OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 26 September 1989 *

Mr President,
Members of the Court,

1. The facts in the case pending before the tribunal de police, Rethel, which submitted this reference for a preliminary ruling, may be summarized in three lines: Mr Paris, a French poultry breeder, was prosecuted for offering for sale in a hypermarket fresh eggs whose shells were marked with the date on which they were laid.

2. The legal issues raised by this case lead me to consider the Community rules on the marketing of eggs not so much, as the national court points out, for the purpose of interpreting them, as in fact to establish whether or not the contested Community rules are valid.

3. As is clear from the Report for the Hearing, to which I refer for a more detailed summary of the facts of the case and the arguments of the parties, the sale by Mr Paris of eggs whose shells were marked with the date on which they were laid led to his being charged with (in France the offence of) infringing Articles 11 and 15 of Regulation (EEC) No 2772/75 of the Council of 29 October 1975 on marketing standards for eggs (Official Journal 1975, L 282, p. 56), hereinafter referred to as 'the contested regulation'. As the Court learnt at the hearing, this is not an isolated case since several prosecutions have been initiated for the same offence. It should also be pointed out that in some cases the national court has found it necessary to acquit the accused. Other courts have instead applied the relevant provisions to the letter on the ground that the rules in question had not, as it were, 'lapsed' or even been 'invalidated' either by technical developments at the time of the adoption of the regulation or by the need to implement the principle of consumer protection properly and in full. Hence the importance of the Court's decision.

4. According to the contested regulation, and particular Article 15 thereof, 'eggs shall not bear any marks other than those provided for in this regulation'. Article 11 contains an exhaustive list of 'distinguishing marks' which may be stamped on eggs to be marketed. The 'marks' do not include the date on which the eggs were laid.

5. In the criminal proceedings instituted against them, the accused claimed that Article 15 of the contested regulation must be regarded as contrary to the Treaty of Rome and to the consumer's basic right to information. The national court therefore asks the Court to give a ruling on the interpretation of Article 15 of the contested regulation in the light of the Treaty.

6. Allow me to preface my Opinion with a remark. The question submitted for a preliminary ruling can turn only on the

* Original language Italian.

validity of the regulation in question. The interpretation of Article 15 in conjunction with Article 11 is in no way open to doubt. The sale of eggs marked with the date on which they were laid is contrary to those provisions. The real problem is whether or not the Community regulation which prohibits the eggs from being so marked is valid.

7. In that regard there is no need to dwell at great length on one of the possibilities suggested by the national court, that is to say the existence of a conflict between the contested rules and Article 86 of the Treaty of Rome. Article 86 applies to the conduct of undertakings and the issue in this case is a prohibition on sales of products marked with the production date laid down by Community legislation. Article 86 is therefore inapplicable to this case.

8. Instead, Mr Paris's critical observations regarding the existence of a conflict between the prohibition under consideration and the requirements of consumer protection are more substantial and in any event deserve more detailed consideration.

9. In that regard, the exchange of views which took place at the hearing has made it possible to focus more clearly on the elements of a problem which remained somewhat out of focus during the written procedure.

10. The main argument put forward by Mr Paris, that is to say that the prohibition laid down by the contested regulation on marking eggs with the date on which they were laid is unlawful inasmuch as it makes it impossible to satisfy the requirement of consumer protection, was refined at the hearing. Mr Paris argued that the only date which may lawfully be affixed under the regulation, apart from the recommended sell-by date for small packs, does not provide consumers with proper information, thus making it possible — lawfully — to sell, as extra fresh, eggs laid more than 10 days before being sold.

11. For the purposes of this investigation, I would point out that, in principle, that assertion has not been challenged either by the Commission or by the Council, the two institutions which submitted observations at the hearing. Those two institutions have explained to the Court the reasons why the Community legislature opted for a prohibition on marking eggs with the date on which they were laid but have been unable either to deny that in certain cases the factual situation may correspond to that described by Mr Paris or to answer the Court's questions exhaustively. In particular, notwithstanding repeated requests on my part, I have been unable to obtain sufficient clarification as to the criteria for checking the freshness of an egg. Indeed, the Commission acknowledged that there is no reliable criterion for ascertaining with certainty the date on which an egg was laid.

12. That being so, I consider that although the grounds relied upon by the two Community institutions may indeed clarify the *ratio legis* of the contested legislation, they do not constitute an answer to Mr Paris's argument. Mr Paris does not claim that the contested regulation does not state the reasons on which it is based. Instead, if I understand his argument correctly, he maintains that the prohibition in question constitutes a bad solution by the Community legislature to a real problem,

inasmuch as it gives excessive weight to the interests of egg producers over the interests of consumers.

13. In order to give a useful answer to the national court, therefore, it is necessary to consider whether the legislation in question exhibits a flaw which is sufficiently serious for the legislation to be declared invalid.

