OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 15 MAY 1979

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My Lords,

Introductory

This case comes to the Court by way of a reference for a preliminary ruling by the High Court of Ireland (Costello J.). It concerns the compatibility of certain activities of an Irish statutory body, the Pigs and Bacon Commission (or "PBC"), with the EEC Treaty and with the common organization of the market in pigmeat.

The plaintiff in the proceedings before the High Court is the PBC. The defendant is a company called McCarron and Company Limited, which carries on business as a bacon curer at Cavan.

The economic and the legal background to the case are very fully considered in the Judgment of Costello J. and I need recall only those aspects of them that have a particular bearing on the questions referred by him to this Court and on the arguments submitted to us on those questions.

The Irish pigmeat industry is small in relation to that of the Community as a whole. In 1976 pig production in Ireland amounted to 1.5 % of Community production. Ireland had formerly a large number of pig processing factories (40 in 1965) but that number has, by a deliberate policy of "rationalization", now been reduced to 28. Their production is however, on average, still small in scale. Altogether they deal in

approximately 1½ million pigs per annum.

The principal product of the Irish factories is bacon. The distinctive process used in the production of bacon, known as "curing", was described in the answer given by the Irish Government to one af the written questions put by the Court to the parties. It consists essentially in the treatment of trimmed pork sides with a brine solution; the meat may subsequently be smoked. We were also told in that answer that pig carcases that are destined for processing into bacon are readily distinguishable from other carcases because they are subject to a system of marking supervised by officers of the Department of Agriculture at the premises of licensed bacon curers.

Bacon is graded according to its leanness and there are certain high grades known as "specials" which are particulary relevant in these proceedings.

The pattern of the Irish home and export trade is illustrated by figures for 1976. Of the pigs slaughtered in Ireland during that year, 55 % were disposed of on the home bacon market, 19 % on the export bacon market, 10 % on the home pork market, and 12 % on the export pork market, with the remaining 4 % representing by-products. According to figures given to us at the hearing, in answer to a question from one of Your Lordships, 85 % of Irish bacon exports are of "specials" and one-third of the bacon sold on the home market consists of "specials". Virtually all Irish bacon exports are to the United Kingdom, where they accounted for 2 % of the market in 1976 and 4 % in 1977. The other suppliers of the United Kingdom market are British, Danish, Dutch and Polish producers. Pork is exported from Ireland to *inter alia* Belgium, France, Germany and Italy; more recently, a market has been opened up in Japan.

National measures for the organization of the pigmeat market were first introduced in Ireland by the Pigs and Bacon Act 1935, which was followed by amending Acts of 1937, 1939, 1956 and 1961. The purpose of the national measures was to stabilize the market, which had previously been subject to violent fluctuations, and thereby, in the words of the learned Judge, to "ensure orderly (and reasonably profitable) production". One of the requirements laid down by the Act of 1935 was that any undertaking engaged in curing bacon must hold a licence from the Minister of Agriculture.

The PBC was established by section 4 of the Act of 1939. It was given wide powers in relation to the regulation and control of the production and marketing of pigmeat. Those powers included a power under section 34 of the Act of 1939 to impose on licensed bacon curers a levy in respect of every pig carcase used for the production of bacon. In describing the further powers of the PBC, the learned Judge says:

"The PBC was empowered to pay subsidies on bacon exported or bacon sold on the home market. It had direct

control over the production of bacon by a power to fix production periods and allot production quotas amongst individual curers, and in addition it could allot amongst curers the amount of bacon to be sold by each on the home market and the amount to be exported. It could fix prices both for pigs and bacon, and prohibit sales at other than the authorised prices. Its ability to control the pigmeat industry and the production and marketing of bacon was extensive and, indeed, all-embracing".

A further power of importance in this case was conferred on the PBC in 1961. In the words of the learned Judge:

"By the Pigs and Bacon (Amendment) Act of that year the PBC was empowered itself to engage in the export of bacon and to require by law licensed curers to sell bacon to it (section 23), and at the sanction of the Minister for Agriculture could prohibit the exportation of bacon except through the PBC. By 1965 these powers were being fully operated, and from that time on the PBC became a trading organization engaged in the export of pigmeat. All exports of pigmeat from the State were required by law to be carried out by the PBC, as a result of which it became a state monopoly for the export of pigmeat".

In addition, the PBC "was given specific powers to carry out promotional activities inside and outside the State, and its powers to grade bacon and maintain standards were supervised by inspectors appointed by it who were placed in the factories of licensed curers".

During the period immediately preceding the accession of Ireland to the European Communities Irish bacon exports benefited from two different types of subsidy. One consisted in a system of guaranteed export prices, under which the difference between the guaranteed price and the actual price on export was made up by the PBC. The other consisted in a bonus scheme, introduced in 1970, in respect of exports of bacon in the "specials" grades. The guaranteed export price was partly, and the bonus scheme entirely, financed out of the production levy, which at the beginning of 1973 stood at £1.15 per carcase. The proceeds of the levy were divided at that time as follows: 72 ½ p towards the guaranteed export price; 20 p toward the export bonus on specials; 12 ½ p towards administrative costs; and 10 p towards the cost of the scheme for the rationalization of bacon production.

It is common ground that the Irish authorities strove to adapt those arrangements to the requirements of the common organization of the market for pigmeat from the time when the latter entered into full force in Ireland on 1 February 1973. The Pigs and Bacon Acts were not amended but the Minister of Agriculture and the PBC ceased to exercise such of their statutory powers as were considered incompatible with Ireland's membership of the Communities. The powers renounced by the PBC include those to fix production periods and sales periods, and to fix quotas for home-market and export sales. The system of guaranteed export

prices also came to an end, as did the prohibition of exports otherwise than through the PBC.

The main features of what was to be the new system were agreed at a meeting on 11 January 1973 between representatives of the PBC, the Department of Agriculture and the Irish Bacon Curers' Society. The curers agreed to continue on a voluntary basis to use the PBC as a central marketing agency for their bacon exports. The PBC was to continue to raise the levy on all carcases used in the production of bacon, while granting the export bonus on "specials" to those curers who took advantage of its services as a marketing agency. Thus, as the learned Judge observed, the arrangements have a voluntary aspect "in the sense that the central marketing system is maintained by agreement with the producers of bacon who may or may not avail of its services", and a compulsory aspect "in the sense that all curers are required to pay by means of levy for the maintenance of the system, but will forfeit the refund (the bonus) if they decide to export independently of the PBC".

