Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 13 July 2017 [1]

Case C-433/15

European Commission
v

Italian Republic

(Failure of a Member State to fulfil its obligations — Milk and milk products — Additional levy on milk — 1995/1996 to 2008/2009 marketing years — Failure in particular to comply with Articles 79, 80 and 83 of Regulation (EC) No 1234/2007 and Articles 15 and 17 of Regulation (EC) No 595/2004 — Failure to ensure the proper allocation of the additional levy on milk between producers who contributed to the reference quantities being exceeded — Failure to ensure that the levy was paid within the prescribed periods — Failure to recover in cases of non-payment of the levy)

1. By its application brought under the second paragraph of Article 258 TFEU, the European Commission in essence asks the Court to declare that the Italian Republic has failed in its duty (i) to ensure that the additional levy payable on milk and milk products was properly charged to the account of the producers liable to account for it and (ii) to ensure that the levy was paid by the producers and purchasers liable to pay it at national level and, in the event of a failure in that regard, to recover using the appropriate procedures available at national level, in each case for the period from 1995/1996 to 2008/2009.

EU law

The additional levy on milk and milk products

2. The first levy on milk production in the (former) European Economic Community was imposed by Regulation No 1079/77. [2] It took the form of a co-responsibility levy of between 1.5 and 4% of the milk target price, payable by milk producers in respect of the period from 16 September 1977 to the end of the 1979/1980 milk year. [3]

1 Original language: English.

2 Council Regulation (EEC) of 17 May 1977 on a co-responsibility levy and on measures for expanding the markets in milk and milk products (OJ 1977 L 131, p. 6).

3 The period of the co-responsibility levy was extended a number of times, on the last occasion by Council Regulation (EEC) No 1894/87 of 2 July 1987 amending Regulation No 1079/77 in respect of the co-responsibility levy on milk and milk products (OJ 1987 L 182, p. 32), which extended it until the 1987/1988 milk year.

3. The recitals of Regulation No 856/84[4] record that, notwithstanding the application of the co-responsibility levy, quantities of milk delivered were increasing at such a rate that the disposal of surpluses was imposing financial burdens and market difficulties which were jeopardising the very future of the common agricultural policy.[5] In order to resolve those issues, Article 1 of the regulation introduced an additional levy ('the levy') on quantities of milk or milk equivalent[6] delivered beyond a reference quantity to be determined. The levy was to be payable by producers or purchasers in respect of five consecutive periods of 12 months beginning on 1 April 1984.

4. Implementing Regulation No 857/84[7] provided for the Member States to allocate individual reference quantities to purchasers and producers of milk based on the quantities purchased, delivered or sold in 1981. The levy on milk delivered in excess of the reference quantity was payable by purchasers and producers to the national authorities by way of quarterly instalments. The amount of the levy collected was to be paid over to the Community.[8]

5. Regulation No 1109/88[9] extended the number of periods in respect of which the levy was to be payable from five to eight and, by Regulation No 816/92,[10] that number was further increased to nine.

6. By virtue of Articles 15 and 16 of implementing Regulation No 1546/88,[11] purchasers and producers respectively were required to account to the competent national agency in respect of the levy for each 12-month period within three months of the end of that period. Article 19(1) of that regulation provided, inter alia, that the Member States should adopt whatever additional measures were required in order to ensure collection of the levy.

7. Regulation No 3950/92[12] repealed and replaced the existing provisions in order to simplify and clarify the arrangements relating to the levy with a view to ensuring the legal certainty of producers and the other parties concerned.[13] By virtue of Article 1, an additional levy was to be payable by producers on quantities of milk delivered to purchasers or sold directly for consumption in excess of a quantity to be determined. The levy was to run for seven new consecutive periods of 12 months commencing on 1 April 1993. Article 2 provided for the levy to be shared between producers who contributed to the overrun, with the purchaser liable to pay, as a general rule, the amount of the levy (which he was to deduct from the price of milk paid to producers who owed the levy) to the competent body of the Member State.

4 Council Regulation (EEC) of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ 1984 L 90, p. 10).

5 See the third recital of the regulation.

6 Together referred to below as 'milk'.

7 Council Regulation (EEC) of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13). The regulation was amended, as regards the obligation on the Member State to make payment of the levy collected, by Council Regulation (EEC) No 1305/85 of 23 May 1985 amending Regulation No 857/84 (OJ 1985 L 137, p. 12).

8 See Articles 6 and 9 of the regulation. See also judgment of 13 November 2001, *France* v *Commission*, C-277/98, EU:C:2001:603, paragraph 12.

9 Council Regulation (EEC) of 25 April 1988 amending Regulation No 804/68 (OJ 1988 L 110, p. 27).

10 Council Regulation (EEC) of 31 March 1992 amending Regulation No 804/68 (OJ 1992 L 86, p. 83).

11 Commission Regulation (EEC) of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation No 804/68 (OJ 1988 L 139, p. 12).

12 Council Regulation (EEC) of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1).

13 See the second recital.

8. Regulation No 536/93[14] laid down detailed implementing rules in relation to Regulation No 3950/92. Articles 3 and 4 provided that purchasers and producers respectively were to pay the competent authority the amount due before 1 September in each year. Article 5(2) obliged Member States to 'take any additional measures necessary' to ensure payment of the levies due to the Community within the period laid down. Pursuant to Article 7, they were to take all the verification measures necessary to ensure payment of the levy and set out requirements as to the approval of purchasers and producers.

9. By Regulation No 1256/1999,[15] the levy regime was extended by eight further consecutive periods of 12 months until April 2008.

10. Article 11(1) and (2) of implementing Regulation No 1392/2001[16] introduced tighter procedures with a view to making the Member States play a greater role in the controls and penalties they were required to introduce to ensure that the levy was collected correctly.[17]

11. Regulation No 1788/2003[18] introduced a number of modifications to the levy system. By Article 1, the levy introduced by that regulation was to run for 11 consecutive periods of 12 months starting on 1 April 2004.

