

cheese a control stamp attesting compliance with national rules on quality, provided that such requirement applies without distinction to domestic production marketed in the Member State concerned and production intended for export.

Nor does Article 34 preclude the adoption of a national rule providing for samples to be taken, by an inspection agency which subsequently issues a document setting out the results of that inspection, of all cheese products intended for domestic consumption or for export.

7. Regulation No 804/68 must be interpreted as meaning that it does not prevent a Member State from requiring cheese producers to become affiliated to an inspection agency provided that the objectives pursued by that agency are consistent with Community law and that the marketing, re-sale, import, export or offering for export of cheese products is not reserved exclusively to persons affiliated to that agency.

In Case 237/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arrondissementsrechtbank [District Court], The Hague, for a preliminary ruling in the proceedings pending before that court between

JONGENEEL KAAS BV, Bodegraven, and 14 other plaintiffs,

and

STATE OF THE NETHERLANDS AND STICHTING CENTRAAL ORGAAN ZUIVEL-CONTROLE [Central Agency for the Inspection of Dairy Produce]

on the interpretation of Regulation (EEC) No 804/68 of the Council of 27 June 1968 (Official Journal, English Special Edition 1968 (I), p. 176) and Articles 30 and 34 of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), Lord Mackenzie Stuart, A. O'Keefe, G. Bosco, O. Due and U. Everling, Judges,

Advocate General: G. F. Mancini
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

On 1 July 1982 a series of measures intended to regulate the production of cheese entered into force in the Netherlands.

Those measures were adopted under the Landbouwkwaliteitswet [Law on Standards in Agriculture] of 8 April 1971 (Staatsblad, p. 371).

According to the statement of the reasons on which the Landbouwkwaliteitswet was based, it was desirable in order to promote sales to lay down general rules on the quality of agricultural and fishery products. It is not possible to rely for that purpose on the Warenwet [Law on Goods] which authorized the adoption of rules only in the interest of public health or fair trading and not in order to safeguard the quality of agricultural products.

In order to remedy that omission the following measures were adopted:

The Landbouwkwaliteitsbesluit: Kaasprodukten [Decree on Standards in Agriculture: Cheese Products] of 2 December 1981, Staatsblad, p. 726 (Hereinafter referred to as "the Decree");

The Landbouwkwaliteitsbeschikking Kaasprodukten [Order on Standards in Agriculture: Cheese Products] of 28 December 1981, Nederlandse Staatscourant [Official Gazette] No 251 (hereinafter referred to as "the Order").

Those two measures assigned certain functions to the second defendant in the main action, the Stichting Centraal Orgaan Zuivelcontrole [Central Agency for the Inspection of Dairy Produce,

hereinafter referred to as "the Central Agency"], having its office in The Hague.

The Central Agency itself adopted certain rules, in particular the Keuringsreglement Centraal Orgaan Zuivelcontrole Kaasprodukten [Regulation on Inspections: Cheese Products], approved by Ministerial Order of 2 June 1982, Nederlandse Staatscourant, No 105 (hereinafter referred to as "the Regulation on Inspections") and the Heffingenreglement [Regulation on Levies] Centraal Orgaan Zuivelcontrole, approved by Ministerial Decree of 15 June 1982, Nederlandse Staatscourant, No 118 (hereinafter referred to as "the Regulation on Levies").

1.1. Scope of the rules

(a) The rules apply to:

All cheese produced in the Netherlands, whether intended for domestic consumption in the country or for export;

Re-export and inward processing traffic.

On the other hand, except for the general provisions contained in Articles 3, 4, and 5 of the Decree, they do not apply to imported cheese.

(b) The general provisions of the Decree prohibit the use of noxious substances and misleading statements as to the nature of the product.

(c) The rules which apply only to cheese produced in the Netherlands are: the order, the Regulation on Inspections and the Regulation on Levies, adopted pursuant to the powers laid down in the Decree. Their content is briefly summarized below.

1.2. Main characteristics of the rules

The production of cheeses other than those which are exhaustively listed in the order is prohibited. The list includes a number of traditional Dutch cheeses, such as Gouda, Edam and Commiessie-kaas in various packages, in addition to Cheddar and Feta.

There are specific provisions prescribing the fat and water content for each variety of cheese. It is forbidden to produce cheese which does not comply with those rules.

In addition, compliance with the rules is to be proved by the use of stamps and the existence of inspection documents. All cheese is subject to a system of compulsory inspection. The marketing of products which do not carry a stamp is prohibited. The inspection documents attest that cheese which has undergone inspection by sampling complies with the rules.

The Central Agency, a body incorporated under private law to which all undertakings producing cheese must be affiliated, is to ensure that the rules are complied with.

The Central Agency collects from its members levies to cover the cost of supervision and inspection.

1.3. Community rules

The Community rules on cheese provide for a number of measures.

(a) In the domestic market:

Intervention prices for Grana Padano and Parmigiano Reggiano cheeses and storage aids for those cheeses and for Provolone and also for cheeses which keep for long periods.

Application of monetary compensatory amounts;

Prohibition of measures having an effect equivalent to quantitative restrictions;

Prohibition of State aids (cf. Articles 92 to 94 of the EEC Treaty).

(b) In trade with non-member countries:

Threshold prices and levies, compensatory amounts;

Compulsory use of import and export licences;

Payment of refunds on export to certain countries at certain times in relation to specified cheeses;

Other measures and international agreements;

Prohibition of measures having an effect equivalent to quantitative restrictions.