The PBC continued to carry out certain other activities for the benefit of the bacon industry. These have been variously described to us. They include sales promotion, market investigation, quality control, the provision of educational and instructional services, and research into production methods. I shall for convenience refer to them as the "promotional activities" of the PBC. The learned Judge stressed that they were of secondary importance.

The PBC also continued to administer the rationalization scheme.

The abolition of the system of guaranteed export prices enabled the amount of the levy to be reduced as from 1 February 1973. It became 50 p per carcase, of which 20 p represented the cost of the export bonus, 20 p what the learned Judge describes as "administrative costs of the PBC" and 10 p the cost of the rationalization scheme.

There has since 1973 been a series of increases in the amount of the levy and in the amount of the bonus. At 1 January 1978 the levy stood at £1.30, of which 80 p represented the cost of the bonus. The Irish Government and the PBC have sought to explain those increases as a normal response to inflation. The learned Judge makes it clear, however, that they were due in part at least to other factors.

He found that there was a change in the structure of the levy/bonus system in October 1974. This consisted in the introduction of a "base line bonus" in addition to the existing bonus. The "base line bonus" was paid in respect of exports over and above a "base line" predetermined for each producer. To pay for it the levy was increased by 20 p. The system was again altered in 1977. The concept of the "base line" was then abandoned and the two bonuses were added together. They are now both payable in respect of all exports of "specials" effected through the PBC.

Another factor contributing to an increase in the amount of the levy was the need to compensate for the loss suffered by the PBC as the result of an

attempt on its part to engage in wholesale trading on the British market. For that purpose the PBC, in 1975, acquired an existing business, called Bearfield Stratfield. The venture was a failure and was discontinued in July 1976. In 1977, 10 p was added to the levy in order to write off the investment in Bearfield Stratfield.

The learned Judge also records as a change in the levy/bonus system the fact that, for a time in 1974, part of the proceeds of the levy was used to pay a bonus on exports of pork to Japan.

For the sake of completeness I should mention that the learned Judge found that the levy/bonus system benefited the majority of pig producers and of pigmeat processors in Ireland; that it was supported by them (evidence was indeed placed before this Court to that effect); that it did not to any appreciable extent affect consumer interests in Ireland or elsewhere in the Community; nor did it affect Community prices; but that it did hinder and restrict exports from Ireland by firms wishing to export independently of the PBC.

The present case

The present proceedings before the High Court in Dublin have arisen because the defendant gave notice of withdrawal "from the Pigs and Bacon Commission" as from 30 April 1975, since when it has exported independently and refused to pay the levy. The actual claim by the PBC is for a sum of £ 28 594 in respect of the levy from 1 January 1975 to 30 September 1975. The defendant has counterclaimed for a sum of £ 52 787 representing the amounts which it paid to the PBC by way of levy between 1 February 1973 and 31 December 1974. Depending on the outcome of the proceedings, further claims may arise in respect of the period after September 1975.

The defendant does not deny that under the relevant Irish law it is liable to pay the levy, but contends that Community law absolves it from such liability.

Of the facts found by the learned Judge relating to the specific situation of the defendant, the following seem to me of significance.

First, the defendant's factory, which is one of the largest in Ireland, is in County Cavan, not far from the East coast ports, which means that it is well placed for exporting to Great Britain. The export of high quality bacon to the British market had been a feature of the defendant's business before it was restricted to exporting through the PBC.

Secondly, the defendant, during the period from 1 February 1973 to 30 April 1975, not only paid the amount of levy that is the subject of the counterclaim but also received payments of bonus totalling £18 823.

Thirdly, the defendant has obtained a better return on its exports since April 1975 than it would have done if it had continued to export through the PBC, even allowing for the fact that it has received no bonus. But its ability to export successfully would be restricted to a significant degree if it were required to

pay the levy. Indeed the learned Judge expressed himself as being satisfied that, if the defendant were required by law to pay the levy, it would find it increasingly difficult "to remain outside the system".

Lastly, the defendant and the PBC are competitors on the United Kingdom market.

In support of its contention that the levy/bonus system infringes Community law, the defendant invoked in the High Court a wide range of provisions of that law. Those provisions were:

(i) Article 16 of the EEC Treaty, forbidding as between Member States customs duties on exports and charges having equivalent effect;

(ii) Article 34 of the Treaty, forbidding as between Member States quantitative restrictions on exports and all measures having equivalent effect;

(iii) Article 37 of the Treaty, relating to State monopolies of a commercial character;

(iv) Article 40 of the Treaty, relating to the common agricultural policy, and the Regulations of the Council establishing the common organization of the market in pigmeat;

(v) Article 85 of the Treaty, forbidding agreements restricting competition in the common market;

(vi) Article 86 of the Treaty, forbidding any abuse of a dominant position within the common market;

(vii) Article 92 to 94 of the Treaty, relating to aids granted by Member States.

To counter that contention the PBC relied primarily, though not exclusively, on Articles 92 to 94, arguing that the levy/bonus system was one of State aid, the compatibility of which with the common market could, under those Articles, be decided upon only by the Commission or the Council. In the absence of any act of either of those Institutions condemning the system, it was beyond the jurisdiction of a national court or indeed of this Court to adjudicate upon the matter. The PBC further submitted that, even if a particular aspect of a State aid infringed the Treaty, a levy used to finance that aid would not for that reason be unlawful.

Such are the circumstances in which the learned Judge decided to refer to this Court no fewer than 10 questions, many of which are sub-divided, some of them elaborately. Between them those questions raise a formidable complex of issues.

The Commission has submitted that, in a case like this arising in an agricultural sector where there is a common organization of the market, consideration should first be given to the question of the compatibility with that organization of the national rules of which the lawfulness has been challenged. That approach has much to commend it, because, as this Court pointed out in Case 83/78 *Pigs Marketing Board (Northern Ireland)* v *Redmond* [1978] ECR 2347, to which I shall refer for short as "the *Redmond* case":

"It follows from Article 38 (2) of the EEC Treaty that the provisions of the Treaty relating to the common agri-

cultural policy have precedence, in case of any discrepancy, over the other rules relating to the establishment of the common market." (Paragraph 37 of the Judgment).

