Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 14 March 2019 [1]

Case C-46/18

Caseificio Sociale San Rocco Soc. coop. Arl,
S.s. Franco e Maurizio Artuso,
Sebastiano Bolzon,
Claudio Matteazzi,
Roberto Tellatin
v
Agenzia per le Erogazioni in Agricoltura (AGEA)
Regione Veneto

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Milk — Quotas — Additional levy — Article 2 of Regulation (EEC) No 3950/92 — Article 11(3) of Regulation (EC) No 1788/2003 — Obligation on purchasers to deduct the levy from the price of milk — Article 9 of Regulation (EC) No 1392/2001 — Redistribution of excess levy — Priority categories — Reallocation of unused quotas)

1. In 1984, with a view to overcoming structural surpluses, the then EEC legislature introduced a quota system for the production of milk and milk products linked to an additional levy on deliveries and direct sales exceeding the quota. The operation of that system, originally planned for a 5-year period, was repeatedly extended, before eventually coming to an end on 31 March 2015.

2. The quota system has given rise to an extraordinary volume of litigation before both the EU Courts and the national courts. [2] Furthermore, in some Member States, the system was applied only in a 'fragmentary fashion'. [3] That is especially so in the case of Italy where, for a relatively long period, the authorities failed to ensure that the additional levy due in respect of quantities produced in excess of the national quota was correctly allocated, paid at the appropriate time and/or at any rate duly registered and recovered. [4]

3. The present case is an additional episode of the lengthy saga concerning the recovery of unpaid levies in Italy. In a nutshell, it raises the issue of whether a Member State may require purchasers, by law, to deduct from the price of milk the amount owed for the levy by producers who exceed their individual quotas. If such a national law is incompatible with EU law, a further issue then arises as to what consequences the incompatibility of national law with EU law on that point may have for purchasers and producers.

1 Original language: English.

2 Cf. O'Reilly, J., 'Milk quotas and their consideration before the institutions of the Community of particular interest to lawyers', in Heusel, W., Collins, A.M., (eds), *Agricultural law for the European Union*, EIPA, Trier/Dublin, 1999, p. 103.

3 See, to that effect, Court of Auditors, Special Report No 4/93 on the implementation of the quota system intended to control milk production together with the Commission's reply (OJ 1994 C 12, p. 1).

4 See, recently, judgment of 24 January 2018, *Commission* v *Italy* (C-433/15, EU:C:2018:31).

I. Legal framework

A. EU law

4. Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector[5] extended the additional levy scheme for the milk and milk products sector that was due to expire on 31 March 1993. That scheme was to run for seven further consecutive 12-month periods, starting on 1 April 1993.[6]

5. Article 2 of Regulation No 3950/92 provides:

'1. The levy shall be payable on all quantities of milk or milk equivalent marketed during the 12-month period in question in excess of the relevant quantity referred to in Article 3. It shall be shared between the producers who contributed to the overrun.

In accordance with a decision of the Member State, the contribution of producers towards the levy payable shall be established, after the unused reference quantities have been reallocated or not, either at the level of the purchaser, in the light of the overrun remaining after unused reference quantities have been allocated in proportion to the reference quantities of each producer, or at national level, in the light of the overrun in the reference quantity of each individual producer.

2. As regards deliveries, before a date and in accordance with detailed rules to be laid down, the purchaser liable for the levy shall pay to the competent body of the Member State the amount payable, which he shall deduct from the price of milk paid to producers who owe the levy or, failing this, collect by any appropriate means.

…

Where quantities delivered by a producer exceed his reference quantity, the purchaser shall be authorised, by way of an advance on the levy payable, in accordance with detailed rules laid down by the Member State, to deduct an amount from the price of the milk in respect of any delivery by that producer in excess of his reference quantity.

…

4. Where the levy is payable and the amount collected is greater than that levy, the Member State may use the excess to finance the measures referred to in the first indent of Article 8 and/or redistribute it to producers who fall within priority categories established by the Member State on the basis of objective criteria to be determined or who are affected by an exceptional situation resulting from a national provision unconnected with this scheme.'