12. Whilst previous legislation had imposed the liability to pay the levy on producers, with Member States forwarding sums collected to the Community budget,[19] Article 3 of that regulation added to that system, by imposing a liability on the Member States themselves to pay the levy to the Community. Paragraph 1 provided:

'Member States shall be liable to the Community for the levy resulting from overruns of the national reference quantity … and … shall pay it, within the limit of 99% of the amount due, into the European Agricultural Guidance and Guarantee Fund (EAGGF).'[20]

13. Under Article 4:

'The levy shall be entirely allocated, in accordance with the provisions of Articles 10 and 12, among the producers who have contributed to each of the overruns of the national reference quantities ...

… producers shall be liable vis-à-vis the Member State for payment of their contribution to the levy due, calculated in accordance with the provisions of Chapter 3, for the mere fact of having overrun their available reference quantities.'

14 Commission Regulation (EEC) of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products (OJ 1993 L 57, p. 12).

15 Council Regulation (EC) of 17 May 1999 amending Regulation No 3950/92 (OJ 1999 L 160, p. 73).

16 Commission Regulation (EC) of 9 July 2001 laying down detailed rules for applying Regulation No 3950/92 (OJ 2001 L 187, p. 19).

17 See recital 5.

18 Council Regulation (EC) of 29 September 2003 establishing a levy in the milk and milk products sector (OJ 2003 L 270, p. 123).

19 See, in that regard, judgment of 13 November 2001, *France* v *Commission*, C-277/98, EU:C:2001:603, paragraphs 34 to 36. Although the detailed arrangements for implementing the levy meant that purchasers were in many cases liable to account for the levy to the national authorities, the actual liability to pay it was imposed on producers. See further footnote 62 below.

20 The reduction of 1% was in order 'to take account of cases of bankruptcy or the definitive inability of certain producers to make their contribution to the levy due' (recital 6).

14. Article 15 of implementing Regulation No 595/2004[21] provided that purchasers and producers were to pay the levy to the competent national authority before 1 September in each year[22] and obliged Member States to declare the amounts resulting from the application of Article 3 of Regulation No 1788/2003 to the EAGGF. By virtue of Article 17 of that regulation, the Member States were to take all measures necessary to ensure that the levy was correctly charged and that it fell on the producers who contributed to the overrun.

15. Regulation No 1234/2007[23] (otherwise known as 'the Single CMO Regulation') replaced a series of separate regulations[24] by a single legislative instrument without, however, changing the substantive policy underlying the milk quota levy system or the arrangements for its payment.

16. Section III of Chapter III of Title I of that regulation was entitled 'Milk'. Subsection III of Section III, entitled 'Quota Overrun' comprised Articles 78 to 84. Article 78 provided for a levy to be payable on milk and other milk products marketed in excess of the national quota. Member States were to be liable to the Community for that levy to the extent of 99% of the amount due to with payment to be made to the European Agricultural Guarantee Fund.

17. Under Article 79 of that regulation, the levy was to be entirely allocated among the producers who had contributed to each of the overruns of the national quotas. Those producers were to be liable vis-à-vis the Member State for payment of their contribution to the levy due 'for the mere fact of having overrun their available quotas'.

18. Article 80(3) provided for each producer's contribution to payment of the levy to be established by decision of the Member State, after any unused part of the national quota allocated to deliveries had or had not been re-allocated, in proportion to the individual quotas of each producer or according to objective criteria to be set by the Member States.

19. By virtue of Article 83 of that regulation, in the case of direct sales, each producer's contribution to payment of the levy was to be established by decision of the Member State, after any unused part of the national quota allocated to direct sales had or had not been re-allocated, at the appropriate territorial level or at national level. The Commission was to determine how and when the levy was to be paid to the Member State's competent body.[25]

20. Article 1 of Regulation No 1034/2008[26] amended Regulation No 885/2006[27] by introducing, inter alia, a new Article 5b. That provided:

'Without prejudice to any other enforcement action provided for in national law, Member States shall off-set any still outstanding debt of a beneficiary which has been established in accordance with national law against any future payment to be made by the paying agency [[28]] responsible for the recovery of the debt to the same beneficiary.'

21 Commission Regulation (EC) of 30 March 2004 laying down detailed rules for applying Regulation No 1788/2003 (OJ 2004 L 94, p. 22).

22 By Commission Regulation (EC) No 1468/2006 of 4 October 2006 amending Regulation No 595/2004 (OJ 2006 L 274, p. 6), this was amended to 1 October in each year.

23 Council Regulation (EC) of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (OJ 2007 L 299, p. 1).

24 Including Regulation No 1788/2003.

25 It appears that this was done by maintaining in force the timescales laid down by Regulation No 595/2004, as amended. See Commission Implementing Regulation (EU) 2015/517 of 26 March 2015 amending Regulation No 595/2004 (OJ 2015 L 82, p. 73).

26 Commission Regulation (EC) of 21 October 2008 amending Regulation (EC) No 885/2006 laying down detailed rules for the application of Regulation (EC) No 1290/2005 as regards the accreditation of paying agencies and other bodies and the clearance of the accounts of the EAGF and the EAFRD (OJ 2008 L 279, p. 13). The regulation entered into force on 29 October 2008.

27 That regulation introduced implementing provisions in relation to Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1), which replaced, inter alia, the EAGGF with the European Agricultural Guarantee Fund with effect from 1 January 2007.

28 As defined in Article 6(1) of Regulation No 1290/2005.

21. By Article 230(1) of Regulation No 1308/2013,[29] the levy was abolished with effect from 31 March 2015.

State aid

22. Recitals 2 to 5 and 8 of Decision 2003/530[30] stated:

'(2) Italian milk producers have produced milk in excess of their reference quantities during the period from 1995/1996 to 2001/2002 and are due to pay to the Community an amount of EUR 1 386 475 250 by virtue of the additional levy on milk and milk products established in accordance with Regulation (EEC) No 3950/92.

(3) This amount has to a large extent not been recovered by the Italian authorities following suspensions of payment obtained by these producers from national Administrative Courts.

(4) The current situation in Italy is characterised by the fact that the collection of the additional levy is running into a series of difficulties, which have notably resulted in a vast number of pending court cases which may continue to retard actual payments for a considerable time in the future.

(5) The Italian authorities envisage measures to settle this pending litigation and to remove the social tensions that currently exist by allowing these milk producers to settle their outstanding debt by means of deferred payment without interest over a number of years.