14. To that end it is necessary, in my view, to rule out the possibility of invalidity as a result of a conflict between the relevant provisions of secondary legislation and primary rules such as the EEC Treaty or a higher principle of law. In that regard, I would point out that all the parties which have submitted observations in the proceedings before the Court, whether in the oral procedure or at the hearing, namely Mr Paris, the United Kingdom, the Council and the Commission, acknowledge that one of the aims of the contested rules is to afford protection to the consumer. The parties disagree, however, about the effects of taking the interests of consumers into account in that way, said to be sufficient and therefore not open to criticism by some, but totally inadequate and indeed 'deceptive', to adopt the expression used at the hearing, by the accused in the criminal proceedings.

Accordingly, without dwelling on the merits of the conflicting arguments advanced by Mr Paris and the United Kingdom as regards the existence or otherwise of a basic right of consumers to information, I shall confine myself to stating that it is unnecessary to resolve that vexed question in this case since the divergences which have come to the fore relate not so much to the question whether or not the consumer is entitled to information as to the quantum thereof.

Similarly, it does not, in my view, serve any purpose to consider in depth another argument which could be adopted to establish a conflict between the rules under consideration and a general legal principle whose observance is ensured by the Court, namely breach of the principle of freedom to engage in a professional or trade activity. It has been pointed out that the rules under consideration prevent efficient producers, who are able to make the investments needed in order to equip themselves with devices to ensure that the date marked on the eggs is correct and that the product is marketed within 24 hours, from taking advantage of that capability. However, it must be pointed out in that regard that, as is apparent from the Court's judgment of 8 October 1986 in Case 234/85 *Keller* [1986] ECR 2897, for an infringement of that principle to occur, the Community rules which impose certain restrictions on the activities of the traders concerned must adversely affect the actual substantive content of the right freely to engage in an activity. In my view, no such breach of the substantive content of the right under consideration has occurred in this case.

15. The real problem to be resolved is, therefore, whether the Council regulation, which constitutes the outcome of an attempt to reconcile divergent interests, is internally valid or whether, in adopting that regulation, the Council committed an error which invalidated it.

16. It is clear from the preamble to the contested regulation and the details given at the hearing by the two Community institutions that the reasons which led the Community legislature to make the packing

date mandatory and to prohibit the marking of eggs with the date on which they were laid are connected with the aims of the common agricultural policy referred to in Article 39 of the EEC Treaty and are essentially as follows:

(i) to contribute to an improvement in the quality of the product;

(ii) to guarantee Community producers equivalent prospects of sale, in order to ensure a fair standard of living for them.

Added to those is the concern:

(i) to ensure that the consumer is given sufficient information;

(ii) to avoid any effect on trading conditions within the Community.

17. The Commission has pointed out in that regard that the primary aim of those rules is the second of the two aforesaid objectives, namely ensuring equivalent prospects of sale for Community producers. In that connection I would point out in the first place that, as the Court stated, in particular, in paragraph 21 of its judgment of 11 March 1987 in Joined Cases 279, 280, 285 and 286/84 *Rau* [1987] ECR 1069,

'... according to the settled case-law of the Court (judgments of 24 October 1973 in Case 5/73 *Balkan Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, of 20 October 1977 in Case 29/77 *Roquette Frères* v *France* [1977] ECR 1835 and of 6 December 1984 in Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057), in pursuing the various aims laid down in Article 39 of the Treaty, the Community institutions have a permanent duty to reconcile the individual aims. Although that duty to reconcile means that no single aim may be pursued in isolation in such a way as to make the achievement of the others impossible, the Community institutions may allow one of them temporary priority in order to satisfy the demands of the economic or other conditions in view of which their decisions are made'.

Even if the approach initially taken by the Court in its judgment of 1 July 1965 in Joined Cases 106 and 107/63 *Töpfer* [1965] ECR 405, namely that 'by subordinating the requirements of market stability to maintenance of the farmers' standard of living seemed to establish an order of priority between social purposes and economic purposes', [1] has been refined as the case-law has developed, with the result that the objectives of Article 39 need not all be achieved simultaneously and in full but must be reconciled with each other, the Court's current approach confirms the conclusion which I had reached earlier, namely that pursuit of the priority objective referred to by the Commission at the hearing cannot be seen as constituting an infringement by the Council of Article 39 of the Treaty.

Accordingly, it is possible to state, by way of initial conclusion, that although, in order to maintain equivalent conditions of production and marketing for eggs, the Community legislature selected, in the light of existing inspection methods, a type of

1 — J. Boulouis, R. M. Chevalier: *Grands arrêts de la Cour de justice des Communautés européenes*, Vol. 2, Second Edition, p. 326.

mark — the packing date — which is accessible to the largest possible number of producers and not only to a restricted group thereof, to give priority to the pursuit of that objective by means of the chosen method is not contrary to Article 39 of the Treaty and is therefore not in itself open to criticism.