1.4. Procedure before the national court

The plaintiffs considered that all those different provisions were contrary to Community law and brought an action before the Arrondissementsrechtbank. They also claimed in interlocutory proceedings that the operation of those rules should be suspended and it was in

the course of the interlocutory proceedings that the President of the Arrondissementsrechtbank considered that it was necessary to obtain a preliminary ruling on the interpretation of certain concepts of Community law, in order to enable him to determine whether the contested rules were contrary to:

- (a) Regulation (EEC) No 804/68 of the Council of 27 June 1968 (Official Journal, English Special Edition 1968 (I), p. 176), either because the Member States were no longer entitled to intervene in the operation of the market in cheese, which is governed exclusively by Community instruments in the framework of the common organization of the market, or because the national rules interfered with the objectives of the common organization of the market;
- (b) Articles 30 and 34 of the EEC Treaty and Article 22 of Regulation No 804/68 on the free movement of goods;
- (c) the principle of proportionality.

As a result of those considerations, the President of the Arrondissementsrechtbank referred to the Court of Justice by order of 14 September 1982 the following questions:

- “(a) Must Regulation (EEC) No 804/68 be interpreted as preventing a Member State such as the Netherlands from unilaterally adopting, with the purpose of promoting sales of cheese and cheese products, rules concerning the quality of those products, such as those contained in the legislation listed in Part 1 of this order?
- (b) If Question (a) is answered in the negative, must Articles 30 and 34 of the EEC Treaty be interpreted as preventing a Member State such as the Netherlands from unilaterally adopting, with the purpose of promoting sales of cheese and

cheese products, rules concerning the quality of those products, such as those contained in the legislation listed in Part 1 of this order?

- (c) If Question (b) is also answered in the negative, must the regulation mentioned in Question (a) and the articles mentioned in Question (b) be interpreted as preventing a Member State such as the Netherlands from adopting rules according to which only persons affiliated to an inspection agency are permitted to manufacture cheese products on a commercial basis, as provided in Article 12 of the Landbouwkwaliteitsbesluit Kaasprodukten?
- (d) Do general legal principles, in particular the principle of proportionality, to which the plaintiffs refer, have direct effect in a case such as this?”

1.5. Procedure before the Court

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiffs in the main action, represented by B. H. ter Kuile and H. J. Bronkhorst, Advocates at the Hoge Raad der Nederlanden [Supreme Court of the Netherlands], of Messrs De Brauw and Helbach, by the Government of the Netherlands, represented by F. Italianer, Secretary General at the Ministry of Foreign Affairs, and by the Commission of the European Communities, represented by Jean-François Verstrynge, a member of its Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, the parties were requested to answer several questions.

II — Written observations

2.1. *Subject of the dispute*

The *Commission* considers that a distinction must be drawn between, on the one hand, Articles 3, 4 and 5 of the Decree, which are undoubtedly intended to protect public health and the interests of consumers — a matter which, according to the *Commission*, is not challenged by the *plaintiffs* — and, on the other hand, the rules adopted under Article 6 of the Decree, which is the true subject of the dispute and the essential purpose of which is to promote sales.

2.2. *Purposes of the rules*

2.2.1. The *Netherlands Government* observes that cheese is an important product for the Netherlands and provides an outlet for 35 % of the milk produced.

The rules were established in the interests of producers and consumers in order to make it impossible for a variety of cheese of a less satisfactory quality to be marketed.

It is necessary to combat operations such as those affecting the fat and water content, the basic products and descriptions. The restrictions remain within the limits needed in order to maintain the special characteristics of the different varieties of cheese.

The State of the Netherlands is also a signatory of the Convention on the Use of Indications of Origin and Designations of Cheese (Stresa Convention of 1951). It is also necessary to take into account the Code of Principles concerning Milk and Milk Products prepared in the framework of the Food and Agriculture Organization.

The Netherlands rules thus contribute to equal conditions of competition and fair trading and at the same time promote the interests of the consumer who can be certain that the product complies with what he is entitled to expect.

2.2.2. The *Commission* and the *plaintiffs* maintain that the stated aim of the rules is to promote the sale of domestic products and in support of that view refer to the statement of reasons for the rules adopted.

The *Commission* distinguishes between Articles 3, 4 and 5 of the Decree, which in its view is clearly intended to protect public health and the interests of consumers, and Article 6 of the Decree which is intended to promote sales.

2.3. *Effects of the rules*

According to the *plaintiffs*, the rules seriously affect the interests of cheese producers, traders and exporters.

- (a) Compulsory affiliation to the Central Agency involves considerable expense;
- (b) The prohibition of the delivery of cheese which has not yet reached the minimum level of maturity prescribed by the rules results in serious obstacles to trade and widens the definition of producers subject to compulsory registration with the Central Agency so as to include certain traders not previously affected;
- (c) Certain good quality cheeses may no longer be offered for sale or may be sold only to be sliced or melted, such as Emmental in which the holes are larger than 10 mm, cheese flavoured with mustard and diet cheese with a low salt content.

- (d) Some cheeses may not be exported to other Member States, even where they comply with the conditions laid down in those States. The cases in question are not insignificant, but involve very important markets, such as the United Kingdom in particular.

Question (a): Conformity with the rules on the common organization of the market

2.4. Lack of competence of the Member States

2.4.1. According to the plaintiffs in the main action, the exclusive nature of the common organization of the market implies that the Member States are no longer free to adopt national rules which pursue the same objective as the common organization of the market.

The operation of the common market in agricultural products, governed by a common organization of the markets, is regulated exclusively by instruments laid down by that organization of the market, without its being possible for the national authorities to intervene.

The Court stated in its judgment of 10 March 1981 in Joined Cases 36 and 71/80, *Irish Creamery Milk Suppliers' Association v Ireland*, [1981] ECR 735, that the supply of the market was one of the objectives of Regulation No 804/68. The objective of the contested rules, namely the promotion of sales, is the same as that of the common organization of the market established by Regulation No 804/68.

2.4.2. The *Netherlands Government* contends that the Community regulations do not contain any rules either on the

production or marketing of cheese or on the quality of cheese, except for purposes of the application of the system of intervention and aids. To lay down uniform rules on quality for the whole Community would be virtually impossible in view of the many different varieties of cheese and would, on account of that diversity, scarcely be appreciated by the consumer.