…

(8) In order to avoid the imposition of heavy financial burdens on the individual Italian milk producers concerned, which would probably be caused by the immediate recovery in full of all the amounts due, and thus to alleviate the existing social tensions, exceptional circumstances exist which justify considering the aid which the Italian Republic intends to grant to these milk producers in the form of an advance and a deferred payment to be compatible with the common market in derogation from Article 87 of the Treaty, if the conditions laid down in this Decision are fulfilled.'

23. Article 1 of that decision provided:

'The aid the Italian Republic intends to grant to milk producers, by itself making payment to the Community of the amount due from them to the Community by virtue of the additional levy on milk and milk products for the period 1995/1996 to 2001/2002 and by allowing these producers to repay their debt by way of deferred payment [31] over a number of years without interest, is exceptionally considered to be compatible with the common market on condition that:

– repayment shall be in full by yearly instalments of equal size,

– the repayment period shall not exceed 14 years, starting from 1 January 2004.'

29 Regulation (EU) of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and No 1234/2007 (OJ 2013 L 347, p. 671).

30 Council Decision of 16 July 2003 on the compatibility with the common market of an aid that the Italian Republic intends to grant to its milk producers (OJ 2003 L 184, p. 15).

31 I shall refer below to these deferred payment arrangements as 'the 2003 deferred payment scheme'.

24. In Decision 2013/665,[32] the Commission noted that Italy had introduced legislation extending the period for repayment of certain instalments referred to in Decision 2003/530, thereby infringing the condition laid down in Article 1 of that decision that all repayments should be by way of instalments of equal size. Articles 1 and 2 of Decision 2013/665 declared that the deferral of payment in question constituted State aid which was incompatible with the internal market and ordered Italy to recover the incompatible aid from the beneficiaries of the deferral.

National law

25. Space does not permit a full review of the relevant Italian legislation in this area. Much of it is extremely complicated. What follows represents of necessity a brief overview.

26. While the levy on milk production was originally introduced at Community level in 1984, the Court's judgment in *Lattepiù*[33] records that the legislative arrangements as regards Italy were first adopted in 1992.[34] Those arrangements appear to have been abortive in so far as, on the one hand, the individual reference quantities allocated by the Italian authorities contained a great number of errors, due in particular to the fact that they were certified by the producers themselves[35] and, on the other hand, some of the subsequent national legislation was declared invalid by the Corte costituzionale (Constitutional Court).[36]

27. Article 2 of Law No 5/98 gave a number of powers to the Azienda di Stato per gli interventi nel mercato agricolo (State Agricultural Market Intervention Board; 'the AIMA') to administer the milk levy scheme, including in particular the determination of reference quantities and their communication to producers.[37]

28. Following a report by a Government Commission of Inquiry, several further measures were adopted, including Decree-Law No 43/99 (converted, in amended form, into Law No 118 of 27 April 1999). Article 1 of that decree-law gave the AIMA a period of 60 days in which to make the appropriate national adjustments for the 1995/1996 and 1996/1997 milk production periods. By virtue of the same provision, individual reference quantities, as adjusted if necessary by the AIMA, were to be definitive for the purposes of payment of the levy.[38]

29. Decree-Law No 49/2003 of 28 March 2003 (converted, in amended form, into Law No 119/2003) provided that duties relating to monitoring compliance with the levy scheme and for enforced recovery procedures were to fall on the regions and autonomous provinces. The Agenzia per le Erogazioni in Agricoltura (Agricultural Payments Agency; 'the AGEA')[39] was to have exclusive responsibility for managing the national reserve and for calculating the relevant quantities and amounts due.

30. Article 3(5) *duodecies* and *terdecies* of Law No 231/2005 introduced a prohibition on set-off in relation to sums owing by accredited paying agencies under Regulation No 1663/95[40] to claimants.

32 Commission Decision (EU) of 17 July 2013 on State aid SA.33726 (11/C) [ex SA.33726 (11/NN)] — granted by Italy (deferral of payment of the milk levy in Italy) (OJ 2013 L 309, p. 40).

33 Judgment of 25 March 2004, *Cooperativa Lattepiù and Others*, C-231/00, C-303/00 and C-451/00, EU:C:2004:178.

34 See paragraph 15 of the judgment. The principal implementing legislation was Law No 468/92 of 26 November 1992, although the Commission also refers in its application to Ministerial Decree No 258/89 and Law No 209/91. That paragraph records that Law No 468/92 'was subsequently followed by an abundance of much amended legislation'.

35 See paragraph 79 of the judgment.

36 See paragraph 16 of the judgment.

37 See paragraph 20 of the judgment.

38 See paragraphs 19, 21 and 22 of the judgment.

39 The AGEA replaced the AIMA in 1999.

40 Commission Regulation (EC) of 7 July 1995 laying down detailed rules for the application of Council Regulation (EEC) No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section (OJ 1995 L 158, p. 6).

31. Article 8 *quinquies* (in particular) of Law No 33/2009 introduced new provisions concerning deferred payments of the levy into Decree-Law No 49/2003.[41] Debtors could apply to the AGEA for a deferral over a period of up to 30 years, provided they agreed to abandon all pending court proceedings they might have brought. Should a producer not apply within the prescribed period to participate in the new arrangements, cease to participate in them or fail to make a payment falling under them on the due date, his debt would become immediately recoverable and subject to enforcement procedures under Royal Decree No 639/1910.

32. Law No 228/2012[42] made substantial changes to Article 8 *quinquies* of Law No 33/2009. While the AGEA remained primarily responsible for recovery of unpaid levies, it was to do so by way of an assessment procedure with the assistance of members of the Equitalia group[43] and the Guardia di Finanza (Tax and Financial Police).

Pre-litigation proceedings

33. By a series of exchanges of letters during the period between July 2008 and July 2012, most of which took place under the EU Pilot Procedure, the Commission sought to obtain information from Italy regarding the allocation of the levy on those responsible to account for it and the steps taken to recover it in cases of non-payment. The Commission expressed its concern as to what it considered the significant amounts remaining unpaid.

34. Since the Commission was dissatisfied with the information Italy had provided, it sent that Member State a letter of formal notice on 21 June 2013, inviting it to submit its observations. Italy responded by a series of letters dated 23 September 2013 and subsequent dates.