5 OJ 1992 L 405, p. 1.

6 See the first recital of Regulation No 3950/92.

6. Article 9 ('Criteria for redistributing the excess levy') of Commission Regulation (EC) No 1392/2001 of 9 July 2001 laying down detailed rules for applying [Regulation No 3950/92] establishing an additional levy on milk and milk products,[7] provides:

'1. Where appropriate, Member States shall determine the priority categories of producers as referred to in Article 2(4) of Regulation (EEC) No 3950/92, on the basis of one or more of the following objective criteria, in order of priority:

(a) formal acknowledgement by the competent authority of the Member State that all or part of the levy has been wrongly charged;

(b) the geographical location of the holding, and primarily mountain areas as referred to in Article 18 of Council Regulation (EC) No 1257/1999 [of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80)];

(c) the maximum stocking density on the holding for the purposes of extensive livestock production;

(d) the amount by which the individual reference quantity is exceeded;

(e) the producer's reference quantity.

2. Where the financial resources available for a given period are not used up after the criteria set out in paragraph 1 have been applied, the Member State shall adopt other objective criteria after consulting the Commission.'

7. Council Regulation (EC) No 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector[8] repealed Regulation No 3950/92. According to Article 11(1) ('Role of purchasers') thereof, purchasers are responsible for collecting contributions from producers which are owed as a result of the levy. They must pay those contributions to the competent body of the Member State. Under Article 11(3), 'where, during the reference period, quantities delivered by a producer exceed that producer's available reference quantity, the relevant Member State may decide that the purchaser shall deduct part of the price of the milk in any delivery by the producer concerned in excess of the reference quantity, by way of an advance on the producer's contribution, in accordance with detailed rules laid down by the Member State'.

8. In accordance with Article 27 ('Entry into force') of Regulation No 1788/2003, that regulation entered into force on 24 October 2003. Its provisions became applicable from 1 April 2004, with the exception of Articles 6 and 24, which applied from the date of entry into force of that regulation.

7 OJ 2001 L 187, p. 19.

8 OJ 2003 L 270, p. 123.

B. National law

9. Article 5(1) and (2) ('Obligations of purchasers') of decreto-legge n. 49, Riforma della normativa in tema di applicazione del prelievo supplementare nel settore del latte e dei prodotti lattiero-caseari (Decree-Law No 49 reforming the rules on the application of the additional levy in the milk and dairy products sector), of 28 March 2003, converted, with amendments, into Law No 119 of 30 May 2003 ('Decree-Law No 49/2003'),[9] as applicable at the material time, provides:

'1. … Purchasers shall deduct the additional levy, calculated on the basis of Article 1 of Regulation No 3950/92, as amended, in relation to milk delivered in excess of the individual reference quantity allocated to each individual transferring producer, …

2. Within 30 days of the expiry of the period referred to in paragraph 1, ... purchasers shall pay the amounts deducted into the bank account of the AGEA.'

10. Article 9(1), (3) and (4) ('Refund of levies overpaid') of Decree-Law No 49/2003 states:

'1. At the end of every period, the AGEA: (a) shall draw up a statement of the deliveries of milk made and the total levy paid by the purchasers in accordance with the performance of the obligations set out in Article 5; (b) shall calculate the total national levy payable to the European Union for excess production in the deliveries; (c) shall calculate the amount of the levy overpaid.

...

3. The amount referred to in paragraph 1(c) ... shall be shared among producers holding a quota that have paid the levy, in accordance with the following criteria and in order: ...

4. If these repayments do not exhaust the amount available referred to in paragraph 3, the remainder shall be shared among producers holding a quota that have paid the levy, except for those that have exceeded their own individual reference quantity by more than 100 per cent, in accordance with the following criteria and in order ...'

11. Article 2(3) of decreto-legge del 24 giugno 2004 n. 157 — Disposizioni urgenti per l'etichettatura di alcuni prodotti agroalimentari, nonché in materia di agricoltura e pesca (Decree-Law No 157 of 24 June 2004 — Urgent provisions on the labelling of some agri-food products, and on agriculture and fisheries), converted, with amendments, into Law No 204 of 3 August 2004 ('Decree-Law No 157/2004')[10] provides:

'Pursuant to Article 9 of [Decree-Law No 49/2003], overpaid amounts of the levy paid monthly by producers that are up to date with their payments shall be refunded to the producers. At the end of that operation, if the remaining total of the levy allocations to be made is greater than the levy payable to the European Union, plus 5 per cent, the AGEA shall cancel the levy overcharged for producers that have not yet made the monthly payments, applying the priority criteria laid down by Article 9(3) and (4), without prejudice to the penalties referred to in Article 5(5) of [Decree-Law No 49/2003].'