The Court has never accepted the argument put forward by the plaintiffs that the organization of the market has an exclusive effect. Community law requires the Member States to refrain from adopting any measures which interfere with the operation of the common organization of the market, but there is no question of such interference in this case.

The *Netherlands Government* refers to the judgment of the Court of 1 April 1982 in Joined Cases 141 to 143/81, *Holdijk*, [1982] ECR 1299, in which it ruled that the establishment of the common organization of the market did not have the effect of exempting producers from any national provisions intended to attain objectives other than those covered by the common organization.

Contrary to the plaintiffs' contention, the promotion of sales is not one of the objectives of the organization of the market. That idea does not appear in Regulation No 804/68. Even if the Community were to adopt measures for that purpose, or even if the Court were to decide that Regulation No 804/68 was intended indirectly to promote the sale of milk products, that would not be an aim which fell exclusively within the jurisdiction of the Community. The national measures would be incompatible only if they conflicted with the Community rules.

2.4.3. According to the *Commission*, there is already a large number of existing measures or measures which may be adopted on the basis of specific powers delegated to the Community. Accordingly, a collection of rules and a basic organization exist by reference to which every foreseeable situation may be dealt with.

The common organization of the market is based on the principle of an open market to which any producer has free access without being at an economic disadvantage.

The diversity of cheese products plays an important part in increasing opportunities for the disposal of surplus milk.

The promotion of sales could have appeared in the common organization of the market.

After analysing the case-law of the Court, the Commission concludes that, where there is a common organization of the market, there are two areas in which the Community has exclusive power and the Member States have no power to fill any remaining lacunae, namely:

- (a) The power to adopt intervention measures;
- (b) The power to regulate access to the open market;

2.4.3.1. The Commission takes the view that the restriction of the list of authorized cheeses encroaches upon the exclusive powers of the Community to lay down rules concerning freedom of access to the market. It is clear that the Community would not have wished to

adopt measures to limit the production and exportation of cheese products.

2.4.3.2. The same consideration applies to the prohibition of the production and marketing of cheese not of the prescribed quality, which must in reality be regarded as a measure limiting production and having the same effect as the withdrawal from the market of certain products, so impinging upon the exclusive powers of the Community.

2.4.3.3. The Commission also considers that the compulsory use of stamps, marks and inspection documents is incompatible with the exclusive powers of the Community to adopt the rules needed in order to ensure free access to the market. The prohibition of production or marketing purely because a cheese product does not carry the national stamp also amounts to interference with free access to the market. The Commission provided further observations on that point in its written answers to the questions put by the Court.

2.4.3.4. The Community has already laid down rules in relation to licences for import from or export to non-member countries in Regulation No 804/68.

The Commission also refers to provisions of the same regulation on control stamps for butter.

The unity of the open market requires that measures should not be adopted in a disparate manner. It is for the Community institutions to adopt the measures needed, and if such measures have not been adopted, that simply means that the Community legislature did not consider them necessary.

2.4.3.5. Before the national court, the Netherlands Government referred to the judgment in Case 120/78, *REWE-Zentrale*, [1979] ECR 649, in order to prove the existence of national powers. That argument is vitiated by fundamental errors, including the fact that that judgment relates exclusively to restrictions applicable to imported products and not restrictions on production, exports and disposal on the domestic market, the fact that the judgment applies only if there are no Community rules, the fact that the objectives of Article 39 of the EEC Treaty are not among the mandatory requirements listed in that judgment and, finally, the fact that account must be taken of the principle of proportionality in the light of which the national rules must be assessed.

National powers may therefore pursue only objectives relating to public health, fair trading and protection of consumers.

2.4.3.6. On the basis of those considerations, the Commission examines whether the Member States have the power to adopt rules on designation. It points out that the purpose of the contested rules is to promote the sale of domestic products and not the protection of public health, fair trading or the protection of consumers.

The Commission cites various spheres, such as the customs nomenclature and refunds, in which the Community has exercised the power to lay down quality standards. The Community has also envisaged the possibility that national definitions may play a supplementary part by referring in Community measures to national definitions.

The Commission draws a distinction in the sphere in question between three different situations.

- (a) where the Community has already exercised its powers in order to

adopt at Community level rules on designation;

- (b) where the Community has already exercised its powers in order to incorporate in the Community system national rules on designation.
- (c) where the Community has not exercised its powers and national rules on designation which are quite distinct from Community measures remain in force.

The Commission considers that in the situation outlined in (a), above, the Member States have relinquished their powers irrevocably. In the situation outlined in (b), above, the Member States retain their own powers alongside the powers of the Community. However, in that situation, the exercise by the Member States of their powers is subject to certain limitations. In the situation outlined in (c), above, the Member States also retain their powers. The Commission however takes the view that even in those circumstances the exercise of those powers may be subject to certain limitations.

2.4.3.7. The Commission takes the view that Article 5 and also Article 40 (3) of the EEC Treaty, and the need for close cooperation between the Member States and the institutions of the Community in order to ensure the proper functioning of the common organization of the market, require that the Member States should inform the competent Community institutions in advance of their intention to adopt national rules. The Commission must be informed in advance in order to be able to adopt coordinating measures and to avoid disparities between national laws. The risk of such disparities is only too real, especially when the Member States unilaterally adopt different definitions of the typical cheeses of other Member States, as the Netherlands has defined Cheddar and Feta.

2.5. *Interference with the objectives of the common organization of the market*

2.5.1. According to the *plaintiffs*, the common organization of the markets implies an open market, subject to Community intervention measures, to which every producer has free access and with which the Member States may not interfere (judgments of 28 November 1978 in Case 83/78, *Pigs Marketing Board v Redmond* [1978] ECR 2347, of 26 June 1979 in Case 177/78, *Pigs and Bacon Commission v McCarren*, [1979] ECR 2161, and of 26 February 1980 in Case 94/79, *Vriend*, [1980] ECR 327).