35. In view of what it termed the 'persistent stagnation of the recovery procedures and the significant sums remaining outstanding', the Commission served a reasoned opinion on 10 July 2014. Italy requested an extension of time for submitting its response, which was set at 11 October 2014. It provided its response on 13 October 2014.

Procedure and forms of order sought

36. Taking the view that Italy had failed to provide information which answered its concerns, the Commission brought the present action on 6 August 2015.

37. The Commission requests the Court to:

– declare that, by failing to ensure that the additional levy payable in respect of quantities produced in Italy in excess of the national quota from the first year in which the additional levy was in fact applied in Italy (1995/1996) until the last year in which there was surplus production in Italy (2008/2009) was in fact charged to the account of the individual producers who had contributed to each of the production overruns and that it was paid at the appropriate time, upon their being given notification of the amount payable, by the purchaser or the producer in the case of direct sales or, where the levy was not paid within the period prescribed, registered and, where possible, collected by way of enforcement from those purchasers or producers, the Italian Republic has failed to fulfil the obligations imposed on it by the relevant provisions of EU law applicable in the years concerned, in particular: (i) Articles 1 and 2 of Regulation No 3950/92, (ii) Article 4 of Regulation No 1788/2003, (iii) Articles 79, 80 and 83 of Regulation No 1234/2007, and, with

41 I shall refer below to these deferred payment arrangements as 'the 2009 deferred payment scheme'.

42 Also known as 'the 2013 Stability Law'.

43 Equitalia SpA is a company under the control of the Italian State.

regard to the Commission's implementing provisions, (iv) Article 7 of Regulation No 536/1993, (v) Article 11(1) and (2) of Regulation No 1392/2001, and (vi) Articles 15 and 17 of Regulation No 595/2004; and

– order the Italian Republic to pay the costs.

38. The Italian Republic requests the Court to:

– dismiss the action, and

– order the Commission to pay the costs.

39. At the hearing on 8 September 2016, the Commission and Italy made oral submissions and responded to the questions put by the Court.

Analysis

Preliminary points

Admissibility

40. Whilst Italy does not raise a formal plea of inadmissibility, it argues in its defence that the Commission has no legal interest in bringing proceedings in this case, since the levy has now been abolished.[44] If that argument were to be accepted, the case would be inadmissible and the fact that Italy has raised no formal plea would be irrelevant, since the Court may of its own motion examine whether the conditions laid down in Article 258 TFEU for bringing an action for failure to fulfil an obligation are satisfied.[45]

41. However, I do not believe that Italy's argument can be accepted.

42. It is the Court's settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion.[46] Thus, the Court will dismiss an action as inadmissible where the Member State concerned has remedied the alleged infringement prior to the expiry of that period.[47] Conversely, the Court will not do so where the breach has ended only after the end of that period. In that regard, it has held that the object in bringing the action may consist in particular in establishing the basis of the liability that a Member State could incur towards those who acquire rights as a result of its default.[48]

43. The same reasoning will, in my view, apply where the legislation that forms the subject matter of the reasoned opinion has been repealed after the expiry of the period laid down in it, which is the case here.[49] Indeed, as the Commission rightly points out, the failure to collect the levy from those liable to account for it will have prejudiced those producers who actually paid it when it fell due, since they will have suffered an economic disadvantage as compared with persons who did not pay or paid only very

44 See point 21 above.

45 See, inter alia, judgment of 31 March 1992, *Commission* v *Italy*, C-362/90, EU:C:1992:158, paragraph 8.

46 See, inter alia, judgment of 27 October 2005, *Commission* v *Italy*, C-525/03, EU:C:2005:648, paragraph 14.

47 See judgment of 27 October 2005, *Commission* v *Italy*, C-525/03, EU:C:2005:648, paragraphs 16 and 17.

48 See, inter alia, judgment of 14 September 2004, *Commission* v *Spain*, C-168/03, EU:C:2004:525, paragraph 24.

49 The period laid down in the reasoned opinion, after extension, expired on 11 October 2014 (see point 35 above). The levy was abolished with effect from 31 March 2015 (see point 21 above).

late. Such a situation will inevitably produce (and may, in the result, continue to produce) unjustified distortions in competition, potentially extending not only to producers within Italy itself but also to those within the European Union as a whole. The Commission's interest in bringing the action remains and the action is therefore admissible.

The amount of the unrecovered levy

44. The parties are in dispute as regards the precise amount of the levy that has not been recovered.

45. Whilst the Commission does not specify any figure in the form of order it seeks, it states in its application that, as at the deadline laid down in the reasoned opinion,[50] the total amount of the levy chargeable in Italy stood at approximately EUR 2 305 million. This figure is further broken down as follows:

– the amount of the levy that has been recovered is approximately EUR 282 million (this figure does not include sums covered by the 2003 deferred payment scheme[51] of roughly EUR 469 million);

– the amount remaining due, after deduction of both those sums, stands at EUR 1 554 million;

– of that sum, approximately EUR 211 million falls to be deducted in respect of amounts that have ceased to be recoverable, for example by reason of producer insolvency or court orders annulling the obligation to pay, leaving an amount of roughly EUR 1 343 million;

– that figure includes sums which are the subject of proceedings before the Italian courts and in respect of which those courts have made an order suspending the obligation to pay, a sum which the Commission estimates at approximately EUR 500 million;

– the amount recovered so far represents 21% of the total that remains outstanding, after deduction of sums that have ceased to be recoverable.[52]

46. Italy adopts a different approach. It accepts the Commission's figures set out above. However, it argues that the figure of EUR 1 343 million referred to in point 45 should not be taken into account, on the basis that it includes amounts that are not recoverable by reason of court orders suspending payment. Instead, it considers that the outstanding amount should be set at EUR 827.39 million. This should be contrasted with the sum of EUR 962 million, representing the aggregate of (i) amounts recovered by the relevant date, including sums recovered by way of the deferred payment schemes and by way of set-off, (ii) amounts 'in course of being recovered' under the deferred payment schemes and (iii) amounts that are irrecoverable by reason of producer insolvency, court orders annulling the obligation to pay or any other ground. On that basis, Italy argues, the amount recovered or 'deemed to be recovered' represents 42% of the total levy of EUR 2289.77 million, the amount not currently due is 21.85% of that figure and the amount in respect of which enforced recovery procedures are pending is 36.13% of that figure.

