**provisions laying down marketing and quality standards for slaughtered poultry and enforceable by disciplinary measures are compatible with it, provided that they are compatible with the aim of the common organization of the market and applied in such a way that imports of poultrymeat lawfully produced and marketed in accordance with the marketing and quality standards in force in the other Member States are not restricted.**

Koopmans Bahlmann

Pescatore O'Keeffe Bosco

Delivered in open court in Luxembourg on 28 March 1984.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the Fourth Chamber

## OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 1 FEBRUARY 1984 [1]

*Mr President,*
*Members of the Court,*

In the two references which it has made to the Court the College van Beroep raises the same question:

"Must Article 2 of Regulation (EEC) No 2777/75 be interpreted as meaning that national provisions not based on Community law which lay down requirements as to quality for slaughtered poultry and are enforceable by means of disciplinary measures are incompatible with it?"

The question arises from infringements by two Netherlands poultry-slaughtering undertakings of certain provisions of the Netherlands regulation on quality standards (Verordening Kwaliteitseisen) which led to the imposition of disciplinary measures in the form of fines.

1 — Translated from the French.

That regulation was adopted on 24 February 1966 by the Netherlands poultry-trade board (Bedrijfschap voor de Pluimveehandel en -industrie). It applies to the wholesale trade and requires the undertakings concerned, trading in the product or acting as commission agents or intermediaries or processing the product industrially, to observe quality standards: for slaughtered poultry (part III), the standards apply in particular to the various processed states (Article 8), processing requirements (Article 9), grading by quality (Article 10), standard weight (Article 11), packaging (Articles 12 to 15) and transport and delivery (Articles 17 and 18).

At the Community level, the market in poultrymeat is governed by the common organization of the market established by Regulation (EEC) No 2777/75 of the Council of 29 October 1975, [1] which replaced Regulation (EEC) No 123/67 of the Council of 13 June 1967. [2] Slaughtered poultry, defined in Article 1 (2) (c) as "dead fowls, ducks, geese, turkeys and guinea fowls, whole, with or without offal", falls under tariff heading No 02.02 (Article 1 (1) (b)). For external trade, the regulation provides for a system of levies and refunds (Articles 3 to 13). Article 2, which governs intra-Community trade, specifies the Community measures to be adopted.

Paragraph (1) provides that: "In order to encourage action by trade and joint trade organizations to facilitate the adjustment of supply to market requirements, with the exception of action relating to withdrawal from the market, ... Community measures may be taken in respect of the products specified in Article 1 (1)" in order, in particular, to promote better organization of their production, processing and marketing and to improve their quality. Paragraph (2) provides that:

"Marketing standards:

— shall be adopted for one or more of the products specified in Article 1 (1) (b)", that is to say slaughtered poultry.

For the other products, the *second indent* of paragraph (2) states that marketing standards "may be adopted".

The matters to which the standards may relate are indicated by way of *guidance* in the same paragraph:

They "may relate in particular to grading by quality and weight, packaging, storage, transport, presentation and marketing".

They must be adopted by the Council acting by a qualified majority on a proposal from the Commission.

For the internal market, Regulation No 2777/75 of the Council therefore provides for Community measures of different scope: some are *incitative* (Article 2 (1)) or *optional* in nature (second indent of Article 2 (2): products other than slaughtered poultry); others are *mandatory* (first indent of Article 2 (2): slaughtered poultry). The first indent of Article 2 (2) is directly relevant since it is categorical as far as slaughtered poultry is concerned: the Council *must*

1 — Official Journal L 282, 1. 11. 1975, p. 77.

2 — Official Journal, English Special Edition 1967, p. 63.

adopt marketing standards. This provision was already to be found in Regulation No 123/67 but the first steps to implement it have covered very little ground since only one regulation, [1] laying down common standards for the water content of certain kinds of frozen fowl, exists at present. It was adopted "pending the adoption of more comprehensive Community rules", as the fourth recital of its preamble states with reference to Article 2 (2) of the parent regulation. It is not relied upon in this case.