None the less I find it convenient to deal with the learned Judge's questions in the order in which he has put them. If I may say so with respect, I find that order, having regard to the arguments that have been presented in this case, logical. It must be borne in mind that no question was raised in the *Redmond* case about Articles 92 to 94. In contrast, those Articles have been in the forefront of the argument in this case. One argument put forward on behalf of the defendant in reliance on Article 93 (3) would lead to the conclusion that the whole of the levy was unlawful, whereas its arguments based on the provisions of the common organization of the market in pigmeat can lead, at most, only to the conclusion that part of the levy (the part destined to finance the bonus) is unlawful.

Articles 92 to 94 of the EEC Treaty

Your Lordships will remember that, by virtue of Article 42 of the Treaty, the provisions of the Chapter relating to rules on competition, which includes Articles 92 to 94, apply to production of and trade in agricultural products only to the extent determined by the Council under Article 43. For present purposes it is sufficient to recall that the Regulations establishing the common organization of the market in pigmeat, of which the first was Council Regulation No 121/67/EEC and which are now consolidated by Council Regulation (EEC) No 2759/75, render Articles 92 to 94 applicable to the production of and trade in the products subject to that organization — see Article 21 of respectively Regulation No 121/67 and Regulation No 2759/75, both of which, however, begin with the words "Save as otherwise provided in this Regulation". That qualification is important in relation to the question of "precedence" as between the provisions of Articles 92 to 94 on the one hand and those of the common organization of the market on the other.

Article 60 (1) of the Act of Accession provided that, in respect of products covered on the date of accession (i.e. 1 January 1973) by a common organization of the market, "the system applicable in the Community as originally constituted in respect of customs duties and charges having equivalent effect and quantitative restrictions and measures having equivalent effect" should, with certain immaterial qualifications, apply in the new Member States from 1 February 1973. There was nothing, however, to defer until the latter date the entry into force in the new Member States of Articles 92 to 94 as regards products covered by a common organization of the market.

Before I advert to the questions put by the learned Judge I must also note an argument advanced on behalf of the defendant to the effect that the levy/bonus system operated by the PBC, as distinct from its promotional activities and the rationalization scheme, should not be regarded as a State aid falling within Articles 92 to 94 at all, because it is an adjunct to the PBC's activity as a central exporting agency, which is a commercial enterprise run for the benefit of a specific group of producers at their wish.

In my opinion those circumstances are not such as to exclude the application of Article 92. As the Court said in Case 173/73 *Italy* v *Commission* [1974] ECR 709 (paragraph 13 of the Judgment):

"The aim of Article 92 is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods.

Accordingly, Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects."

And again in Case 78/76 *Steinike & Weinlig* v *Germany* [1977] ECR 595 (in paragraph 21 of the Judgment) the Court said:

"The prohibition contained in Article 92 (1) covers all aid granted by a Member State or through State resources without it being necessary to make the distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid. In applying Article 92 regard must primarily be had to the effects of the aid on undertakings or producers favoured and not the status of the institutions entrusted with the distribution and administration of the aid."

So I turn to the questions put by the learned Judge.

The first is in these terms:

"(1) (a) Whether *Articles 92 and 93* are to be interpreted as imposing an obligation to inform the Commission under paragraph 3 of Article 93 of the agreement entered into as to the marketing system which would operate after 1 February 1973, and/or of the changes in the system which occurred since February 1973?

(b) If so, whether the failure to inform the Commission means that the system was invalid for some or all of the period since 1973?

If the answers to (a) and (b) are in the affirmative, whether the levy is payable for the period of invalidity?"

That question reflects a main and an alternative submission put forward on behalf of the defendant.

The main submission was that, if the levy/bonus system is a State aid within Articles 92 and 94, it is invalid because Ireland never informed the Commission of it under Article 93 (3) of the Treaty. The defendant says that, Ireland having joined the Community on 1 January 1973, neither a new aid introduced in Ireland after that date nor any alteration made after that date in an aid existing before that date could be valid unless the Commission were informed of it "in sufficient time" for the purposes of Article 93 (3). There was no such notification to the Commission of the arrangements that were agreed upon at the meeting on 11 January 1973 and brought into force on 1 February 1973. Those arrangements constituted a new aid or, at least, alterations in an existing aid. Therefore the whole system instituted under those arrangements was unlawful.

The defendant's alternative submission is that at least the subsequent changes in the system, none of which was notified to the Commission under Article 93 (3), were unlawful. those changes included, besides the periodic increases in the amounts of the levy and of the bonus, the introduction of the "base line bonus", the payment of bonus on exports of pork to Japan and the Bearfield Stratfield episode.

It has not been suggested on behalf of the PBC or of the Irish Government that any relevant notification under Article 93 (3) was made to the Commission. The documents annexed to the Irish Government's and to the Commission's written Observations in this Court show that some information about the PBC's activities was given by the Irish Government to the Commission, but that information is sketchy and the inference from the documents is that it was given in response to enquiries made by the Commission pursuant to Article 93 (1).

The submissions of the PBC and of the Irish Government were to the effect that there had been, after 1 January 1973, no introduction of a new aid and no alteration of an existing aid substantial enough to require notification under Article 93 (3).

It is not in my opinion for this Court to choose between those rival submissions. To do so would involve applying the relevant principles of Community law to the actual facts of the case, a task that must be left to the Irish Courts. But it is this Court's function to give to the Irish Courts guidance as to what those principles are.

The purpose of the requirement in Article 93 (3) that a Member State proposing to introduce a new aid or to alter an existing one should first inform the Commission of its plans is of course to enable the Commission to take steps that may result in the implementation of those plans being forbidden under Article 93 (2). That being so, I do not think that the reference in Article 93 (3) to the alteration of an aid can be interpreted as extending to its abolition or reduction. It is no part of the functions of the Commission (or of the Council) under Article 93 (2) to forbid the abolition or the reduction of an aid.