9 Gazzetta Ufficiale No. 75 of 31 March 2003.

10 Gazzetta Ufficiale No. 147 of 25 June 2004.

II. Facts, procedure and the questions referred

12. In July 2004, the Agenzia per le Erogazioni in Agricoltura (the Italian agricultural payments agency) ('AGEA') sent a notification to Caseificio Sociale San Rocco, as 'first purchaser' of milk products. That notification, which concerned the milk quotas and the additional levy for the period from 1 April 2003 to 31 March 2004, stated that:

– calculations had been made to refund the overpaid levy on deliveries of cow's milk made during the reference period. The calculations were based on reference quantities that had been determined by the regions and autonomous provinces and by the monthly statements of the purchasing undertakings;

– producers could benefit from the refund if they had complied with the payment of the additional levy, according to the monthly statements of the purchasing undertakings;

– the AGEA had applied Article 2(3) of Decree-Law No 157/2004 according to which producers who had overpaid were to receive refunds; at the end of that operation, if the remaining total of the levy allocations to be made were greater than the levy payable to the European Union, plus 5%, the AGEA would not request the levy overcharged from producers who had not yet made the monthly payments. In such cases it would apply the priority criteria laid down by Article 9(3) and (4), and the penalties laid down by Article 5, of Decree-Law No 49/2003. The AGEA would therefore share the surplus already paid only among producers who had reference quantities that were up to date with their payments.

13. The AGEA attached to that notification a list, for each producer, of the amounts already paid, and the amounts to be refunded.

14. On the basis of the above notification, the AGEA noted that, in relation to the reference period, Caseificio Sociale San Rocco had not made the deduction of the additional levy laid down in Article 5 of Decree-Law No 49/2003. Accordingly, the producers from which it had purchased milk still owed the relevant amounts.

15. Caseificio Sociale San Rocco and the producers ('the Applicants in the main proceedings') took the view that the Italian legislation applied by the AGEA was incompatible with EU law. They challenged the AGEA's notification before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court of Lazio, Italy). By judgment of 3 February 2010, that court dismissed the action, concluding, in essence, that the Italian legislation at issue was compatible with the provisions of Regulation No 1788/2003.

16. The Applicants in the main proceedings appealed against that judgment before the Consiglio di Stato (Council of State, Italy). By interlocutory judgment of 21 November 2017, that court allowed the appeal in part. It held that the EU rules applicable in the case at hand were not those included in Regulation No 1788/2003, but those included in Regulation No 3950/92. However, harbouring doubts as to the correct interpretation of certain provisions of Regulation No 3950/92, that court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In a situation such as that described in the case in the main proceedings, must EU law be interpreted to the effect that the consequence of the conflict of a legislative provision of a Member State with the third paragraph of Article 2(2) of [Regulation No 3950/92] is that producers are not obliged to pay the additional levy if the conditions laid down by that regulation are met?

(2) In a situation such as that described in the case in the main proceedings, must EU law and, in particular, the general principle of protection of legitimate expectations, be interpreted as meaning that the expectations of persons who have performed an obligation laid down by a Member State and have benefited from the effects associated with performance of that obligation may not be protected, if that obligation has proved to be in conflict with EU law?

(3) In a situation such as that described in the case in the main proceedings, do Article 9 of [Regulation No 1392/2001] and the EU concept of "priority category" preclude a provision of a Member State, such as Article 2(3) of Decree-Law No 157/2004, adopted by the Italian Republic, which lays down varying methods for refunding an additional levy that has been overcharged, drawing a distinction, in terms of timetables and methods of repayment, between producers that have relied upon due compliance with a national provision that has proved to be in conflict with EU law and producers who have not complied with such a provision?'

17. Written observations have been submitted by the Applicants in the main proceedings, the Italian Government and the Commission.

18. On 21 November 2018, the Court requested certain clarifications from the Italian Government regarding the procedures followed with regard to the calculation of the additional levy due for the milk year 2003/2004. The Italian Government responded to the request for clarification on 13 December 2018.

19. The Applicants in the main proceedings, the Italian Government and the Commission also presented oral argument at the hearing on 17 January 2019.