A comparison of the national and Community provisions makes it possible to clarify the problem raised by the national court: the Netherlands regulation imposes certain standards on wholesalers which cover most of the areas mentioned in the second subparagraph of Article 2 (2) of Regulation No 2777/75 of the Council and which must be complied with before the relevant products may be marketed. In the absence of Community legislation laying down marketing standards for slaughtered poultry, the question therefore arises whether the Member States have the power to maintain or adopt national standards of this kind, having regard to the first indent of Article 2 (2) of Regulation No 2777/75 of the Council which, owing to its mandatory nature, appears to vest such power exclusively in the Community. Formulated in this way, the question raises two sets of problems, as is clear from the observations submitted by the Netherlands trade organization and the Commission: first, it must be inquired whether the existence of Community powers to regulate agricultural matters excludes all possibility for a Member State to take action if the regulation establishing the common organization of the relevant market has been implemented only in part; secondly, if Member States have that right, the extent of their powers in this area must be determined.

## I — Whether the Member States retain competence in the event of a failure on the part of the Community legislature to act in pursuit of the common agricultural policy

In the view of the Netherlands trade organization, only the *actual use* by the Community of the powers provided for in the first indent of Article 2 (2) can give the Community exclusive competence, especially since the Court has not ruled out the possibility for Member States to act in connection with a common organization of a market provided that certain conditions are met. The retention of competence by Member States is in any event justified where it is a question of their maintaining existing legislation in a situation in which the Community has failed to adopt common rules, especially if, as in this case, the measures provided for by the regulation establishing the common organization of the market are necessary, as is clear from the mandatory nature of the first indent of Article 2 (2).

1 — Regulation No 2967/76 of 23 November 1976, Official Journal L 339, 8. 12. 1976, p. 1.

In the Commission's view, there is some evidence to suggest that the Community legislature intended to vest in itself exclusive power to prescribe marketing standards. It also refers to the mandatory nature of the first indent of Article 2 (2), which the third recital of the preamble to Regulation No 2777/75 helps to clarify. It states that:

"... in the poultrymeat sector, in order to stabilize markets and to ensure a fair standard of living for the agricultural community concerned, provision should be made for measures to facilitate the adjustment of supply to market requirements."

Lastly, the Commission points out that Regulation No 2967/76 was adopted "pending the adoption of more comprehensive Community rules" on marketing standards (first recital), which confirms that the Community's competence is exclusive.

The Commission is, however, bound to admit the failure of the Community legislature to act in this field: except in the very limited field already referred to, the first indent of Article 2 (2) has not been implemented. Consequently, Member States must be allowed to maintain provisionally the legislation in force when the common organization of the market was established. However, they cannot amend existing legislation or adopt new legislation without encroaching on the Community's exclusive competence. Finally, the Commission makes the more general point that disparities caused by the continuing coexistence of different national legislation might distort competition.

Those observations show that both the Commission and the Netherlands trade organization take the view that the Member States therefore retain legislative power until the obligations imposed by the regulation establishing the common organization of the market are complied with. In the field of agriculture, the Court has already dealt with this problem with reference to the conservation of fishery resources.

It held that:

"... the transfer to the Community of powers in this matter being total and definitive ... (its) failure to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field". [1]

That statement of principle is followed by a corollary and a qualification:

First, national conservation measures "are maintained in the state in which they were" on 1 January 1979; [2]

The Court then went on to state that "... it is not possible to extend that idea to the point of making it entirely impossible for the Member States to amend the existing conservation measures in case of need owing to the development of the relevant biological and technological facts in this sphere." [3]

1 — Case 804/79, *Commission* v *United Kingdom*, [1981] ECR 1045, paragraph 20 at page 1073; see also, as regards the previous period, Case 32/79 [1980] ECR 2403, paragraph 10 at page 2432.

2 — Ibid., paragraph 21.

3 — Ibid., paragraph 22.

For the time being Member States have, as it were, a "substitutive" power in an area falling within the exclusive jurisdiction of the Community. The Court further held that they act "as trustees of the common interest", [1] and in that capacity are subject to the general duties arising from Article 5 (duty to cooperate) and Article 7 (duty to grant equal access to fish stocks).[2]

Reference to those principles is, I think, useful in so far as in my view they are generally applicable to any case in which the Community legislature has failed to adopt the measures which the Treaty or secondary legislation requires it to adopt by exercising a power vested in it. Whether it is a question of conserving fishery resources or establishing marketing standards for slaughtered poultry, it hardly matters whether the common organization of the market does not yet exist [3] or, if it does, is incomplete, because the absence of common rules may jeopardize the aims of the common agricultural policy, as set out in Article 39 of the Treaty, and defeat the principle laid down in the second subparagraph of Article 40 (3) of the Treaty that there must be no discrimination between producers or consumers within the Community. [4]

Consequently, the "substitutive" power of the Member States should not be excluded if exercised *in accordance with the general rules of the Treaty*, as defined, where necessary, by secondary law governing the area in question.