It seems to me that it might well be found that in fact what was agreed upon on 11 January 1973 and brought into effect on 1 February of that year amounted to a reduction in the scope of the relevant aid. If so, and if I am right on the law, Ireland was under no obligation to inform the Commission of what was then proposed and there was no breach of Article 93 (3) at that stage. But it will be for the High Court of Ireland to make, if it is a proper one to make, the finding of fact leading to that conclusion.

As to the subsequent changes, I, for my part, cannot accept the view put forward on behalf of the PBC and of the Irish Government that they can be dismissed from consideration as "minor changes in administration and minor increases in monetary amounts" (Transcript p. 7). In

my opinion there is every danger that the adoption of such elastic formulae to interpret Article 93 (3) would, in practice, lead to its object being defeated. Nor is there anything in its wording to warrant such an interpretation. I would accept of course, on the basis of a familiar general principle of law ("de minimis non curat lex"), that an alteration that can properly be described as negligible may be ignored for the purposes of that provision. I would accept too that, in the case of a pecuniary aid granted in accordance with a formula, automatic increases in amounts resulting from the operation of the formula in inflationary conditions (as distinct from increases resulting from a change in the formula) would not be alterations in the aid within Article 93 (3). But, in my opinion, there is in general no reason to interpret Article 93 (3) otherwise than strictly. On this point the PBC relied a great deal on Case 2/73 *Geddo* v *Ente Nazionale Risi* [1973] ECR 865. No question was however raised or decided in that case about the interpretation of any of the provisions of Articles 92 to 94. It is therefore not, in my opinion, a relevant authority.

It was submitted to us, particularly on behalf of the Irish Government, that, even if the payment of the bonus was unlawful for want of compliance with Article 93 (3), the legality of the levy was left untouched. Manifestly, where an aid is paid for out of general taxation, the method of its financing is not for scrutiny under Articles 92 to 94. But Case 47/69 *France* v *Commission* [1970] ECR 487 shows that the position is different where the aid is financed out of an impost levied specifically for the purpose, for, then, an aid that may be innocuous in itself may be rendered "incompatible with the common market" by the method of its financing. In such a case the Commission must, under Article 92 and 93, assess the situation as a whole, including the method of financing the aid. It follows that the Commission must be informed of the method of financing under Article 93 (3).

That the grant of an aid or the alteration of an aid in breach of Article 93 (3) is unlawful, and that that provision has direct effect in the sense that private persons are entitled to rely on it in the national Courts, are propositions established by decisions of this Court so numerous and so familiar that it is unnecessary to cite them.

Accordingly I am of the opinion that, in answer to the first question referred to the Court by the learned Judge, Your Lordships should rule that:

(a) Article 93 (3) of the EEC Treaty imposes on a Member State an obligation to inform the Commission of any plants to grant or alter an aid, as distinct from plans to abolish or reduce one. A proposed

alteration that may properly be described as negligible is not within the scope of that obligation, but otherwise Article 93 (3) is to be interpreted strictly.

(b) Where an aid is granted or altered in breach of Article 93 (3), the aid or its alteration (as the case may be) is unlawful.

(c) Where an aid is financed out of an impost levied specifically for the purpose, as distinct from out of general taxation, the method of financing it is within the scope of Article 93 (3). In such case, liability to pay the impost may not be enforced in a national court in so far as the impost has been introduced or altered in breach of that provision.

The learned Judge's second question is this:

"(2) If the answer to (1) (a) is in the negative, whether *Article 92* is to be interpreted as imposing an obligation on a national court where it considers that a State aid may be incompatible with *Article 92* to refer to the European Court of Justice for decision the question whether the marketing system is incompatible with the provisions of Article 92 (1) and (2) and if the question is answered affirmatively by that Court whether the national court should then stay proceedings before it pending an adjudication on the system by the Commission under Article 93?"

It is trite law that:

"Whilst, for projects introducing new aids or altering existing ones, the last sentence of Article 93 (3) establishes procedural criteria which the national court can appraise, the same does not hold true for existing systems of aid referred to in Article 93 (1).

With regard to such aids, the provisions of Article 92 (1) are intended to take effect in the legal systems of Member States, so that they may be invoked before national courts, where they have been put in concrete form by acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article 93 (2)." (Case 77/72 *Capolongo v Maya* [1973] ECR 611, paragraph 6 of the Judgment.

That principle was further explained in Case 78/76 *Steinike & Weinlig* v *Germany* [1977] ECR 595 (paragraphs 5 to 15 of the Jugdment) where the Court said that a national court was not prevented, because of the special machinery in Article 93, from seeking a preliminary ruling on the interpretation of Article 92, for instance when it had to decide whether a State measure amounted to an aid which ought to have been notified to the Commission under Article 93 (3). What a national court

may not do, however, is to apply the criteria in Article 92 in order to determine the compatibility of an aid with the common market, in the absence of any specifically relevant decision of the Commission or act of the Council.

The learned Judge's question reflects an argument put forward on behalf of the defendant which was on the following lines. Article 5 of the EEC Treaty imposes on all Member States and, therefore, on their national courts, a general obligation to ensure the fulfilment of the objectives of the Treaty. Accordingly, if a national court suspects that a provision of national law is potentially in conflict with Article 92, it is under an obligation to refrain from enforcing that law until it has been satisfied that no such incompatibility exists. That may require the court to stay proceedings before it until the Commission has ruled on the question of compatibility under Article 93. At the very least, Article 92 must be interpreted in the case of existing aids as according to the national court a discretion to refuse to enforce a national system or measure which is suspected of being incompatible with the common market until a decision about it is forthcoming from the Commission. Otherwise a national court would be obliged, agaist its better judgment, to enforce provisions of national law which afterwards turned out to have been illegal.

In my opinion that argument is misconceived. An "existing" aid, lawfully introduced, remains entirely lawful unless and until the Commission decides under Article 93 (2) that the Member State concerned is to abolish or alter it; indeed, even then, it remains lawful until the expiration of the period of time prescribed by the Commission for its abolition or alteration. As I ventured to point out in Case 173/73 *Italy* v *Commission* [1974] ECR at p. 723, and as indeed is implicit in the Judgment of the Court in that case, such a decision of the Commission cannot have any retroactive or declaratory effect. It follows that a national court is under no obligation, nor has it any discretion, to refuse to enforce a national law providing for such an aid pending a decision of the Commission as to the compatibility of that aid with the common market. It follows likewise that it would be inappropriate for that court to refer to this Court any question as to the compatibility of the aid with the common market. (In Case 70/72 *Commission* v *Germany* [1973] ECR 813 (paragraph 13 of the Judgment) the Court mentioned the possibility for the Commission to make a retroactive decision under Article 93 (2) but that was in the context of an aid introduced or continued in force in breach of the Treaty).