50 That is to say, following the extension allowed by the Commission (see point 35 above), 11 October 2014.

51 See point 22 et seq. above.

52 In its application, the Commission also presents an alternative set of figures, which record the outstanding amount at EUR 1 068 million, with the percentage recovered standing at 23%. Asked to clarify those figures at the hearing, the Commission stated that the figure of EUR 1 068 million represents the outstanding amount under deduction of sums in relation to which Italy had not sought to suggest that they should be disregarded as being subject to proceedings before the national courts. Since, however, the Commission also stated that the EUR 1 343 million referred to above represented the amount remaining to be recovered and since the amount subject to court orders is recorded in the application at EUR 500 million, I am unable to reconcile those figures. For the reasons I set out in point 48 below, I do not consider it necessary to explore this point further.

47. The Commission's figures could be said to mislead inasmuch as, if amounts recovered or recoverable under the deferred payment schemes are not brought into the reckoning, it is impossible to glean a 'true' picture of the extent of Italy's breach. However, Italy's description could equally well be said to do the same, since (i) it deducts amounts that have become legally irrecoverable where, had Italy acted with due diligence that might not, at least in part, have been the case and (ii) (arguably) had Italy properly administered the recovery arrangements for the levy in the first place, the deferred payment schemes would not have been necessary.

48. I do not consider it necessary to reach a concluded view on those arguments. As I have indicated, the form of order sought by the Commission mentions no figure.[53] Whilst the statistical data provided by both parties may be of informative interest at a general level, a precise calculation of the amount owing is not crucial, in the present proceedings, to either side's case. The question for decision in this case is whether the Commission has substantiated its allegations of infringement against Italy and, if so, whether Italy has put forward a valid defence. It is on those aspects that I shall concentrate in my analysis below. In the meantime, I would simply observe that it is clear that, whatever basis of calculation is used, Italy had failed to recover substantial amounts of the levy due by the deadline set in the reasoned opinion.

Italy's general defences

49. Italy puts forward two general defences, each of which, if valid, would require the Court to dismiss the action. I shall therefore consider them before addressing the detail of the Commission's allegations.

– *Breach of the ne bis in idem principle*

50. Italy argues that, by bringing infringement proceedings, the Commission breaches the *ne bis in idem* principle. It bases that argument on the overall scheme for the levy that was introduced by Regulation No 1788/2003. Before that regulation came into force, EU legislation had provided expressly only for purchasers and producers to account for and pay the levy to the competent national agency. Whilst the Member States were required to ensure collection of the levy,[54] they were not expressly bound to pay the whole of the levy to the Community. Dismissing the Commission's argument that such a duty should be implied, the Court ruled in 2001 that Member States were under an obligation to use best endeavours as to payment of the levy to the Commission but were under no obligation to achieve a specific result.[55] As a result, Regulation No 1788/2003 was adopted; Article 3(1) thereof imposed an additional duty on the Member States to pay the levy to (what is now) the European Union.[56]

53 See point 45 above.

54 See, inter alia, Articles 15, 16 and 19 of Regulation No 1546/88.

55 See judgment of 13 November 2001, *France* v *Commission*, C-277/98, EU:C:2001:603, paragraph 36.

56 To the extent of 99% of the total amount. See further footnote 20 above.

51. Italy does not deny the obligation to collect the levy at national level and to pay it to the European Union. Rather, it suggests that the financial correction procedure in respect of sums owing under the Common Agricultural Policy represents the penalty that is imposed on Member States as regards their failure to collect it, since that failure will of necessity have an impact on the budget of any Member State that does not collect the levy in full. To penalise Italy further by bringing infringement proceedings against it would contravene the *ne bis in idem* principle and would be disproportionate. [57]

52. In my view, that argument cannot succeed.

53. First, as the Commission rightly notes, the Court has held in the context of a Member State's duties in relation to the accounts clearance procedure under the rules relating to the EAGGF, that that procedure serves a different purpose from that of infringement proceedings. In the former case, the procedure serves to ensure that the requirements of the EU budget are satisfied and there is no question of a penalty. [58] The latter is a procedure seeking a declaration that a Member State has failed to fulfil its duties under EU law. That approach seems to me to be clearly valid in this case. It is clear that infringement proceedings may serve purposes beyond merely establishing the position as far as the relationship between the Member State and the European Union is concerned. As I have already indicated, [59] those proceedings may also be relevant, inter alia, to determining the basis of the liability that a Member State could incur towards those who acquire rights as a result of its default and to remedying unfair distortions in competition that may have arisen as a result of the infringement complained of. But they do not seem to me to constitute a 'penalty' in the normal sense of that term.

54. Moreover, Italy's interpretation of Member States' obligations relating to the levy would mean that the duty to recover it at national level would, in effect, be optional. Whilst it is true that the Court has held that the levy had an economic objective, in terms of bringing to the Community the funds necessary for disposal of milk produced by producers in excess of their quotas, it has at the same time emphasised that the levy had the 'obvious aim' of requiring milk producers to observe the reference quantities allocated to them. [60] That statement is in clear conflict with Italy's position and, for this reason as well, that Member State's argument must be rejected. If Italy 'absorbs' the economic impact of the levy by refraining from recovering it from the economic operators concerned, the levy loses its desired effect on the operation of the market in milk.

– The alleged inappropriateness of infringement proceedings in cases of State aid

55. Italy itself appears to accept the reasoning set out towards the end of point 53, observing that a failure by a Member State to implement the levy scheme at national level could lead to unfair competition on the part of those producers that did not pay the levy. It argues, however, that the proper remedy in such circumstances is for the Commission to bring proceedings for unlawful State aid under Article 108 TFEU. The Commission was therefore wrong to bring infringement proceedings, since that procedure is unavailable where other remedies can instead be applied.