III. Analysis

A. Preliminary remarks

1. Applicable law ratione temporis

20. In its request for a preliminary ruling, the referring court expressly refers to Article 2 of Regulation No 3950/92 as the central provision applicable in the present proceedings. However, that view is contested by the Italian Government, which argues that Article 11(3) of Regulation No 1788/2003 is applicable to the main proceedings in so far as the decision of the AGEA challenged by the Applicants in the main proceedings was issued in July 2004.

21. In the light of this, I deem it useful to define the legal framework that is applicable *ratione temporis* in the present case.

22. This issue is not unimportant: the Applicants in the main proceedings argue that the Italian legislation at issue is incompatible with EU law in so far as it obliged milk purchasers to deduct the levy from the price of milk. However, the provisions which govern the operation of the levy in Regulation No 3950/92 and Regulation No 1788/2003, respectively, are not identical.

23. Article 11(3) of Regulation No 1788/2003, which repealed Regulation No 3950/92, expressly allowed Member States to decide that, when during a milk year the quantities delivered by a producer exceeded that producer's quota, the purchaser was *required* to deduct part of the price of the milk by way of an advance on the producer's additional levy. Conversely, as the Court has made clear in

Consorzio Caseifici dell'Altopiano di Asiago,[11] Article 2(2) of Regulation No 3950/92 merely *entitled*, but by no means obliged, purchasers to make such a deduction.

24. In that respect, I share the referring court's view that, as far as EU law is concerned, the rules that were applicable at the material time were those provided for in Regulation No 3950/92 (and, as a consequence, those included in Regulation No 1392/2001 which laid down the implementing rules).

25. The main proceedings concern the 2003/2004 milk year (running from 1 April 2003 to 30 March 2004). However, Regulation No 1788/2003 only became applicable, in accordance with Article 27 thereof, from 1 April 2004.

26. That is by no means surprising. Traditionally, a milk year starts on 1 April of each year and ends on 30 March of the following year.[12] This explains why Regulation No 1788/2003 — like previous instruments, including Regulation No 3950/92[13] — became applicable at the beginning of a milk year.

27. The running of a scheme such as that providing for an additional levy on milk necessarily requires the application of a given set of rules throughout the reference period. Rules such as those determining the subjects charged with the task of collecting the levy and the manner and amount in which the levy is payable are not procedural rules — as the Italian Government argues — but rather substantive rules.[14] In that regard, it must be borne in mind that, according to settled case-law, whereas procedural rules are generally applicable upon their entry into force, even to pending cases and disputes unless the specific measure in question provides otherwise, substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force.[15]

28. Provisions such as Article 2 of Regulation No 3950/92 and Article 11(3) of Regulation No 1788/2003 concern key aspects of the substantive obligations laid down in Regulation No 3950/92. Therefore, in accordance with the aforementioned principles, those provisions do not apply to situations existing before their entry into force.

29. The argument of the Italian Government would mean that Article 11(3) of Regulation No 1788/2003 becomes applicable to facts (especially deliveries) that took place, and economic relations entered into, before 1 April 2004. It would, in other words, lead to a de facto retroactive application of Article 11(3) of Regulation No 1788/2003, going against both the clear wording and the spirit of Article 27 of the same regulation.

30. Concluding on this point, in so far as the national legislation at issue obliged milk purchasers to deduct the levy from the price of milk in a period *before* 1 April 2004, the parameters of compatibility with EU law cannot but be given by the EU provisions which were applicable during that very period: the provisions of Regulation No 3950/92, in particular Article 2(2).

2. The system established by Regulations No 3950/92 and No 1392/2001

31. For a better understanding of the questions referred by the national court, it may be useful to start by outlining the aspects of the system set up by Regulations No 3950/92 and No 1392/2001 that are relevant for the present proceedings.

11 Judgment of 29 April 1999 (C-288/97, EU:C:1999:214, paragraphs 29 to 32, '*Consorzio Caseifici dell'Altopiano di Asiago*').

12 See, for example, recitals 1 to 3 of Regulation No 1788/2003 as well as Article 1(1) thereof.

13 See Article 13 of Regulation No 3950/92.

14 In this connection, it may be worth noting by the way of an analogy that it is well established that, in EU tax law, provisions which concern, inter alia, the manner and amount in which a tax is to be levied cannot apply to situations existing before their entry into force. See, for example, judgment of 17 July 2014, *Equoland* (C-272/13, EU:C:2014:2091, paragraph 20).