I am accordingly of the opinion that Your Lordships should answer the learned Judge's second question by ruling that, so far as Articles 92 and 93 are concerned, an aid granted by a Member State otherwise than in breach

of Article 93 (3) remains lawful until the Commission has decided under Article 93 (2) that it is to be abolished or altered and until the period prescribed by the Commission for that purpose has expired; that such a decision has effect only for the future; and that, therefore, no question as to the compatibility of the aid with the common market prior to the decision taking effect can be for consideration by a national court.

I do not think that I need read the full text of the learned Judge's third question. Essentially it is directed to the issues raised by the PBC's primary argument that, as a system of State aid, the activities of the PBC are immune from challenge under any provision of the Treaty other than Articles 92 to 94, and to its further argument that, even if a particular aspect of the system of aid infringes the Treaty, the levy used to finance the aid is nonetheless payable.

The authority relied on by the PBC in support of its primary argument is Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557. There are certainly dicta in the Judgment of the Court in that case which, if taken by themselves, could be interpreted as meaning that once a measure or complex of measures adopted by a Member State has been classified as a system of aid, no aspect of it may be challenged under any provision of Community law other than Articles 92 to 94 unless it is an aspect that is not necessary for the attainment of the object of the aid or for its proper functioning. Case 91/78 *Hansen* v *HZA Flensburg* (13 March 1979, not yet reported) shows however that that interpretation would be wrong (see in particular paragraph 9 of the Judgment). It was there held that the same measure may fall foul both of Article 37 of the Treaty and of Articles 92 and 93. The essential point decided in the *Iannelli* case, so far as here material, was that Article 30 of the Treaty forbidding, as between Member States, quantitative restrictions on imports and all measures having equivalent effect could not be interpreted so widely as to extend to obstacles to trade which, as such, were covered by Articles 92 and 93. In reaching that conclusion the Court had regard to the circumstance that otherwise the provisions of Articles 92 to 94 would be rendered largely inoperative. The true principle is thus, in my opinion, that the question whether and to what extent a provision of Community law other than Articles 92 to 94 can apply to a system of aids at the same time as those Articles is a question of interpretation of that provision itself, and that it must be interpreted in the light of the contents of Articles 92 to 94. The question whether the method of financing an aid is incompatible with some provision of Community law other than Articles 92 to 94 is also, in my opinion, one of interpretation of that provision.

I am accordingly of the opinion that Your Lordships should answer the learned Judge's third question by ruling that the circumstances that Articles 92 and 93 apply to an aid does not of itself render every aspect of the aid (including the method of financing it) immune from challenge in a national court under any other provision of Community law.

Article 16 of the treaty

The learned Judge's fourth question is:

"(4) Is *Article 16* to be interpreted as meaning that if the operation of the marketing system referred to above results in a restriction or hindrance of exports by firms independently of the central marketing agency that a violation of this Article has occurred and the levy payable to finance the system is irrecoverable?"

This Court has over and over again defined a charge having an effect equivalent to a customs duty, be it on imports or exports, as one which is imposed on goods "by reason of the fact that they cross a frontier" (see for instance Case 63/74 the *Cadsky* case [1975] ECR 281, paragraphs 4 and 5 of the Judgment; Case 87/75 the *Bresciani* case [1976] ECR 129, paragraphs 8 and 9 of the Judgment; and Case 78/76 *Steinike & Weinlig* v *Germany* [1977] ECR 595, paragraph 29 of the Judgment).

Here, Your Lordships will have it in mind, the levy is imposed on all bacon produced in Ireland, but the bonus is paid only on "specials" so produced exported through the PBC. The net result is that the levy is charged at a higher rate on bacon sold in the home market, on bacon exported independently of the PBC and on bacon other than "specials" exported through the PBC. In my opinion, that being so, it would be an abuse of language to describe the levy/bonus system as a charge on exports. The figures that I cited earlier show that the greater part of it is a burden on home sales.

I am accordingly of the opinion that Your Lordships should answer the learned Judge's fourth question by ruling that Article 16 does not apply to a system under which a levy is imposed on the totality of a Member State's production of a particular kind of goods and the proceeds of the levy are

used (in whole or in part) to pay a subsidy on exports of certain of those goods effected through a prescribed agency to the exclusion of other exports and of sales in the home market.

Article 34 of the Treaty

The learned Judge's fifth question is:

"(5) Is *Article 34* to be interpreted as meaning that if the operation of the marketing system referred to above restricts or hinders exports by firms independently of the central marketing agency that a violation of this article has occurred and that the levy payable as part of the system is irrecoverable?"

In submitting that an affirmative answer should be given to that question the defendant found an ally in the Commission. Both referred to this Court's familiar ruling in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837:

"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."

The authors of the Treaty, however, drew a distinction between pecuniary obstacles to trade and obstacles of other kinds. The former they called "customs duties and charges having equivalent effect" and they dealt with, so far as trade between Member States was concerned, in Articles 12 to 17 of the Treaty. The latter they called "quantitative restrictions and measures having equivalent effect" and they dealt with, so far as trade between Member States was concerned, in Articles 30 to 36 of the Treaty. The distinction was underlined by this Court in Case 7/68 *Commission* v *Italy* [1968] ECR 423, where the Court also pointed out, as it has done in many other cases, that "customs duties and charges having equivalent effect" are not limited to those of a fiscal character.

There is no case in which the Court has held that a pecuniary obstacle to trade (by which I mean a direct pecuniary burden, not measures such as price controls which may indirectly hinder trade) can constitute a measure having equivalent effect to a quantitative restriction. In Case 2/73 the *Geddo* case [1973] ECR 865 the Court suggested that it could not (see paragraph 7 of the Judgment) and in Case 74/76 the *Iannelli* case [1977] ECR 557 the Court stated that "... obstacles which are of a fiscal nature or have equivalent effect and are covered by Articles 9 to 16 and 95 of the Treaty do not fall within the prohibition in Article 30".