57 In support of its argument in this regard, Italy refers to the Court's judgment of 13 November 2001, *France* v *Commission*, C-277/98, EU:C:2001:603. But the judgment goes no further than reaching the findings set out in point 50 above, in any respect that is relevant to Italy's line of argument. Italy also calls in aid three judgments of the General Court cited by the Commission in its application. These are judgments of 9 October 2012, *Italy* v *Commission*, T-426/08, not published, EU:T:2012:526; of 6 July 2015, *Italy* v *Commission*, T-44/11, not published, EU:T:2015:469; and of 2 December 2014, *Italy* v *Commission*, T-661/11, EU:T:2014:1016. However, Italy does not refer to any paragraph or paragraphs of those judgments to substantiate its position and a perusal of them does not appear to offer any support to the arguments it puts forward. I therefore do not consider them further.

58 See, to that effect, judgments of 11 January 2001, *Greece* v *Commission*, C-247/98, EU:C:2001:4, paragraphs 13 and 14, and of 9 September 2004, *Greece* v *Commission*, C-332/01, EU:C:2004:496, paragraph 63.

59 See point 42 above.

60 See judgment of 25 March 2004, *Cooperativa Lattepiù and Others*, C-231/00, C-303/00 and C-451/00, EU:C:2004:178, paragraph 75.

56. That argument can be swiftly disposed of, since it is directly contrary to settled case-law. Thus:

'… the Court has consistently held that the appropriate procedure for obtaining a declaration that the rules of the common organisation of the markets have been infringed is the procedure for a declaration against Member States under [Article 258 TFEU]. Although, according to that case-law, [Article 108(2) TFEU] set up a procedure specifically adapted to the special problems created by State aid with regard to competition in the common market, the existence of that procedure in no way prevents the compatibility of an aid scheme in relation to [EU] rules other than those contained in [Article 107 TFEU] from being assessed under the procedure provided for in [Article 258 TFEU] …'.[61]

57. That being so, Italy's second general defence must be rejected.

Scope of the declaration sought

58. The form of order sought by the Commission requests the Court, in summary, to declare that Italy has failed to fulfil its obligations under the EU legislative measures applying to the levy on milk:

– in respect of the years from 1995/1996, being the first year in which the levy was in fact applied in Italy, to 2008/2009, being the last year in which there was surplus production in that Member State;

– by failing to ensure that (i) the levy was in fact charged to the account of the individual producers who had contributed to the production overruns leading to liability to pay the levy, (ii) the levy was paid at the appropriate time by the purchaser or, in the case of direct sales, by the producer and (iii) where the levy was not paid within the period prescribed, the obligation to pay was properly enforced, using the appropriate procedures for recovery under the national legal system.

59. The essential thrust of the Commission's complaint is that Italy failed woefully — over 14 consecutive accounting periods — to perform its duties at national level in relation to the levy as a whole. No allegations are made, and there is no dispute concerning, Italy's obligations to pay to the European Union an amount equivalent to the levy pursuant to Article 3 of Regulation No 1788/2003 and legislation that succeeded it.

60. Since the Commission's complaints are closely linked, I shall consider them together.

The Commission's complaints

61. Dealing, first, with the allocation of the levy, the Court has held that it is essential that Member States should allocate the levy among producers, since that step forms an inherent part of the process leading to payment thereof.[62]

62. As regards the initial stages of the period covered by the Commission's allegations, it seems plain that Italy's application of that obligation has, on occasion, been less than felicitous. In *Lattepiù*, for example, the Court noted that, according to the orders for reference before it, 'the individual reference quantities originally allocated by the Italian authorities contained a great number of errors,

61 See judgment of 12 July 1990, *Commission* v *Greece*, C-35/88, EU:C:1990:302, paragraph 11 and the case-law cited.

62 See, to that effect, judgment of 25 March 2004, *Azienda Agricola Ettore Ribaldi and Others*, C-480/00, C-482/00, C-484/00, C-489/00 to C-491/00 and C-497/00 to C-499/00, EU:C:2004:179, paragraph 87, where the Court held that allocations of individual reference quantities must be notified to producers by the competent national authorities in such a way as to give the persons concerned all information relating to the allocation in question. Whilst purchasers are also closely involved in the process leading to payment of the levy (see, for example, the seventh recital of Regulation No 536/93, which records that 'purchasers bear chief responsibility for the correct implementation of the arrangements'), and were in many cases to be liable to account for and pay the levy to the competent national authorities, the allocation, as such, of the levy was made on producers. See, for example, Article 2(2) of Regulation No 3950/92.

due in particular to the circumstance that the actual production on the basis of which those quantities were allocated had been certified by the producers themselves. Among the errors so identified, the Government Commission of Inquiry found, in particular, that more than 2 000 farms which reported milk production did not possess any cows'.[63] In the same case, the Court recorded that it was only in 1999 that the applicants in the main proceedings had learned of the reference quantities allocated to them.[64]

63. More generally, the Commission draws attention to the statistics for recovery of the levy in Italy.[65] It goes on to set out a number of specific allegations.

Poor legislative practice: illegal, confused and conflicting national laws

64. The Commission complains that national legislation concerning the levy was badly conceived or poorly drafted and that failure was coupled with inefficient application by the national authorities, leading to proceedings before the national courts. It bases those allegations on information provided by the Avvocatura Generale dello Stato (State Legal Advisory Service) in reply to requests for information made to Italy by the Commission. It refers specifically in that regard to:

– Law No 118/1999, where the national courts held, in proceedings for interim measures, that that law had been illegal in so far as it allocated the levy retrospectively and there had been no proper notification of the amounts allocated;

– Law No 5/98, which was the subject of successful challenges before the national courts since it based levy allocations on (unreliable) inferential statistics;

– the use by the competent authorities of national reference quantities that were disputed and continue to be disputed for the years 1995/1996 to 1999/2000 also led to proceedings being brought before the national courts. In that regard, the Corte dei conti (Court of Auditors) stated[66] that 'the weak point of [Law No 118/99] lay in its persistent use of procedures and methods of calculation that were annulled as a result of reviews as to constitutionality and decisions of the courts'.

65. The Commission goes on to observe that the initial legislative confusion appears to have given rise to litigation which, at least when the levy was introduced in Italy, resulted in decisions in favour of those challenging the national rules and prevented the competent authorities from fulfilling their tasks. Given the lengthy delays that may be said to characterise the court system in Italy, the result was that the levy recovery process stagnated. The Commission records in that regard observations of the AGEA made in 2010 that 'the state of uncertainty arising at the time of the suspension at first instance, requested by the applicants and delivered as a matter of urgency by the court seised … and any definitive judgment on appeal at second instance generates serious disruption which dangerously undermines the milk quota system'.