15 See, inter alia, judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 47 and the case-law cited).

32. On the basis of those regulations, a levy was applied to quantities of milk collected or sold for direct consumption above a certain national quota. Member States who exceeded the national quota had to divide the burden of payment among the producers who had contributed to the overrun by exceeding their individual quotas.

33. To avoid delays in the collection and payment of the levy, the EU legislature decided that, for deliveries, it was the purchaser who was liable to pay the levy to the public administration, after collecting it from producers by means of a deduction from the price of milk or by any other appropriate means. To that end, the competent national authority notified or confirmed to each purchaser the amount of levies payable by them, after a decision was taken by the Member State as to whether all or part of the unused quotas were to be reallocated to the producers concerned (either directly or via the purchasers).[16] In the case of reallocation of the unused individual quotas, those were to be allocated in proportion to the reference quantities of each producer.

34. However, Member States might also decide not to reallocate unused quotas. In that case, they could use the amount collected in excess of the levy owed to the European Union to fund national restructuring programmes and/or to refund it to producers falling within certain 'priority categories' or producers who find themselves in an exceptional situation.

35. It is against this background that I will now turn to the analysis of the questions referred.

B. First question

36. By its first question, the referring court essentially asks whether the consequence of the conflict of a national legislative provision with Article 2(2) of Regulation No 3950/92 is that producers are not obliged to pay the additional levy even if the conditions laid down by that regulation are met.

37. The premiss on which this question is based is that, by obliging purchasers to deduct the additional levy from the payment for the milk delivered by producers in excess of their individual quotas, and to transfer it on a monthly basis to the AGEA, the Italian legislation at issue was incompatible with Article 2(2) of Regulation No 3950/92. The latter provision, as the Court clarified in *Consorzio Caseifici dell'Altopiano di Asiago*,[17] entitles purchasers to deduct from the price of milk paid to a producer the amount owed by that producer by way of additional levy, but does not impose on them any obligation in that regard.

38. However, that premiss is disputed by the Italian Government. Therefore, I shall first address that objection, before dealing with the main issue raised by the first question referred.

1. The incompatibility between national law and EU law

39. In the Italian Government's view, the referring court's reading of the judgment in *Consorzio Caseifici dell'Altopiano di Asiago* goes too far. According to that government, that judgment does not rule out the possibility that Member States may limit the choice provided for in Article 2(2) of Regulation No 3950/92 with regard to the manner in which the levy is to be collected (mandatory deduction *or* any other means). The Court merely found that Member States may not impose a penalty upon purchasers that do not comply with that obligation.

16 See, in particular, Article 7 of Regulation No 1392/2001.

17 Paragraphs 29 to 32 of the judgment.

40. It is true that the proceedings which gave rise to the judgment in *Consorzio Caseifici dell'Altopiano di Asiago* arose from an action brought by a body representing milk producers against an administrative penalty imposed upon it by the Italian authorities for, inter alia, failing to deduct from the price of milk the amounts owed by the producers who had exceeded their individual quotas. Yet, the Court seems to have dealt with the question in the abstract, without giving much weight to the specific facts of the case.

41. The referring court in that case had asked, in essence, whether a purchaser is, under Article 2(2) of Regulation No 3950/92, obliged to withhold the sums owed by the producers exceeding their individual quotas. The Court answered in the negative, emphasising that Article 2(2) of Regulation No 3950/92 grants purchasers an *option*, but does not lay down an *inescapable obligation*, in that regard. [18]

42. Clearly, that implies that Member States may not impose penalties upon purchasers that decide not to deduct the sums due as additional levy from the price of milk paid to producers, and to recover those sums by other means. But, from those findings, it also follows, quite logically, that Member States may not penalise purchasers that take such a decision by reserving for them any other unfavourable treatment, such as, for example, discriminating against them when re-allocating unused quotas or redistributing the levy collected in excess. [19] That would be incompatible with the fact that Article 2(2) of Regulation No 3950/92 is — to use the words of Advocate General La Pergola — concerned with a *right* of the purchasers, failure to exercise which 'cannot entail penalties'. [20] And 'penalties' should be understood — I would add — in the broadest sense.