In my opinion to hold that a pecuniary obstacle to trade could constitute a measure having equivalent effect to a quantitative restriction would be to strain the meaning of words and to disregard the structure of the Treaty. Nor can it be

argued that the concepts "customs duties and charges having equivalent effect" and "quantitative restrictions and measures having equivalent effect" must between them embrace all obstacles to trade (so that, if a measure is not within the former, it must be within the latter) because, if so, numerous other provisions of the Treaty (e.g. Article 95) would be otiose.

I am therefore of the opinion that Your Lordships should answer the learned Judge's fifth question by ruling that Article 34 of the Treaty does not apply to obstacles to trade that are of a pecuniary character.

Article 37 of the Treaty and Article 44 of the Act of Accession

Your Lordships will remember that Article 44 (1) of the Act of Accession provides:

"The new Member States shall progressively adjust State monopolies of a commercial character within the meaning of Article 37 (1) of the EEC Treaty so as to ensure that by 31 December 1977 no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States."

The defendant, as I understand it, concedes — certainly it must concede — that, as a result of that provision, Articles 37 (1) had direct effect in Ireland only after 31 December 1977. The defendant however relies on Article 37 (2), which requires Member States to refrain from introducing any new measure contrary to the principles laid down in Article 37 (1). Article 37 (2) has undoubtedly had direct effect in the new Member States as from the date of accession. The defendant submits that the arrangements adopted by the PBC as from 1 February 1973 amounted to the introduction of such a new measure, in breach of Article 37 (2).

Having regard to that submission, and also to the circumstance that, although the claim and the counterclaim in the present proceedings relate wholly to periods before 31 December 1977, the PBC's claim against the defendant is a continuing one, the learned Judge has formulated his sixth question as follows:

"(6) Are *Article 37 of the Treaty and Article 44 of the Act of Accession* to be interpreted as meaning that the operation of the new marketing system referred to above meets the obligations imposed by those Articles, (a) up to 31 December 1977 and (b) since that time. If not, is the levy which is paid as part of the system recoverable from 1 February 1973 to 31 December 1977, or (b) since that date?"

That question gave rise before us to arguments centering on three points:

(i) Whether the PBC was a monopoly to which Article 37 applied;

(ii) Whether, if so, it could be said that as a result of the levy/bonus system "discrimination regarding the

conditions under which goods are procured and marketed exists between nationals of Member States"; and

(iii) Whether, if so, the defendant could rely on the consequent breach of Article 37 in respect of any period before 31 December 1977.

On point (i) the argument of the PBC and of the Irish Government was essentially that, although the PBC might have been a monopoly before 1 February 1973, it had ceased to be so on that date, because since that date it had exercised no control over the home market and had permitted exports otherwise than through its own agency (albeit, in the case of "specials", at the cost of the loss of the bonus). That argument is attractive, but it seems to me to overlook the second subparagraph of Article 37 (1), which renders Article 37 applicable "to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States". In the light of the findings of the learned Judge, it seems to me difficult to deny that the PBC does appreciably influence exports of bacon from Ireland.

A more radical argument, put forward by the Commission, was that Article 37 does not apply at all in an agricultural sector which is subject to a common organization of the market. In support of that view the Commission referred to Case 82/71 the *SAIL* case [1972] ECR 119 and to the *Redmond* case, where the Court, after pointing out, in the paragraph of its Judgment that I quoted earlier, that by virtue of Article 38 (2) of the Treaty, the provisions relating to the common agricultural policy have precedence, in the case of any discrepancy, over other rules relating to the establishment of the common market, continued:

"The specific provisions creating a common organization of the market therefore have precedence in the sector in question over the system laid down in Article 37 in favour of State monopolies of a commercial character.

Consequently the special time-limit laid down by Article 44 of the Act of Accession cannot be relied on so as to cover national rules and the action of a national body such as the Board, relating to a sector for which a common organization of the market exists.

It is therefore irrelevant whether the Pigs Marketing Scheme and the Board have the character of a 'State monopoly' within the meaning of Article 37, as the application of that provision was in any case excluded as from 1 February 1973 by the effect of the extension to the United Kingdom of the common organization of the market in pigmeat." (Paragraphs 38 to 40 of the Judgment).

I do not agree with the Commission's interpretation of that passage. In my opinion, having regard in particular to the context in which it is to be found, it means only that Article 37 of the Treaty and Article 44 to the Act of Accession cannot be invoked by a new Member State as absolving it from the obligation to give full effect as from 1 February 1973 to the rules of a common organization of the market for an agricultural product. In so far, however, as Articles 37 and 44 may add to those rules, in the

sense of imposing on Member States, as regards monopolies, obligations as to which those rules are themselves silent, they remain, in my opinion, fully effective.

On point (ii) the defendant submitted to the learned Judge (I quote from his Judgment) that the levy/bonus system created discrimination "in the export market to which the goods are consigned against similar goods marketed by the nationals of other Member States". Before this Court the defendant submitted that there was discrimination within the meaning of Article 37 (1) "because of the disadvantage at which the defendant is placed as against exporters dealing through the PBC".

That the levy/bonus system is in a sense discriminatory is manifest. The question is whether the discrimination that it involves is of a kind forbidden by Article 37.

The defendant relied on Case 59/75 the *Manghera* case [1976] ECR 91, in which the Court held that a State monopoly's exclusive right to import constituted discrimination of a kind forbidden by Article 37 (1), because it inhibited the free movement of goods from other Member States and so discriminated against their exporters. It might be held that, for converse reasons, Article 37 (1) also invalidated a monopoly's exclusive right to export. The present case is not however concerned with such an exclusive right, but with a system of which the effect is to operate as a financial deterrent to exports of certain goods otherwise than through the body deemed to be a "monopoly".

I would find it difficult to accept the defendant's submission, put forward before the learned Judge, that that system discriminated against nationals of other Member States. No doubt it interferes with competition from them, but to say that it discriminates against them would seem to me unduly to stretch the meaning of the word "discrimination".