The rules in question conflict with those objectives, first by imposing a requirement of affiliation (see Section 2.7, below) and, secondly, because the system adopted amounts to a closed system inasmuch as, subject to exceptions, the production of cheeses other than those listed in the order is prohibited. In spite of appearances, designations such as Edam, Gouda and Amsterdam do not guarantee a particular geographical origin, since the varieties referred to may be manufactured throughout the Netherlands. The contested rules are also contrary to the requirement of genuine and effective competition such as is mentioned in the *Vriend* case, because they result in the elimination from the market of certain good quality products.

2.5.2. For the observations of the *Netherlands Government*, see Part 2.4.2 above.

2.5.3. The *Commission* considers that, in relation to the exercise of residual national powers in a sector covered by the common organization of the market, those powers are limited by Community

law, in particular by the restrictions arising from the need to protect the proper functioning of the common organization, to respect the fundamental principles of the EEC Treaty such as free movement of goods, and to apply the general principles of law.

The Commission considers whether the main instruments of the Netherlands rules run the risk of obstructing the proper functioning of the common organization of the markets.

2.5.3.1. The restriction of the list of cheeses

The prohibition of the production of cheeses which keep for long periods, such as Emmental and Gruyère, or cheeses of the Provolone type or even goat's or ewe's cheese threatens the proper functioning of the common organization of the market. It conflicts with the Community policy of widening demand for cheese as much as possible by increasing the variety of products offered and of thus providing a market for more milk products.

In addition, such restrictions impede freedom of production and exportation and the unity of the common market and discriminate against producers and traders of other Member States, at the same time distorting conditions of competition.

Moreover, the effect of the said restrictions is to prevent the functioning in the Netherlands of several measures adopted by the Community. The Commission cites intervention measures and aids for the storage of Grana Padano, Parmigiano, Provolone and cheeses which keep for a long time. Payment of refunds on exports in order to stimulate demand and measures

designed to widen the markets for milk products cannot work effectively, and the possibility of increasing consumption through the production of new cheeses is also removed.

2.5.3.2. The prohibition of the production of cheeses of a different quality

The result of this measure is that only part of the demand for cheaper cheese products can be satisfied. The Commission points out that Belgium exports its "Belgian Gouda" to the Netherlands, where there is clearly a market for Gouda of other quality.

The Commission in addition makes the same criticisms as those made in relation to the restriction of the list of cheeses.

2.5.3.3. Compulsory use of stamps, marks or inspection documents

This measure may make exports to other Member States or non-member countries more difficult or even impossible.

It is not permissible for national rules to require in trade with non-member countries, in addition to the export licences provided for in Article 13 (1) of Regulation No 804/68, national inspection documents not provided for by Community law.

2.5.3.4. Rules on designation accompanied by requirements relating to quality

The Commission first refers to the case-law of the Court in relation to appellations of origin and indications of origin (judgments of 20 February 1975 in Case 12/74, *Commission v Germany*,

[1975] ECR 181, and of 12 October 1978 in Case 13/78, *Eggers v Freie Hansestadt Bremen*, [1978] ECR 1935) and also to the judgment of 24 November 1982 in Case 249/81 (*Commission v Ireland*, [1982] ECR 4005).

Those cases seek to prohibit such rules where their object or effect is to discriminate or to protect domestic markets or to promote the sale of domestic products and thus to place imported products at a disadvantage. It is for the national court to determine how far the rules in question have such consequences.

2.5.3.5. The requirement of the payment of levies

According to the case-law of the Court, an internal levy is incompatible with the Treaty where it falls more heavily on export sales than on sales on the domestic market or where the income from the levy is intended to confer an advantage, on domestic products.

It is also necessary to take into account the provisions of Articles 92 and 93 of the EEC Treaty and the Commission's powers in that sphere.

2.5.3.6. The Commission also points to a provision of the order which limits the border posts at which cheese products may be imported or exported. Although that provision has not yet been brought into force, it is capable of creating obstacles to trade.

2.5.3.7. The Commission stresses that there may be other provisions of the rules which threaten the proper functioning of the Community regulations. In view of their complexity, it is impossible to examine them in detail.

2.6. *Question (b) and Articles 22 (2) and 19 of Regulation No 804/68 (free movement of goods)*

2.6.1. The *plaintiffs* refer to the judgment of the Court of 30 October 1974 in Case 190/73, *Officier van Justitie v Van Haaster*, [1974] ECR 1123, as authority for the premise that any quantitative restriction on production constitutes a measure having an effect equivalent to a restriction on exports. The contested provisions limit production by means of rules on the materials to be used, methods of production, processing methods and also by the restriction of varieties.

The requirement of a minimum maturing period and the fact that products of good quality may not be exported to other Member States are also obstacles to exports.

The exceptions to the prohibition of measures having equivalent effect, namely Article 36 of the Treaty and the consistent line of decisions of the Court since the judgment of 11 July 1974 in Case 8/74, *Dassonville*, [1974] ECR 837, are not applicable since the objective pursued by the contested rules is not included in the category of permissible exceptions. There can be no question of a guarantee of the authenticity of the appellation of origin of the product, since the cheese may be produced anywhere in the Netherlands.

2.6.2. The *Netherlands Government* contends that there can be no question of a breach of fundamental rules on the free movement of goods. Article 34 has been interpreted by the Court as prohibiting specific restrictions which are imposed on export patterns and so establish a

difference in treatment between the domestic trade of a Member State and its export trade (judgments in Cases 15/79, *Groenveld v Produktschap voor Vee en Vlees*, [1979] ECR 3049, Case 155/80, *Oebel*, [1981] ECR 1993 and Joined Cases 141 to 143/81, *Holdijk*, [1982] ECR 1299). The Netherlands regulations on quality contain a collection of objective rules applicable to exports and domestic trade without distinction.

Nor can there be any question of impeding imports in the sense of the judgment in *REWE-Zentral*. The only conditions applicable to imported cheese are those which relate to public health and fair trading.

2.6.3. The *Commission* considers that Question (c) should be answered in the affirmative on several grounds, in view of the considerations cited above.