66. The Commission also notes that the Avvocatura Generale dello Stato stated in the first response to the letter of formal notice that, because of the uncertainty about the domestic legislation, it did not challenge suspensive orders made by the national courts and, in certain cases, did not lodge a defence concerning the merits of the case as it was awaiting 'the consolidation of legislative and regulatory provisions that were constantly changing'. In the second response to the letter of formal notice, the

63 Judgment of 25 March 2004, *Cooperativa Lattepiù and Others*, C-231/00, C-303/00 and C-451/00, EU:C:2004:178, paragraph 79.

64 See paragraph 81 of the judgment.

65 See points 44 to 48 above.

66 Special Report No 2/2012.

Avvocatura Generale dello Stato referred to the lack of clarity and complexity of that legislation that had undeniably contributed to numerous cases being brought before the national courts and administrative tribunals, with the result that defences were not lodged against applications for suspensive measures.

A failure to apply set-off

67. The Commission also alleges a failure on Italy's part to make appropriate use of the remedy of set-off when making payments of amounts due under the common agricultural policy. It notes in that regard that Article 1 of Regulation No 1034/2008, which came into force on 29 October 2008, went so far as to oblige the Member States to set-off any outstanding debt of a beneficiary of those payments which has been established under national law against future payments to be made by the paying agency responsible for the recovery of the debt to the same beneficiary.[67] More generally, the Commission notes that the Corte dei Conti (Court of Auditors) stated[68] that the use of set-off had been hindered by 'confused and unclear legislation' and by the fact that the body responsible for payment (the AGEA) and the body or bodies dealing with recovery (the regions and the autonomous provinces) were different, a matter which precluded the operation of set-off under domestic law.

68. In the light of those difficulties, an agreement was concluded between the Ministero delle Politiche Agricole Alimentari e Forestali (Ministry of Agriculture, Food and Forestry), the regions and the autonomous provinces in 2006 with a view to set-off being applied in those cases. However, that attempt failed. A total of only EUR 118 million was recovered in respect of sums due under the levy for all years from 1995/1996 to 2008/2009, that is to say, hardly more than one-ninth of the amounts paid to the sector between 2010 and 2013.

69. The Commission submits that part of the reason for this failure lies in the fact that the procedure was introduced late and in a contradictory manner. According to information supplied to it by the Italian authorities, many producers challenged the application of set-off before the national courts and, once again, were granted suspensive relief, thereby preventing the use of that remedy. It appears that much of that opposition was based on the fact that the set-off in question was to be based on an agreement entered into between the State and the regions and not on legislation adopted by the State. It was accordingly argued that the agreement was unlawful.

70. A further impediment to the operation of set-off came with the adoption of Law No 231/2005, Article 3(5) *duodecies* and *terdecies* of which provided that sums due by EU paying agencies could not be seized, attached or made subject to protective measures. By virtue of Article 1246(3) of the Codice civile (Italian Civil Code), sums which cannot be attached may not be subject to set-off. Following discussions between the AGEA and the Commission, Article 8 *ter* of Law No 33/2009 was enacted in order to give statutory recognition to the right of set-off contemplated by the agreement referred to in point 68 above. However, since there was no repeal of Article 3(5) *duodecies* and *terdecies* at the same time, the legislative confusion has continued, since that legislation remains in force today.

67 Article 1 of Regulation No 1034/2008 amended Regulation No 885/2006. That regulation was repealed with effect from 7 September 2014 by Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and use of euro (OJ 2014 L 255, p. 18).

68 Report No 11/2013/G concerning milk quotas.

Preferential treatment given to non-payers of the levy

71. Article 8 *bis* (2) of Law No 33/2009 inserted a new Article 10 *bis* into Law No 119/2003, intended to allocate the increased milk quota available to Italy by virtue of Regulations Nos 248/2008[69] and 72/2009.[70] That article provides for priority to be given to producers who exceeded their individual quotas during the 2007/2008 year. The Commission does not understand why that should be the case and why those quotas were not withdrawn from producers who had broken the rules.

Law No 33/2009 and the 2009 deferred payment scheme

72. The combined effect of paragraphs 2 and 10 of Article 8 *quinquies* of Law No 33/2009 is to suspend recovery procedures (whether it be by way of set-off, entry on the court registers or forced recovery) already initiated against debtors who participate in the 2009 deferred payment scheme and, in the event of their failing to adhere to the payment programme, for the new recovery procedure to be conducted, not in accordance with Presidential Decree No 602/1973, as previously, but instead under (the much earlier) Royal Decree No 639/1910. The procedures under that law are considerably longer and more complicated than under the more recent law and the competent authority for administering the procedures which it provides for is not the region or autonomous province acting through Equitalia, but the AGEA.

73. In the event, it appears that all recovery procedures were suspended with the coming into force of Law No 33/2009, whether or not the debtor had signed up to the 2009 deferred payment scheme. In response to a Commission request for information of November 2011, the AGEA replied that, as regards producers who had *not* signed up to the payment scheme, it had asked Equitalia to reactivate recovery procedures but that the latter had replied that this was impossible owing to the wording of Article 8 *quinquies* (10) of that law and that only the AGEA henceforth had competence to do so. That being the case, a decree of the Ministry of Economy and Finance was required in order to provide the AGEA with the requisite powers. Notwithstanding repeated Commission requests for the position to be updated, that decree was not adopted until 12 November 2012, that is to say, almost three years after Law No 33/2009 came into force. The Italian authorities themselves admitted that that law had led to 'a significant stalemate in terms of recoveries'.

Failure on the part of the competent national authorities properly to monitor and to recover outstanding amounts

74. The Commission complains that, as a result of information provided by Italy in the course of the EU pilot procedure[71] that preceded the service of the letter of formal notice in June 2013, it became clear that the AGEA, which was responsible, inter alia, for monitoring sums due under the levy scheme, had overestimated the amounts subject to dispute before the national courts. Where milk was supplied to dairies, the latter were obliged to withhold a part of the price and to record the amounts so withheld in what was termed a 'collective notice', indicating in respect of each producer the levy due. It appears that the AGEA systematically suspended recovery of *all* amounts recorded in the notice even though only *one* of the producers had brought proceedings and obtained suspensive relief. This practice led to considerable sums not being recovered. The Commission was informed that the practice had ceased only in the first reply to the reasoned opinion of 13 October 2014.