There remains the question whether the system discriminates as between Irish exporters in a way that infringes Article 37 (1). I have, after some hesitation, come to the conclusion that it does not. I leave aside the question whether Article 37 (1) relates at all to discrimination between nationals, or between products, of a single Member State. The crux seems to me to be that the "conditions" under which the "goods" produced by Irish bacon curers may be "marketed" are the same for all of them. They may freely sell their goods on the home market and may freely export. The only difference is that if they choose to export "specials" through the PBC they will receive the bonus, whilst if they choose to export "specials" independently they will not. That choice is, however, available to all of them indiscriminately.

Taking, as I do, that view on point (ii), I can only say as to point (iii) that in my opinion it does not arise. Only if one were of the opinion that there had been a breach by Ireland of Article 37 could one say at what date that breach was committed.

I am accordingly of the opinion that Your Lordships should answer the learned Judge's sixth question by ruling that Article 37 of the Treaty is not infringed by a Member State where the conditions under which goods may be marketed are the same for all concerned.

Article 40 of the Treaty and the common organization of the market in pigmeat

The learned Judge's seventh question is in these terms:

"(7) Are *Article 40* and *Regulation No 2759/75* to be interpreted as meaning that the marketing system referred to above is incompatible with the Community common organization of the market in pigmeat and accordingly invalid. If so, is the levy payable as part of the system irrecoverable?"

Regulation No 2759/75 is, Your Lordships remember, that by which the provisions of the earlier Regulations establishing the common organization of the market in pigmeat are now consolidated. Your Lordships will also remember that Article 21 of Regulation No 2759/75 which (re-enacting Article 21 of Regulation No 121/67) renders Articles 92 to 94 of the Treaty applicable to the production of and trade in pigmeat, begins with the words "Save as otherwise provided in this Regulation", which appear to me to accord to the provisions of the Regulation precedence, in the case of any discrepancy, over those of Articles 92 to 94.

The learned Judge, who delivered his Judgment on 30 June 1978, perforce did not have before him the Judgment of this Court in the *Redmond* case, which was delivered on 29 November 1978. To my mind paragraphs 56 to 59 of that Judgment virtually supply the answer to his seventh question. The Court there held:

"As the Court has stated in its Judgment of 18 May 1977 in Case 111/76 *Officier van Justitie* v *Van den Hazel* ([1977] ECR at p. 909) 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 which might undermine or create exceptions to it.

With a view to applying that statement in the case of the Pigs Marketing Scheme it should be borne in mind that the common organization, is based on the concept of an open market to which every producer has free access and the functioning of which is regulated solely by the instruments provided for by that organization.

Hence any provisions or national practices which might alter the pattern of imports or exports or influence the formation of market prices by preventing producers from buying and selling freely within the State in which they are established, or in any other Member State, in conditions laid down by Community rules and from taking advantage directly of intervention measures or any other measures for regulating the market laid down by the

common organization are incompatible with the principles of such organization of the market.

Any action of this type, which is brought to bear upon the market by a body set up by a Member State and which does not come within the arrangements made by Community rules cannot be justified by the pursuit of special objectives of economic policy, national or regional; the common organization of the market, as emerges from the third recital in the preamble to Regulation No 2759/75, is intended precisely to attain such objectives on the Community scale in conditions acceptable for the whole of the Community and taking account of the needs of all its regions."

On the findings of the learned Judge, in particular his finding that the levy/bonus system hinders and restricts exports from Ireland by firms wishing to export independently of the PBC, it seems to me clear that that system does undermine the common organization of the market in pigmeat in that it prevents Irish producers from selling freely in other Member States. I am therefore of the opinion that that system is unlawful.

I should however at once emphasize that, in my opinion, the other activities of the PBC, its promotional activities, the rationalization scheme (about which we have heard very little) and its conduct of a joint exporting agency, in so far as that is entirely voluntary, do not appear to me incompatible with the common organization of the market, though they may be for scrutiny by the Commission under Articles 92 and 93 (consider Case 2/73 the *Geddo* case [1973] ECR 865). It is thus, in my opinion, only the part of the levy that goes to finance the bonus that is unlawful under the present head.

On the view I thus take it is unnecessary to consider whether the bonus taken by itself is incompatible with the common organization of the market, though the Commission gave some very convincing reasons why it should be considered so. The essential vice here lies in the combination of the levy and bonus.

On behalf of the PBC it was stressed that the intervention measures provided for by the common organization of the market (aid for private storage and buying by intervention agencies) applied only to fresh or chilled carcases, half-carcases, belly of pork and unrendered pig fat (see Article 3 of Regulation No 2759/75) and so afforded no help to the bacon industry. That, however, although it may mean that the scope of those intervention measures ought to be extended in some way (which is a political question), is not in point here. What matters is that, as is common ground, bacon is a product to which the common organization of the market applies (see Article 1 of the Regulation).

Nor can it, in my opinion, be material that, as was found by the learned Judge and emphasized to us particularly on behalf of the Irish Government, the Irish bacon industry and its share of the British market are so small that the activities of the PBC have no appreciable effect on prices. In the absence of an express exemption, the rules of the common organization of the market must be applied uniformly in all Member States.

I am accordingly of the opinion that Your Lordships should, in answer to the learned Judge's seventh question, rule that the provisions of the Regulations establishing the common organization of the market in pigmeat render unlawful any system created by or under the law of a Member State that hinders or restricts the freedom of producers of goods covered by that organization to sell such goods anywhere in the common market, with the consequence that liability to pay any levy imposed by that law may not be enforced in a national court in so far as it is part of the system.

Article 85 of the Treaty

The learned Judge's eighth question is:

"(8) Is *Article 85* to be interpreted as meaning that the agreement referred to above by virtue of which the marketing system has operated since 1 February 1973 is a violation of this Article by reason of the fact that it hinders or restricts exports by firms independently of the central marketing agency, or because certain exports are subsidized under it? If yes, is the levy which is payable as part of the system irrecoverable?"

It seems to me that, if we were concerned here with a non-agricultural product, there would be a powerful argument to the effect that a levy/bonus system such as that operated by the PβC in agreement with the Irish bacon curers infringed Article 85 as extended by Article 90 of the Treaty. To bacon, however, Article 42 of the Treaty applies and, so it appears, the only act of the Council rendering Article 85 applicable in that sector of trade is Regulation No 26 of 4 April 1962.