It observes that the Court has already ruled that the requirement of export licences as such is contrary to the Treaty.

The *Commission* considers that the decisions of the Court in the cases of *Groenveld*, *Oebel* and *Holdijk* are not applicable in this case since in the first two cases the products were not covered by a common organization of the market, whereas in the third the objectives pursued by the national rules were different from those laid down in Article 39. Moreover, all those cases concerned national rules which related only to production and not to marketing or exportation.

Article 36 and the judgment in *REWE-Zentral* are not applicable, in view of the aim of the national rules.

2.7. Question (c): *Compulsory affiliation*

2.7.1. According to the *plaintiffs*, the Court held in *Vriend* that the requirement of affiliation to a body approved by an official authority in order to be able to market, re-sell, import, export or offer for export material for plant propagation was contrary to the principle of an open market on which the common organization of the market in the sector in question was based. The rules in this case are similar and compulsory affiliation by the producer must also, like compulsory affiliation by the trader, be regarded as incompatible with Community law.

2.7.2. According to the *Netherlands Government*, a distinction must be drawn between the requirement of affiliation at the marketing stage and the requirement of affiliation at the stage of production. The Netherlands legislature took account of the Court's ruling in *Vriend* in limiting the scope of the rules to producers alone.

If it is considered that the rules on production, and in particular on quality, are compatible with the rules of the Community legal order, the requirement that producers be affiliated to an inspection agency must also be regarded as lawful. It is essential to provide for adequate inspection of such rules on quality either under public or under private law. In the Netherlands, a choice was made in favour of private law. The inspection agency may take either preventive or repressive measures, and in relation to the latter there is a right of appeal before a court of law.

The Netherlands Government thus considers that neither Regulation No 804/68 nor Articles 30 to 34 of the Treaty prevent a Member State from adopting rules by which the industrial preparation of cheese is to be undertaken only by producers affiliated to an inspection agency.

2.7.3. The *Commission* observes that the Netherlands stated before the national court that compulsory affiliation also applies to traders, because the final stage of preparation, namely maturing, often takes place in their establishments, owing to the manufacturers' lack of storage facilities.

The *Commission* considers that the Court's decision in *Vriend* must be applied and that accordingly it is for the national court to decide whether compulsory affiliation of producers may make it impossible for cheese to be marketed, re-sold, imported or exported.

2.8. Question (d): *General principles of law: direct effect*

2.8.1. The *plaintiffs* consider that, if the Court takes the view that the Member States have retained a residual power to adopt provisions in order to promote the sale of cheese, it is necessary to determine how far that power is governed by general principles of law.

The *plaintiffs* take the view that citizens of the Member States may rely upon general principles of Community law before a national court in order to

protect rights based on the Treaty and to contest legislative or administrative measures of a Member State which encroach upon those rights.

Even if the Court were to consider that the Netherlands authorities still had the power to adopt provisions in order to promote the sale of cheese, the authorities would be bound to respect the principle of proportionality in so far as free movement and the open market in those products, guaranteed by Regulation No 804/68 and the Treaty itself, may be limited by national measures only in so far as such measures are strictly necessary to attain the objectives which the national authorities are still entitled to pursue.

2.8.2. The *Netherlands Government* observes that the question submitted does not concern the interpretation of the principle of proportionality, but rather the question whether that principle has direct effect in this case. General principles of law, including the principle of proportionality, form part of unwritten Community law. Those principles play a part chiefly in the assessment of measures adopted by the institutions and in the context of the interpretation of a specific rule of Community law.

General principles of law are not an independent source in the case-law of the Court for the assessment of measures and decisions of Member States. In this case, the contested national rules cannot be regarded as measures implementing Community law.

Nor are the general principles of law a direct source of clearly-defined and

unconditional obligations as defined by the Court in its case-law on direct effect.

The same question was raised in Case 181/82, *Roussel and Others* [1983] ECR 3849, decided by the Court on 29 November 1983.

2.8.3. The *Commission* considers that this question may be interpreted in two different ways:

- (a) If the purpose of the question is to ascertain whether individuals may rely upon general principles of law in an action before a national court in which Community measures are called in question, the Commission would answer in the affirmative.

The same answer must be given where such principles are relied upon to contest measures adopted by Member States on behalf of the Community by virtue of a Community measure or in order to implement a Community measure (including a directive).

- (b) If on the other hand the purpose of the question is to ascertain whether general principles of Community law may be relied upon in order to challenge measures of Member States, even where the Community has taken no action, the Commission would reply in the negative.

In the difficult case of national rules which have some connection with the Community — in this case the pursuit of the objectives of Article 39 of the EEC Treaty — but have not been adopted on behalf of the Community by virtue of a Community measure or in order to implement a Community measure, the

Commission considers that it should be possible to rely on those general principles of law where national law acts as the secular arm of Community law.

That condition is fulfilled where national measures are used in order to attain the objectives of the European Treaties. In this case, it should be possible for the principle of proportionality to be relied upon, since the national measure in question is intended to attain the objectives of Article 39 of the EEC Treaty. In that sense, the principle has direct effect.

III — Oral procedure

At the sitting on 7 June 1983 oral argument was presented by the following: Mr Ter Kuile and Mr Bronkhorst, for the plaintiffs in the main action; Mr Keur, acting as Agent, and Mr Klomp, in his capacity as an expert, for the Netherlands Government; and Mr Verstrynge, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 25 October 1983.