43. In *Consorzio Caseifici dell'Altopiano di Asiago*, the Court therefore considered the choice as to how to collect the levy — by means of deduction or any other appropriate means — and framed it as *a matter of subjective right for each individual purchaser*. If an individual right is given by the EU legislation, it follows that national legislation cannot deprive individuals of such a right. Thus, indeed, such Member State legislation is incompatible with Article 2(2) of Regulation No 3950/92.

44. That being said, even if the EU legislature itself later 'switched' to another model of collection of the levy, the fact remains that in the relevant period, the choice in that regard remained with the purchasers.

45. Therefore, while acknowledging that such interpretation of Article 2(2) of Regulation No 3950/92 might lead to a certain weakening of the system of enforcement, I must nonetheless agree with the Applicants in the main proceedings and the Commission that, as far as the law stood after the decision of the Court in *Consorzio Caseifici dell'Altopiano di Asiago*, the premiss on which the first question is based is correct.

46. I will now deal with the substance of the question.

2. The consequences of the incompatibility between national law and EU law

47. In essence, the issue raised by the first question is whether, in a situation in which a national rule requires, contrary to Article 2(2) of Regulation No 3950/92, purchasers to deduct the additional levy from the price of milk, the levy is no longer payable, even if the conditions laid down by that regulation are met. In other words, would the incompatibility of the national legislation at issue with EU law have the consequence of releasing the purchasers from their obligation to collect the additional levy from the producers and transfer it to the competent national authorities, and/or of releasing the producers from their obligation to pay the additional levy?

18 See, in particular, paragraph 30 of the judgment.

19 More on this issue *infra*, points 69 to 79 of this Opinion.

20 See Opinion of Advocate General La Pergola in *Consorzio Caseifici dell'Altopiano di Asiago* (C-288/97, EU:C:1998:574, point 13).

48. The answer to that question is, to my mind, rather obvious: no. Indeed, all the parties which submitted observations in this case (including the Applicants in the main proceedings) agree: the fact that the national procedural rules governing the collection of the additional levy may be incompatible with EU law cannot release purchasers or producers from their substantive obligations. Put simply, the disagreement (and the incompatibility) with regard to *how* a levy is to be collected has no impact on *whether* it is owed.

49. With regard to *purchasers*, a different conclusion would go against the provisions of Regulations No 3950/92 and No 1392/2001, which clearly and expressly indicate that, in the case of deliveries, it is the purchaser that is liable for the levy.[21] That would also render the system set up by those regulations largely ineffective in so far as deliveries constitute the vast majority of the sales of milk and, because of that, purchasers 'bear prime responsibility for the proper implementation of [that system]'.[22]

50. The only effect stemming from the said incompatibility is that the national rules in question should be disapplied. The consequence for purchasers is mainly twofold: on the one hand, they reacquire their freedom to collect the sums by 'any appropriate means' and, on the other hand, the purchasers that did not collect the levy through deductions from the price of milk cannot be penalised.

51. A fortiori, the incompatibility of national law with EU law on the rules governing the collection of the additional levy by purchasers cannot have any effect on the *producers*' obligation to pay the levy.

52. As the sixth recital and Article 2(1) of Regulation No 3950/92 make clear, the duty to pay the additional levy is a direct consequence of the fact that the national quota is exceeded and it is the 'producers who contributed to the overrun [that] must pay the levy'.

53. As the Court has recently emphasised, in accordance with Article 11(1) and (2) of Regulation No 1392/2001, the Member States 'are to take all the measures necessary to ensure that the levy, including the interest due in the event of failure to comply with the payment period, is correctly charged and that *it falls on the producers who contributed to the overrun*'.[23] In fact, where the producers do not fulfil their obligations under the scheme, and purchasers do not act, Member States have the power to take direct action against producers with a view to recovering the amounts payable.[24]

54. For the reasons explained above, I am of the view that the Court should answer the first question to the effect that the incompatibility of national rules governing the collection of the additional levy with Article 2(2) of Regulation No 3950/92 does not release producers from their obligation to pay the additional levy.

C. Second question

55. By its second question, the referring court asks whether the legitimate expectations of the purchasers and producers who have complied with the obligation to deduct the levy due from the price of milk and to pay that amount to the public authorities on a monthly basis should be protected. That question, as I understand it, is posed only in case the Court were to answer the first question in the affirmative.

21 See, especially, the eighth recital and Article 2(2) of Regulation No 3950/92, and Article 7 and Article 8(1) of Regulation No 1392/2001.