The power of the Member States to adopt legislation is not therefore excluded in agricultural matters if to some extent it makes up for the absence of common legislation. That conclusion brings me to the second point raised by the preliminary question referred to the Court by the College van Beroep: Under which conditions may a Member State maintain or amend marketing measures which it has itself adopted if no rules have been adopted laying down Community marketing measures provided for by the regulation establishing the common organization of the market?

## II — Limits on the action of Member States taken in the context of a market organization

I have already pointed out that Member States may retain legislative powers on the express condition that their exercice does not compromise the interests of the Community which constitutes the framework within which they must act. On the basis of that consideration the Court has, in its decisions, defined the limits on the action of the Member States where, as in the present case, a common organization of the market exists.

(a) First, the establishment by the Community of a common organization of the market means that "Member

1 — Ibid., paragraph 30.

2 — Ibid., paragraphs 28 and 29.

3 — The non-existence of a common organization of the market certainly does not amount to a legal vacuum: the general rules of the Treaty apply (see the judgment of 16. 3. 1977 in Case 68/76, *Commission* v *France*, [1977] ECR 515, paragraph 21 et seq. at page 531, and part 4 of the Opinion of Mr Advocate General Capotorti, at p. 536.

4 — Case 114/76 *Bela-Mühle Josef Bergmann KG* v *Grows-Farm GmbH & Co. KG*, [1977] ECR 1211, paragraph 6 at page 1220.

States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it".[1] Therefore, if the regulation "contains no reference, either in positive or negative terms, to the compatibility or otherwise of national regulations, present or future, with the common market organization established by its provisions",[2] the national measures must be examined to ascertain whether they are "of such a nature as to undermine the aims and objects" of the regulation.[3]

Thus, if Community legislation contains no such reference, it is necessary to prevent the aims of the organization established for the entire common market from being jeopardized. The same principles have logically been applied to an agricultural regulation which lacked certain provisions on how it was to be applied. In such a case, the "freedom allowed to the Member States cannot ... be used in such a way as to jeopardize the objective of the rules which grant it".[4]

(b) Secondly, national measures are clearly incompatible with the market organization if they allow only certain traders access to the market. In the Court's view, every common organization of a market guarantees to Community producers and consumers unrestricted access to the market in the products subject to it in so far as the provisions of Articles 30 to 34 form an integral part of the common organization of the markets,[5] which, moreover, is why the agricultural regulations do not expressly repeat the prohibitions laid down in those articles.[6]

The Court takes the view that the regulations establishing common organizations of the markets are based on the principle of an "open market",[7] that is to say on a market system which

"... in the context of the system for the free movement of goods guaranteed by the provisions of the Treaty is intended to ensure freedom of trade within the Community by the abolition both of barriers to trade and of all distortions in intra-Community trade and hence precludes any intervention by Member States in the market otherwise than as expressly laid down by the regulation itself."[8]

It follows that a common organization of a market, "based on [freedom of] commercial transactions ... is opposed to any national rule which could hinder directly or indirectly, actually or potentially, intra-Community trade".[9]

What conclusion can be drawn from those principles in the present case? Before answering that question I shall make the following remarks:

1 — Case 51/74, *Van der Hulst* v *Produktschap voor Siergewassen,* [1975] ECR 79, paragraph 25 at page 25.

2 — Ibid., paragraph 27.

3 — Ibid., paragraph 28.

4 — Case 31/78, *Bussone* v *Italian Ministry for Agriculture and Forestry,* [1978] ECR 2429, paragraph 16 at page 2442.

5 — Case 29/82, *Van Luipen,* [1983] ECR 151, paragraph 8 at page 162.

6 — Case 251/78, *Denkavit Futtermittel GmbH* v *Minister für Ernährung, Landwirtschaft und Forsten,* [1979] ECR 3369, paragraph 3 at page 3384, and Case 83/78, *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraphs 53 and 54 at pages 2370 and 2371.