Decision

- 1 By order of 14 September 1982 which was received at the Court on 22 September 1982, the President of the Arrondissementsrechtbank [District Court], The Hague, submitted for a preliminary ruling under Article 177 of the EEC Treaty four questions concerning the interpretation of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) and Articles 30 and 34 of the EEC Treaty in order to determine whether Netherlands legislation on the production of cheese is compatible with those provisions.
- 2 That legislation, which entered into force on 1 July 1982, was adopted on the basis of the Landbouwkwaliteitwet [Law on Standards in Agriculture] of 8 April 1971 (Staatsblad, p. 371) whose purpose is to lay down rules on the quality of agricultural and fishery products. The legislation comprises, first of all, the Landbouwkwaliteitsbesluit Kaasprodukten [Decree on Standards in Agriculture: Cheese Products] (Staatsblad, p. 726) and, secondly, a ministerial order to the same effect entitled the Landbouwkwaliteitsbeschikking Kaasprodukten [Order on Standards in Agriculture: Cheese Products] (Nederlandse Staatscourant No 251).

- 3 The legislation accordingly provides for an exhaustive list of the types of cheese which may be produced in the Netherlands and which include essentially traditional Dutch cheeses such as Gouda and Edam, in addition to Cheddar and Feta. There are precise requirements for each variety of cheese and the production of cheese which does not comply with those rules is forbidden.
- 4 The Stichting Centraal Orgaan Zuivelkontrolle [Central Agency for the Inspection of Dairy Produce, hereinafter referred to as "the Central Agency"], a body incorporated under private law to which all undertakings engaged in the commercial production of cheese must be affiliated, supervises compliance with the rules on quality. The Central Agency collects from its members levies to cover the cost of supervision and inspection. All cheese must be marked in accordance with the rules adopted by the Central Agency and must, in addition, undergo inspection by sampling.
- 5 Those rules were contested by the plaintiffs in the main action, who are all wholesale dealers in cheese, on the ground that they infringe, in a number of ways, Regulation No 804/68 on the common organization of the market in milk and milk products and Articles 30 and 34 of the EEC Treaty which are concerned with measures having an effect equivalent to quantitative restrictions on imports and exports. The plaintiffs applied for an interlocutory order to the President of the Arrondissementsrechtbank who submitted a reference to the Court for a preliminary ruling on the interpretation of those provisions. The questions contained in the reference are as follows:
 - (a) Must Regulation (EEC) No 804/68 be interpreted as preventing a Member State such as the Netherlands from unilaterally adopting, with the purpose of promoting sales of cheese and cheese products, rules concerning the quality of those products, such as those contained in the legislation listed in Part 1 of this order?
 - (b) If Question (a) is answered in the negative, must Articles 30 and 34 of the EEC Treaty be interpreted as preventing a Member State such as the Netherlands from unilaterally adopting, with the purpose of promoting sales of cheese and cheese products, rules concerning the quality of those products, such as those contained in the legislation listed in Part 1 of this order?

- (c) If Question (b) is also answered in the negative, must the regulation mentioned in Question (a) and the articles mentioned in Question (b) be interpreted as preventing a Member State such as the Netherlands from adopting rules according to which only persons affiliated to an inspection agency are permitted to manufacture cheese products on a commercial basis, as provided in Article 12 of the Landbouwkwaliteitsbesluit Kaas-produkten?
- (d) Do general principles, in particular the principle of proportionality, to which the plaintiffs refer, have direct effect in a case such as this?

- 6 It must be observed at the outset that although the Court is not empowered under Article 177 of the Treaty to give a ruling on the compatibility of the provisions of a national law with the Treaty, it nevertheless has jurisdiction to provide the national court with all such matters relating to the interpretation of Community law as may enable it to determine whether such compatibility exists.
- 7 It must also be emphasized *in limine* that, according to the documents before the Court and the explanations provided during the oral procedure, the above-mentioned provisions of the Netherlands legislation, since they relate to cheese producers alone, do not affect imports of cheese into the Netherlands and apply without distinction to all Netherlands cheese production regardless of its destination.

First question relating to Regulation No 804/68

- 8 This question seeks in the first place to ascertain whether the Member States are still empowered — after the adoption of the regulation on the common organization of the market in cheese — to intervene in the operation of that market and, in particular, to adopt measures which have the same purpose as the common organization, in particular as regards sales promotion. In the second place, the first question seeks to ascertain, on the assumption that the Member States have retained the power to adopt such measures, whether legislation such as that at issue interferes with the objectives of the common organization of the market.
- 9 In order to reply to that question it is necessary to examine the functioning of the common organization of the market in cheese as provided for by Regulation No 804/68. The common organization of the market does not in

its present state contain any rule on the designation and quality of cheese. Nor does it establish an intervention system for cheese, except in the case of Grana-Padano and Parmigiano-Reggiano. However, Provolone and long-keeping cheese benefit from certain market-support measures which take the form of aids for private storage. Import levies and export refunds are collected in dealings with non-member countries. The system thus established therefore differs from other organizations of the market which have as their purpose to support the market by maintaining prices at a given level through intervention buying or, more indirectly, by the fixing of minimum quality criteria.

- 10 As far as the powers of the Member States are concerned, the plaintiffs in the main action contended that the Member States may not adopt measures which pursue the same objective as the common organization of the market, in particular as regards sales promotion. For its part, the Commission took the view that the restriction of the list of authorized cheeses encroaches upon the exclusive powers of the Community to lay down rules concerning freedom of access to the market. The prohibition of the production and marketing of cheese not exhibiting the prescribed characteristics amounts, it claims, to a measure limiting production which has the same effect as an intervention measure and therefore comes within the scope of the Community's powers.
- 11 The plaintiffs in the main action and the Commission also consider that measures such as those at issue in the main proceedings obstruct the proper functioning of the common organization of the markets. In the first place, the restriction of the list of authorized cheeses is contrary to the principle of an open market to which every producer has free access. Secondly, in the Commission's view, that restriction conflicts with the Community policy of widening demand for cheese as much as possible by increasing the variety of products offered. Finally, the effect of the restrictions is to prevent the functioning in the Netherlands of intervention measures, storage aids and export refunds provided for by the Community.
- 12 That argument cannot be accepted. It is clear from the consistent case-law of the Court that, once the Community has adopted, pursuant to Article 40 of

the Treaty, regulations establishing a common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measures which might undermine or create exceptions to it (judgment of 22 June 1979 in Case 177/78 *Pigs and Bacon Commission v McCarren* [1979] ECR 2161).