22 Seventh recital of Regulation No 1392/2001.

23 Judgment of 24 January 2018, *Commission* v *Italy* (C-433/15, EU:C:2018:31, paragraph 41). Emphasis added.

24 See judgment of 15 January 2004, *Penycoed* (C-230/01, EU:C:2004:20, paragraph 41).

56. Since the incompatibility of national rules governing the collection of the additional levy with Article 2(2) of Regulation No 3950/92 does not, to my mind, release producers and purchasers from their substantive obligations under that regulation, the second question referred seems to lose its significance.

57. Indeed, within such a constellation, I am not entirely sure what legitimate expectations should be protected.

58. In that connection, I would only add that, pursuant to Article 8(2) and (3) of Regulation No 1392/2001, Member States' authorities should take action to ensure payment of the levy owed by the defaulting producers. Furthermore, the sums due are subject to interest for late payment. This is, finally, without prejudice to the Member States' ability to impose appropriate penalties upon parties who breach their obligations under the scheme.

D. Third question

59. The third question referred concerns the consequences that may stem from the incompatibility of the national legislation governing the collection and payment of the additional levy with the provisions of Regulations No 3950/92 and No 1392/2001 with regard to the refund of excess levy.

60. In essence, by its third question, the referring court asks whether Article 9 of Regulation No 1392/2001 precludes a national provision which lays down different methods and timetables for the refund of the excess levy to producers, according to whether or not the amounts due from those producers for the levy have been deducted from the price of milk and transferred, on a monthly basis, to the competent national authorities.

61. To better understand the reasons behind the question referred and the issues raised by it, it may be useful to recall, briefly, the specific facts relevant to this particular question.

1. The factual background

62. Milk production in Italy for the 2003/2004 milk year exceeded the quota allocated to that Member State in the relevant EU legislation. An additional levy on the surplus was consequently owed by that Member State to the European Union. However, because some individual quotas had not been used, the overall amount that the Italian authorities received (or should have received) from the producers that contributed to the overrun — either directly or via the purchasers — was in excess of the amount of the levy payable to the Union budget.

63. According to the Italian Government, the competent national authorities decided not to make use of the possibility, offered by Article 2(1), second subparagraph, of Regulation No 3950/92, to reallocate the unused quotas. It was decided, in fact, to redistribute the excess to producers that fell within certain priority categories, pursuant to Article 2(4) of Regulation No 3950/92. To that end, the producers that had complied with their monthly payment obligations, and that were located either in mountain areas or other disadvantaged areas, were to be reimbursed in the first place. If any part of the excess remained, the authorities would then reduce the amounts requested from those producers that had not complied with their monthly payment obligations, and that were located either in mountain areas or other disadvantaged areas.

64. Nevertheless, the Applicants in the main proceedings dispute this account of the facts given by the Italian Government. They take the view that what the Italian authorities actually did at the material time was not to refund the excess levy, but to reallocate the unused quotas among certain producers that had exceeded their individual quotas.

65. However, it would appear that the manner in which the third question posed by the national court is formulated suggests that the referring court also takes the view that, in 2004, the Italian authorities decided to refund the excess levy to producers that fell in certain priority categories.

66. I shall thus answer the present question as articulated by the referring court. In proceedings under Article 267 TFEU, it is not for the Court to determine the relevant facts. That is a task that belongs to the referring court.

67. That said, and merely for the sake of completeness, I will also address in passing the scenario referred to by the Applicants in the main proceedings. As I see it, the factual aspects of the dispute on which the parties disagree are not determinative in order to address the overarching issue raised by the third question which is, in a nutshell, under what criteria is a differentiation between producers possible.

68. In the following I shall explain why I take the view that purchasers or producers that did not comply with the obligation, set out in national law, to deduct the levy from the price of milk and to transfer it to the competent authorities on a monthly basis cannot be treated less favourably than other producers or purchasers, be it in the refund of the excess levy or in the reallocation of unused quotas.

2. Refund of excess levy

69. As mentioned in point 60 above, the third question concerns the issue of whether Article 9 of Regulation No 1392/2001 precludes a national provision, such as Article 2(3) of Decree-Law No 157/2004, which lays down different methods and timetables for the refund of the excess levy to producers, according to whether or not the amounts owed by those producers for the levy have been deducted from price of milk and transferred, on a monthly basis, to the competent national authorities.

