalties and proceedings in respect of fraud but also to the initiation of any proceedings under administrative, fiscal or civil law to collect or recover duties or levies which have been fraudulently evaded or to obtain compensation.

18. Moreover, the aforesaid obligation to take all appropriate measures arises not only from Article 5 of the EEC Treaty but also, and more specifically, from Article 8 of Council Regulation (EEC) No 729/70 of 21 April 1970, [22] which is the basic regulation for the financing of the common agricultural policy. The additional levy on milk for the purposes of Article 5c of Regulation No 804/68 constitutes 'intervention intended to stabilize the agricultural markets' within the meaning of Article 3(1) of Regulation No 729/70. Article 8 of Regulation No 729/70 imposes on the Member States the following obligations which are designed to combat fraud effectively:

'1. The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to:

— satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly;

— prevent and deal with irregularities;

— recover sums lost as a result of irregularities or negligence.

The Member States shall inform the Commission of the measures taken for those purposes and in particular of the state of the administrative and judicial procedures.

2. In the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences ofirregularities or negligence attributable to

22 — Regulation on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218). The measures which constitute intervention within the meaning of Article 3(1) were initially summarized in the annex to Council Regulation (EEC) No 1883/78 of 2 August 1978 laying down general rules for the financing of interventions by the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ 1978 L 216, p. 1). Council Regulation (EEC) No 1716/84 of 18 June 1984 amending Regulation (EEC) No 1883/78 (OJ 1984 L 163, p. 1) replaced that annex. Since then, the additional levy has been referred to under point 1 in 'X. Milk and milk products. C. Other measures'.

administrative authorities or other bodies of the Member States. (...)'

19. It may be apparent that measures have already been adopted under German law in respect of D's fraudulent transactions from the fact that a number of persons have been prosecuted. In addition, it is conceivable in my view that the plaintiff, and not only 'D', may be accountable under German civil law if it should appear that the former can be held responsible for the latter's manipulations or that individual producers from whom the Hauptzollamt could claim the amount of additional levy in arrears can bring an action for recovery against the plaintiff.

In that connection it must be pointed out that it is for the competent national administrative and judicial authorities, in fulfilment of their obligations under Community law (paragraph 17 and 18 above), to apply the legal remedies and rules available under national law in the broadest possible manner. Within that framework, they must make every possible effort to permit recovery from the plaintiff, its officers or authorized signatories of sums which, for any reason whatever, cannot be recovered from individual producers, for instance on the ground that those producers have become insolvent or can rely on the principle of the protection of legitimate expectations. The fact that no such direct action arises from the specific provisions referred to in the questions submitted for a preliminary ruling cannot prevent the Member States from having to rely for that purpose on national law, in keeping with the provisions of Community law referred to earlier.

Question 3

20. The Finanzgericht's third question reads as follows:

'In the event that Questions 1 and 2 are answered in the affirmative, are Article 12(4) of Regulation (EEC) No 1371/84 and Article 15(4) of Regulation (EEC) No 1546/88 valid in so far as where formula A is applied they provide *inter alia* that the purchaser is liable to pay the levy?'

According to the national court itself, the third question is relevant only in so far as the first two questions are answered in the affirmative. In my view, that is not possible, as may be apparent from the foregoing consid-

erations. If the Court should take a different view, I would refer it to my position as set out in paragraph 14. There, I have already stated that the provisions referred to in Question 3, if they were to be interpreted in the manner suggested by the Hauptzollamt, would come into conflict with Article 5c of the basic Regulation, No 804/68. That would mean, on the basis of the case-law referred to in that paragraph, [23] that the provisions concerned are invalid in so far as, where formula A is applied, they make the purchaser liable to pay the levy as a penalty.

I therefore propose, together with the plaintiff, the Commission and the Finanzgericht, that Question 3 should, if appropriate, be answered in the negative.

Conclusion

21. In conclusion I propose that the Court answer the questions submitted by the Finanzgericht as follows:

Article 12(2) of Commission Regulation (EEC) No 1371/84 of 16 May 1984 — in its original version and as amended and renumbered as Article 12(4) by Regulation (EEC) No 3005/85 of 29 October 1985 — and Article 15(4) of Commission Regulation (EEC) No 1546/88 of 3 June 1988 must be interpreted as meaning that, where formula A provided for in Article 5c(1) of Regulation (EEC) No 804/68 is applied, a milk purchaser may *not* be regarded as liable to pay the levy, even where, as a result of a retroactive reduction in the reference quantities on account of the misconduct of the purchaser, his officers or authorized representatives, a further amount remains to be paid by way of the additional levy on milk.

23 — Footnote 17 above.