- 13 However, the fact that the legislation in question makes no mention of the designation and quality of cheese does not mean that the Community has consciously and of necessity decided to impose on the Member States in that sector an obligation to adhere to a system of absolute freedom of production. In the absence of any rule of Community law on the quality of cheese products the Court considers that the Member States retain the power to apply rules of that kind to cheese producers established within their territory. That power extends not only to rules considered necessary for the protection of the consumer or public health but also to rules which a Member State may wish to enact for the purpose of promoting the quality of domestic production. Such rules cannot however discriminate against imported products or hinder the importation of products from other Member States. Finally, it must be pointed out that national rules on quality make it possible, pending the adoption of Community rules, to achieve the objectives laid down by Article 39 of the EEC Treaty and by the common organization of the market and to give specific form to the measures already adopted by the Community.
- 14 It is also necessary to reject the Commission's argument that the effect of the prohibition of the production of cheeses other than those exhaustively listed by the national legislation in question would be to exclude the possibilities of intervention provided for by the relevant Community rules and thus to prevent that legislation from functioning properly. The aim of the intervention machinery is to restore the balance between supply and demand and national legislation which has as its long-term purpose to increase demand by making domestic cheese production more attractive to the consumer pursues in principle the same objective. In view of the very limited scope of the Community market-support measures in the cheese sector, it is not incompatible with those measures to adopt national measures concerning quality which prohibit the production of cheeses of a type or quality other than those provided for by the national legislation.

- 15 Nor is it possible to accept the Commission's argument to the effect that national legislation prohibiting the production of cheeses whose quality falls below the prescribed quality standards obstructs the Community policy of increasing demand by widening the range of cheeses offered in the various Member States. Neither the system established by, nor the provisions of, Regulation No 804/68 stipulate that, within the common organization of the market and for the attainment of its objectives, priority must necessarily be given to increasing demand for milk products by widening the range of products offered rather than by improving the quality of a limited number of products, which is the method on which the national legislation in question is based.
- 16 Accordingly, in the light of all the foregoing considerations, the answer to the first question must be that Regulation No 804/68 is to be interpreted as meaning that, in the absence of Community rules, a Member State may unilaterally adopt, with the purpose of promoting sales of cheese and cheese products, rules concerning the quality of cheeses produced within its territory including a ban on the production of cheeses other than those exhaustively listed.

Second question relating to Articles 30 and 34 of the EEC Treaty

(a) Measures designed to improve quality

- 17 The second question seeks in substance to ascertain whether Articles 30 and 34 of the EEC Treaty are to be interpreted as meaning that a Member State may unilaterally adopt, with the purpose of promoting sales of cheese and cheese products, rules intended to improve the quality of domestic production together with rules on the compulsory use of stamps, marks or inspection documents.
- 18 The plaintiffs in the main action and the Commission contended that a national measure designed to improve the quality of domestic production and thereby increase the sale of such products was capable of placing imports at a disadvantage and therefore constituted a measure having an effect equivalent to a quantitative restriction on imports.

- 19 It must be remembered in that respect that in its judgment of 24 November 1982 in Case 249/81 *Commission v Ireland* [1982] ECR 4005, the Court held that a publicity campaign to promote the sale and purchase of domestic products may, in certain circumstances, fall within the prohibition contained in Article 30 of the Treaty, if it is supported by the public authorities. The Court has also ruled that a body which is set up by the government of a Member State and is financed by a charge imposed on producers is under a duty not to engage in any advertising intended to discourage the purchase of products of other Member States or to disparage those products in the eyes of consumers. Nor must such a body advise consumers to purchase domestic products solely by reason of their national origin (judgment of 13 December 1983 in Case 222/82 *Apple and Pear Development Council* [1983] ECR 4083).
- 20 On the other hand, Article 30 does not prevent the adoption of national rules which, whilst leaving imported products unaffected, have as their purpose to improve the quality of domestic production so as to make it more attractive to consumers. A measure of that kind complies with the requirement of sound and fair competition laid down by the Treaty.
- 21 The plaintiffs in the main action and the Commission also consider that certain specific aspects of the national legislation in question impair export possibilities and are therefore contrary to Article 34 of the Treaty. Thus the impossibility of producing new types of cheeses in the Netherlands entails the loss of export opportunities in respect of such cheeses. As regards the cheeses which may still be produced, the new provisions have an impact on the cost of Netherlands cheese and therefore on its competitiveness on foreign markets.
- 22 With regard to that argument, the Court must state that it has repeatedly held (in particular in its judgment of 1 April 1982 in Joined Cases 141 to 143/81 *Holdijk* [1982] ECR 1299) that Article 34 of the Treaty concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a special advantage for national production or for the domestic market of the State in question. That is not the case, however, where certain provisions lay down minimum standards of

quality for cheese production, without making any distinction as to whether the cheese is intended for the domestic market or for export.

- 23 It must also be emphasized that Article 34 does not have the effect of exempting producers from any rules which may, by affecting the conditions of production, have an impact on the volume or the cost of domestic production. A Member State may legitimately pursue a policy based on quality in order to promote sales even if that policy exposes its producers to the risk of price competition from the producers of other Member States who are not bound by the same standards of quality.

(b) Compulsory use of stamps, marks or inspection documents

- 24 In the Commission's view the compulsory use of stamps, marks or inspection documents may make exports to other Member States or to non-member countries more difficult or even impossible. The Netherlands Government, however, contends that no special inspection is prescribed and no inspection document is required on the exportation of cheese products. The products merely undergo an inspection by sampling and the results thereof are set out in a certificate.
- 25 It must be pointed out in that regard that Article 34 of the Treaty does not preclude the adoption of a national rule requiring producers to place on cheese a control stamp attesting compliance with national rules on quality, provided that such requirement applies without distinction to domestic production marketed in the Member State concerned and production intended for export.
- 26 Nor does Article 34 preclude the adoption of a national rule providing for samples to be taken, by an inspection agency which subsequently issues a document setting out the results of that inspection, of all cheese products intended for domestic consumption or for export.
- 27 However, it is contrary to Article 34 to require inspection documents relating specifically to domestic production intended for export to the countries of the Community (judgment of 3 February 1977 in Case 53/76 *Bouhelier* [1977] ECR 197).