70. The answer to that question should, to my mind, be in the affirmative.

71. The wording of Article 9(1) of Regulation No 1392/2001 is very clear: a Member State that decides to redistribute the excess levy among producers may only do so to the benefit of certain 'priority categories' that are to be determined on the basis of the criteria listed therein. Those criteria are clearly exhaustive and listed 'in order of priority'. Member States may thus not deviate from those criteria. A fortiori, they cannot add, in order to define the priority categories, a criterion requiring compliance with a national procedural rule that — what is more — proved incompatible with the provisions of Regulation No 3950/92.

72. Article 9(2) of Regulation No 1392/2001, in turn, allows Member States to adopt 'other objective criteria' but only 'where the financial resources available for a given period are not used up after the criteria set out in paragraph 1 [of the same provision] have been applied', and provided that the Commission has been consulted on the point.

73. My understanding is, however, that the national criterion based on compliance with Article 5(1) of Decree-Law No 49/2003 was applied to determine the producers that would be refunded in the first place. Only where funds were still available after that first round of redistribution, would other producers also receive a refund. The national provisions thus seem to follow a logic which, in practice, is the opposite of that underlying Article 9 of Regulation No 1392/2001. In addition, it is not clear on the basis of the case file whether the Italian authorities have consulted the Commission on the adoption of this 'procedural' criterion.

74. In my view therefore, Article 9 of Regulation No 1392/2001 precludes a Member State from excluding from the refund producers that fall squarely into one of the priority categories listed, or that meet the criteria agreed between the Commission and the Member State in question. As a result, producers who have not paid the levy as provided for in Article 5(1) of Decree-Law No 49/2003 may not be treated less favourably than other producers in the case of a refund of the excess levy in conformity with Article 2(4) of Regulation No 3950/92.

75. For the sake of completeness, I would add as a final remark that producers that duly complied with Article 5(1) of Decree-Law No 49/2003 cannot be considered to be 'affected by an exceptional situation resulting from a national provision unconnected with this scheme' within the meaning of Article 2(4) of Regulation No 3950/92. Leaving aside the interpretation of the scope of the concept of 'exceptional situation', which would likely be interpreted rather narrowly in any case, it remains clear that under no conceivable interpretation of Article 2(4) of Regulation No 3950/92 could a provision such as Article 5(1) of Decree-Law No 49/2003 be considered 'unconnected' with the milk quotas scheme.

76. In the light of the foregoing, the third question should in my view be answered to the effect that Article 9 of Regulation No 1392/2001 precludes a national provision which lays down different methods and timetables for the refund of the excess levy to producers, according to whether or not the amounts due from those producers for the levy have been deducted from the price of milk and transferred, on a monthly basis, to the public authorities.

3. Reallocation of unused quotas

77. My assessment would have been no different even if the distinctive treatment reserved by the Italian authorities for producers and purchasers who had not complied with Article 5(1) of Decree-Law No 49/2003 concerned — as the Applicants in the main proceedings maintain — a reallocation of unused quotas.

78. Unused individual quotas must, in accordance with Article 2(1) of Regulation No 3950/92, be 'allocated in proportion to the reference quantities of *each* producer'.[25] That means, arguably, that unused quotas are to be allocated to *all* producers that have contributed to the overrun and that their contribution for the levy must be established accordingly.[26]

79. Consequently, purchasers or producers who have not complied with Article 5(1) of Decree-Law No 49/2003 could not be discriminated against, even in the case of reallocation of unused quotas.

IV. Conclusion

80. In conclusion, I propose that the Court answer the question referred for a preliminary ruling by the Consiglio di Stato (Council of State, Italy) as follows:

– The incompatibility of national rules governing the collection of the additional levy with Article 2(2) of Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector does not release the producers from their obligation to pay the additional levy;

– Article 9 of Commission Regulation (EC) No 1392/2001 of 9 July 2001 laying down detailed rules for applying Council Regulation No 3950/92 establishing an additional levy on milk and milk products precludes a national provision which lays down different methods and timetables for the

25 Emphasis added.

26 See also, to that effect, judgment of 5 May 2011, *Etling and Etling and Others* (C-230/09 and C-231/09, EU:C:2011:271, paragraph 64).

refund of the excess levy to producers according to whether or not the amounts due from those producers for the levy have been deducted from the price of milk and transferred, on a monthly basis, to the competent national authorities.