Article 2 (1) of that Regulation excepts from the scope of Article 85 (1) agreements, decisions and practices which "are necessary for attainment of the objectives set out in Article 39 of the Treaty". By the subsequent paragraphs of Article 2, a procedure is prescribed under which the Commission has "sole power, subject to review by the Court of Justice, to determine, by decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1".

The result, as it seems to me, is that Article 85 as applied by Regulation No 26 has no direct effect and cannot be invoked in a national court until the Commission has published a relevant decision under Article 2. I understood the Commission so to submit in answer to a question of mine at the hearing.

I am accordingly of the opinion that, in answer to the learned Judge's eighth question, Your Lordships should rule that, in the case of a product to which Article 42 of the Treaty applies and to production of and trade in which no act to the Council other than Regulation No 26 has rendered Article 85 applicable, the latter Article cannot be relied upon in a national court in the absence of a relevant decision of the Commission under Article 2 of that Regulation.

Article 86 of the Treaty

The learned Judge's ninth question, which is about Article 86 of the Treaty, I need not, I think, read.

The PBC, the Irish Government, and the Commission put forward, as a short answer to it, the ruling of the Court in Case 2/73 the *Geddo* case [1973] ECR 865 that "Article 86 of the Treaty does not apply to a charge for the purpose of financing national aids". That is not, in my opinion, a complete answer.

Nor, in my opinion, is the complete answer to be sought in the circumstance that the PBC is a statutory body, for Article 90 of the Treaty effectively extends the discipline of Article 86 to such a body. Nor is it to be sought in Article 42 of the Treaty, for Regulation No 26 renders Article 86 applicable in the relevant sector without qualification.

The answer, to my mind, lies in the fact that, the PBC is not in "a dominant position within the common market or in a substantial part of it". The PBC is simply a body upon which the legislature of a Member State, and the majority of the producers of a particular kind of goods in that Member State, have, between them, bestowed certain powers. The PBC is plainly not in a "dominant position" in the common market as a whole. Nor is it easy, on the findings of the learned Judge, to identify a part of the common market in which it is dominant. No doubt the existence of those powers places the PBC in a dominant position in the export trade for Irish bacon to Great Britain, but it does not seem to me that a particular current of trade constitutes a "part of" the common market within the meaning of Article 86.

Assuming, however, contrary to my view, that the PBC has a dominant position in a substantial part of the common market, there is nothing to show that it has abused that position. It has simply exercised quite straightforwardly the powers conferred on it by the Irish legislature and by the Irish bacon curers.

I am accordingly of the opinion that, in answer to the learned Judge's ninth question, Your Lordships should rule that Article 86 does not apply in a situation in which a statutory undertaking has a dominant position only in the export trade of a particular Member State and exercises, without abusing them, the powers conferred on it to conduct that trade.

The counterclaim

If I am right in my views as to the answer to be given to the learned Judge's first and seventh questions, it is plain that the defendant will escape liability for part at least of the levy. A point then arises as to its counterclaim. That point is the subject of the learned Judge's tenth and last question, which is as follows:

"(10) If the levy hereinbefore referred to is not lawfully payable by reason of the operation of Community law should a national court in considering a claim for a refund of the levy apply the principles of its national laws or those of the Community? If Community law is applicable do its principles justify a claim that payments actually made should be refunded, either with or without a deduction in respect of the bonus received by the defendants?"

The learned Judge explained that he had come to the conclusion that if he were to apply the principles of Irish law to the situation the defendant's counterclaim would fail because, he said:

"I am satisfied that the payments were made by the defendants pursuant to an agreement (in the making of which they participated) that the PBC would continue to act as a central marketing agency and operate its statutory powers to raise the levy ... If they now wish to withdraw their consent from the agreement they are free to do so — but they cannot claim that the money which they paid pursuant to it should be paid back to them."

In my opinion, if and in so far as Community law renders the levy unlawful, it invalidates not only the statutory provisions imposing it but also any agreement pursuant to which it was paid. To that extent at least it seems to me that Community law must, here, override Irish law, for, as this Court pointed out in Case 33/76 *Rewe* v *Landwirtschaftskammer Saarland* [1976] ECR 1989 (paragraph 5 of the Judgment) and in Case 45/76 *Comet* v *Produktschap voor Siergewassen*, [1976] ECR 2043 (paragraph 16 of the Judgment) the rules of national law must not make it impossible for private persons to exercise the rights conferred on them by Community law which the national courts have a duty to protect; and, as Mr Advocate General Reischl pointed out in Case 77/76 *Cucchi* v *Avez* [1977] ECR 987, at p. 1020, where a charge has been

levied in breach of Community law the amount of it should normally be refunded.

The scope of the remedy is however a matter for national law.

In the *Rewe* case [1976] ECR at pp. 1997-1998, the Court said:

"Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.

Accordingly in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.

...

In the absence of ... measures of harmonization the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules." (See also the Judgment in the *Comet* case, paragraphs 12, 13 and 15).

Thus it is for the national law to determine whether or not the claim for a refund is time-barred (see the *Rewe* and *Comet* cases); whether any refund ordered should carry interest (see Case 6/60 *Humblet* v *Belgium* [1960] ECR 559 and consider Case 26/74 *Roquette* v *Commission* [1976] 1 ECR 677); and, in the case of a tax infringing Article 95 of the Treaty, whether the person concerned is entitled to recover the whole amount of the tax paid or only the unlawful excess (see Case 74/76 the *Iannelli* case [1977] ECR 557 and the earlier authorities referred in my Opinion in that case, at p. 592).

It follows, in my opinion, that, here, the question whether there should be set off against any refund ordered in favour of the defendant all or any part of the amounts received by the defendant by way of bonus is one to be decided according to Irish law.

I am accordingly of the opinion that, in answer to the learned Judge's tenth question, Your Lordships should rule that:

(a) Where any provision of Community law renders the raising of a levy unlawful, such unlawfulness extends to the terms of any agreement pursuant to which the levy is raised;

(b) Where a levy has been raised in breach of Community law, it should normally be refunded, but the scope of the remedy available in a national

court for that purpose, including any question as to the set-off of amounts unlawfully received by the person concerned, is for determination according to the national law of that court.