- 28 Accordingly, the answer to the second question must be that Articles 30 and 34 of the EEC Treaty are to be interpreted as meaning that a Member State may unilaterally adopt, with the purpose of promoting sales of cheese and cheese products, rules which, whilst leaving imported products unaffected, are intended to improve the quality of domestic production so as to make it more attractive to consumers, and rules on the compulsory use of stamps, marks or inspection documents, provided that no distinction is drawn according to whether the cheese is intended for the domestic market or for export.

Third question relating to compulsory affiliation

- 29 The third question seeks in substance to ascertain whether Regulation No 804/68 is to be interpreted as prohibiting the Member States from requiring cheese producers to become members of an inspection agency.
- 30 The plaintiffs in the main action refer to the judgment of the Court of 20 February 1980 in Case 94/79 *Vriend* [1980] ECR 327 in which the Court held that the requirement of affiliation to a body approved by official authority in order to be able to market, re-sell, import, export or offer for export material for plant propagation was contrary to the principle of an open market on which the common organization of the market in the sector in question was based. The relevant legislation in this case is, in the plaintiff's view, similar to that which was at issue in the *Vriend* case and compulsory registration by the producer must therefore be regarded as incompatible with Community law.
- 31 According to the Netherlands Government, a distinction must be drawn between the requirement of affiliation at the marketing stage and the requirement of affiliation at the production stage. In that regard, the Netherlands legislature took account of the Court's ruling in the *Vriend* case in limiting the scope of the rules to producers alone. It is essential to provide for adequate supervision of quality standards and, with that end in view, the Netherlands opted in favour of compulsory affiliation to a body incorporated under private law.

- 32 The Commission observes that compulsory affiliation applies also to traders, because the final stage of preparation, namely maturation, often takes place in their establishments, owing to the manufacturers' lack of storage facilities. The Commission considers that it is for the national court to decide, in the light of the *Vriend* judgment, whether compulsory affiliation by producers may make it impossible for cheese to be marketed, re-sold, imported or exported.
- 33 Whether a requirement to become affiliated to an inspection agency approved by a Member State is consistent with Community law depends in the first place on whether the objectives pursued by the inspection agency itself are consistent with Community law, a matter which the national court will have to determine in the light of the answer given to the first two questions.
- 34 If the national court concludes that the aims of the inspection agency are compatible with Community law, it is for that court subsequently to ascertain whether the means chosen to ensure compliance with the national rules are capable of modifying patterns of imports and exports by preventing producers from marketing the products concerned freely.
- 35 In that regard it must be pointed out that there is nothing to prevent a Member State from establishing an inspection agency and allowing it to exercise authority over producers, or even from requiring them to register with, or become affiliated to, that agency, provided that such measures are necessary to ensure compliance with the rules adopted in accordance with Community law.
- 36 However, it is contrary to Community law for a Member State, either directly or through the intermediary of bodies established or approved by official authority, to reserve exclusively to persons affiliated to such bodies the right to market, re-sell, import, export and offer for export domestic cheese production. It is for the national court to ascertain whether that is the effect of the legislation submitted for its consideration, either because failure to register or to become affiliated results in a prohibition of carrying on business or because the requirement of affiliation goes beyond what is necessary to ensure compliance with the rules on quality. In particular, it is for the national court to ascertain whether, in order to ensure such compliance, the legislation must also apply to traders who are not engaged in

the production of cheese or in processes assimilated to production, such as maturation.

- 37 The answer to the third question must therefore be that Regulation No 804/68 is to be interpreted as meaning that it does not prevent a Member State from requiring cheese producers to become affiliated to an inspection agency provided that the objectives pursued by that agency are consistent with Community law and that the marketing, re-sale, import, export or offering for export of cheese products is not reserved exclusively to persons affiliated to that agency.

Fourth question relating to the general principles of Community law

- 38 The fourth question seeks in substance to ascertain whether the Member States, where they are empowered to lay down rules concerning the quality of cheese, are bound by the general principles of Community law and in particular by the principle of proportionality.
- 39 In view of the answers given to the preceding questions, and in particular to the third question, it is unnecessary to give a separate answer to this question.

Costs

- 40 The costs incurred by the Netherlands Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Arrondissementsrechtbank, The Hague, by order of 14 September 1982, hereby rules:

1. Regulation No 804/68 must be interpreted as meaning that, in the absence of Community rules, a Member State may unilaterally adopt, with the purpose of promoting sales of cheese and cheese products, rules concerning the quality of cheeses produced within its territory and including a ban on the production of cheeses other than those exhaustively listed.
2. Articles 30 and 34 of the EEC Treaty must be interpreted as meaning that a Member State may unilaterally adopt, with the purpose of promoting sales of cheese and cheese products, rules which, whilst leaving imported products unaffected, are intended to improve the quality of domestic production so as to make it more attractive to consumers, and rules on the compulsory use of stamps, marks or inspection documents, provided that no distinction is drawn according to whether the cheese is intended for the domestic market or for export.
3. Regulation No 804/68 must be interpreted as meaning that it does not prevent a Member State from requiring cheese producers to become affiliated to an inspection agency provided that the objectives pursued by that agency are consistent with Community law and that the marketing, re-sale, import, export or offering for export of cheese products is not reserved exclusively to persons affiliated to that agency.

Mertens de Wilmars

Koopmans

Bahlmann

Galmot

Mackenzie Stuart

O'Keeffe

Bosco

Duc

Everling

Delivered in open court in Luxembourg on 7 February 1984.

P. Heim

Registrar

J. Mertens de Wilmars

President