18. It remains to be seen whether the pursuit of an unjustifiable objective or the 'isolation of one of the aims pursued in such a way as to make the achievement of the others impossible' could lead to a declaration of nullity.

19. One of the objectives pursued by the contested regulation is, as we have seen, the need to avoid any effect on trade within the Community. Both the Council and the Commission have laid emphasis on that objective, arguing that the prohibition on marking eggs with the date on which they were laid is justified by the requirement of freedom of movement for goods in a single market. In particular, the point was made that to mark that date on the eggs would raise further problems of inspection upon their exportation to another Member State, such as to hinder the free movement of eggs.

20. Even though I must admit that I am puzzled by that argument because I do not believe that, in itself, the admittedly fundamental principle of freedom of movement must necessarily lead to a prohibition on marking eggs with the date on which they were laid, I consider that, in pursuing that objective, especially if viewed not in isolation but in connection with the other priority objective examined earlier, the Council did not have recourse to measures which were disproportionate to the aim pursued and which were such as to constitute a defect invalidating the regulation.

21. Finally, it remains to be seen whether or not excessive consideration of one or more of the objectives referred to earlier to the detriment of another can lead to a declaration of invalidity. And that is evidently the argument advanced by Mr Paris. He has laid particular emphasis on the view that, under the pretext of ensuring the smooth operation of the market, the real aim of the regulation in question is to prevent consumers from ascertaining the precise date on which eggs were laid. Accordingly, the need to safeguard farmers' interests leads to the consequence of frustrating the legitimate expectations of consumers in ascertaining whether an egg is really fresh.

22. What are we to make of that argument? At first sight, it undeniably has the merit of drawing attention to a seemingly paradoxical state of affairs. Even on the assumption (admittedly in this area we are in the realm of assumptions and the proceedings before the Court have not produced the desired degree of clarity) that the packing date can be checked more easily and reliably than the date on which the eggs were laid, the fact remains that the packing date refers, and I ask for the Court's indulgence for this truism, only to the date on which the eggs were packed. In particular, that date cannot provide an absolute guarantee of the freshness of an egg. And the Commission, I repeat, acknowledged at the hearing that not even examination of the air chamber enables the date on which an egg was laid to be determined.

At this juncture it would seem legitimate to raise the question whether the obligation to affix a mark which does not make it possible to trace the date on which the eggs were laid, except indirectly, that is to say on

the assumption that the various provisions on gathering and labelling the eggs have all been scrupulously complied with, really is in the interest of consumers. Furthermore, in those circumstances, is there any justification for imposing a prohibition on affixing another date, namely that on which the eggs were laid, on the ground that existing technical and structural conditions in manufacturing and distribution undertakings, would render checks unreliable, when it is quite clear that the only date which can lawfully be affixed may perhaps be easier to check but is undoubtedly no more indicative of the sole factor which in the end seems to count for the consumer, that is to say whether an egg is really fresh?

23. Is the fact that the prohibition on marking eggs with the date on which they were laid may, at first sight, seem to constitute an 'over-reaction' on the part of the legislature — in the sense that a failure to abide by that prohibition would not in any event aggravate a situation which is already not very transparent for the consumer, who has to settle for a packing date which says little as regards the actual degree of freshness of the product — sufficient to support the conclusion that the balance which the Council must seek to establish amongst the various, at times conflicting, objectives has in this case been unlawfully upset?

24. In my view, no such conclusion can be drawn. The Court has consistently held that, in assessing a complex economic situation, the Community institutions enjoy a broad discretion, which is not open to criticism by the Court except in the event of a manifest error, abuse of power or where the limits of the discretion have obviously been exceeded.

25. It is apparent from the foregoing considerations that this was not the case here.

A charge which may, in the final analysis, be levelled against the contested legislation is that the choice made with regard to the markings which may be affixed on the eggshell is perhaps incapable of providing consumers with an absolute guarantee as to the freshness of the product purchased. However, marking the eggs with the date on which they were laid would not have given consumers such a guarantee either since, as we have just seen, there does not seem to be a reliable method of checking the freshness of an egg. In those circumstances, therefore, I fail to detect the characteristic features of one of the three defects referred to earlier.

26. In the light of the foregoing considerations, I propose that the Court's answer to the national court should be that Article 15 of Regulation No 2772/75 of the Council must be interpreted as imposing a prohibition on marking eggs with dates, such as the date on which they were laid, other than those provided for in the regulation and, secondly, that consideration of the question submitted to the Court has disclosed no factor of such a kind as to affect the validity of Article 15.