7 — Case 83/78, cited above, paragraph 57.

8 — Case 177/78 *Pigs and Bacon Commission* v *McCarren and Company Limited,* [1979] ECR 2161, paragraph 14 at page 2188, and Case 83/78, cited above, paragraph 58.

9 — Case 94/79, *Vriend,* [1980] ECR 327, paragraph 8 at page 339.

The limits laid down in the decisions of the Court are closely interlocked: if, owing to the effect of national measures, access to the market is barred to some products or traders, the functioning and aims of the common organization of the market are clearly jeopardized, since its very foundation is freedom of trade;

The absence of common marketing standards for slaughtered poultry and the existence of national rules acting, as it were, as a substitute for them raise a question of compatibility as regards free access to the market;

As is demonstrated by the observations submitted in this case, there is a risk that such national rules may exclude certain products from the relevant market;

Finally, as the Netherlands trade organization and the Commission have pointed out, it is also necessary, in so far as the marketing standards apply to all products, to assess that potential danger with regard to imported products.

## III — National marketing standards and free access to the market

On the question of the effect of the Netherlands rules on domestic products I can be very brief. Their impact on imported goods will require more attention, however.

(a) When poultry slaughtered by the undertakings concerned is marketed the Verordening Kwaliteitseisen requires them to observe two sets of rules which may restrict access to the market:

Some of them (Articles 8 and 9) lay down the requirements to be met before poultry may be marketed in one of the five forms of presentation provided for (drawn poultry, undrawn poultry, and so forth);

Others define three quality grades, A, B and C (Article 10).

As the Commission has pointed out, those provisions do not exclude any customary form of presentation or quality grade. They merely regulate the processing of slaughtered poultry and make it easier for the consumer to ascertain its quality. From that point of view the Netherlands rules are, to my mind, totally in accordance with the principle of free access to the market. What, however, is the situation as far as imported products are concerned?

(b) As the Commission has pointed out, the coexistence of national laws and regulations applicable to all products, domestic or imported, adopted in the absence of common harmonization measures in the same field, creates obstacles to freedom of trade within the Community because they differ in each State. However, the Court has held that such a situation may be tolerated, provided that such national provisions are

"... necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial

transactions and the defence of the consumer"[1]

in order for a derogation from the requirements of Article 30 to be permitted. In other words, the access to a given market of imported products, which are themselves subject to marketing standards in the State of origin, may not be restricted except on the exceptional conditions laid down by the Court in the Rewe case ("Cassis de Dijon").

As I have already pointed out, Articles 30 to 34 of the Treaty form an integral part of the common market in agricultural products and to my mind nothing prevents these principles from being applied to the marketing standards governing an agricultural product.

I therefore find it possible to conclude, on the basis of all the Court's previous decisions in the agricultural field and the more general field of the free movement of goods, that, in the absence of harmonization in the relevant field by secondary law, national rules fixing marketing standards are compatible with Community law, provided that the requirements set forth above are observed.

In view of the information provided by the Netherlands trade organization and the Commission, I shall make only one short comment on the Netherlands rules which prompted the reference of the preliminary question to the Court by the College van Beroep. It is this: the systematic application to imported products of the standards laid down for slaughtered poultry in Part III of the Verordening is unquestionably an obstacle to trade within the Community; it is therefore for the national court to decide in each specific case, in the light of the requirements laid down in the Court's decisions, as I have referred to them, whether those national rules are applicable to imported products.

In conclusion, I therefore propose that, in reply to the question referred to it by the College van Beroep, the Court should declare that:

National rules which, in the absence of Community harmonization measures, make the marketing of a product covered by a common organization of the relevant market subject to the observance of certain standards, in particular quality standards, are compatible with the provisions of the regulations establishing the relevant organization of the market, provided that they are consistent with the aims of the regulation and are not contrary to the general rules of the Treaty;

The obstacles to Community trade which may result from disparities caused by the coexistence of national rules of this kind must be tolerated in so far as they are necessary in order to satisfy mandatory requirements of public interest, such as the protection of public health, fair trading and consumer protection;

It is for the national court to assess the rules in question with reference to those principles in each particular case.

1 — Case 120/78, *Rewe* v *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649, paragraph 8 at page 683; see also Case 113/80, *Commission* v *Ireland* [1981] ECR 1625, paragraph 10 at page 1639.