69 Council Regulation (EC) of 17 March 2008 amending Regulation No 1234/2007 as regards the national quotas for milk (OJ 2008 L 76, p. 6).

70 Council Regulation (EC) of 19 January 2009 on modifications to the Common Agricultural Policy by amending Regulations (EC) No 247/2006, (EC) No 320/2006, (EC) No 1405/2006, No 1234/2007, (EC) No 3/2008 and (EC) No 479/2008 and repealing Regulations (EEC) No 1883/78, (EEC) No 1254/89, (EEC) No 2247/89, (EEC) No 2055/93, (EC) No 1868/94, (EC) No 2596/97, (EC) No 1182/2005 and (EC) No 315/2007 (OJ 2009 L 30, p. 1).

71 See point 9 of my Opinion in *Sweden* v *Commission*, C-562/14 P, EU:C:2016:885, for further details regarding this procedure.

The 2013 'Stability Law'

75. Less than a month and a half after the approval of the regulatory instrument necessary to reactivate the recovery procedures in accordance with Royal Decree No 639/1910,[72] the legislation governing the recovery of the levy was fundamentally amended by the 2013 Stability Law. That law repealed Article 8 *quinquies* (10) of Law No 33/2009 and replaced it with new paragraphs 10, 10 *bis* and 10 *ter*. By these new provisions, the AGEA was to retain ultimate responsibility for recovery but was to pass responsibility for the management of the system to Equitalia, by providing that body with information as to forced recovery procedures which was to be used in drawing up payment notices. Equitalia was, on the basis of an ad hoc agreement to be entered into with the AGEA, to print those notices, which were then to be served on debtors by the Guardia di Finanza (Tax and financial police). The agreement between the AGEA and Equitalia was not signed until 11 November 2013.

76. As regards the effectiveness of that law, a report of the Corti dei Conti (Court of Auditors) of October 2014[73] recorded that 'two years after the nth [sic] new law on recovery procedures, they have still to begin'. The same report also stated that 'forced recovery of the levy has not progressed since the introduction of Law No 33/2009'. The Commission states that it is unable to understand why, if Law No 33/2009 was to be reformed, Equitalia was not made responsible for debt recovery, as it had been under Law No 119/2003, in accordance with the procedures laid down under Presidential Decree No 602/1973, but that task was instead given to the AGEA 'with the support of Equitalia and the Guardia di Finanza'.[74] Recoveries were, of necessity, blocked pending the signing of an agreement between the parties concerned. In its reasoned opinion of July 2014 (that is to say, more than a year and a half after the entry into force of the 2013 Stability Law), the Commission asked for information as to recoveries actually made under the new procedure. No reply was forthcoming; the first and second replies to the reasoned opinion refer only to recovery procedures that were ready to be implemented but were not yet under way.

Infringement of the principles of equivalence and effectiveness

77. Do the above allegations, read in the light of the figures as to recovery of the levy referred to in points 44 to 48 above, constitute a prima facie case on the Commission's part?

78. In my view, they do. I would however make the following observations.

79. First, as I indicated in point 59 above, the essence of the Commission's complaint is a woeful failure on Italy's part to comply with the legislation relating to the levy. The Commission draws particular attention in that regard to the principles of equivalence and effectiveness.

80. As is well known, the former requires that national procedural governing actions for safeguarding rights which individuals derive from EU law are not less favourable than those governing similar domestic actions.[75] But the Commission's submissions in that regard are limited to noting, on the one hand, the poor level of recovery of the levy by Italy and, on the other hand, to the introduction of what it terms 'special procedures' in that regard. In the absence of any relevant indications covering, in sufficient detail, the corresponding procedures at national level, it does not seem to me that that allegation can be sustained.

72 See point 73 above.

73 Report No 12/2014 G.

74 Article 8 *quinquies* (10) of Law No 33/2009, as amended by the 2013 Stability Law.

75 See, among many, judgment of 7 June 2007, *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318, paragraph 28 and the case-law cited.

81. As regards the principle of effectiveness, this is most commonly described as the rule that those national rules do not render impossible or excessively difficult the exercise of rights conferred by EU law.[76] Once again, I derive no useful guidance from this principle.

82. Rather, it seems to me that the evocation of both of those principles serves to detract from consideration of the underlying question in this case, which is whether Italy has infringed its obligations under EU law as regards the payment and recovery of the levy.

83. Second, as regards the Commission's criticisms in relation to set-off,[77] to the extent that those observations are based on Regulation No 1034/2008, it should be noted that that regulation came into force only on 29 October 2008 and cannot apply to matters taking place before that date. It is also necessary to be clear as to its scope. The obligation which it lays down is to off-set 'any still outstanding debt of a beneficiary' against 'any future payment to be made by the paying agency responsible for the recovery of the debt to the same beneficiary'. That will apply only where the debtor in question owes the paying agency the debt in question.[78] By extension, it will *not* apply where the paying agency is different from the entity to which the debt is owed, as appears de facto to be been the situation in this case, at least since the adoption of Law No 119/2003.[79]

84. That said, however, it is worth noting recital 3 of the regulation, which refers to the set-off obligation which it introduces as an 'an effective and cost-efficient way' of allowing Member States to recover amounts owing. To the extent that the Commission argues that, had Italy structured the debtor/creditor relationship in such a way that set-off might lawfully be applied it would have been in a better position to recover the significant amount of sums outstanding or, in the alternative, to the extent that it argues that a similar result would have been achieved had Italy introduced legislation at national level that would allow set-off to be applied even in the absence of a direct relationship between debtor and creditor in a timely and effective manner, I take no issue with the Commission's position.

85. Third, as regards the allegation that the AGEA wrongly suspended the recovery of amounts when it did not require to do so,[80] the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion.[81] There is no suggestion in the Commission's pleadings that the state of affairs referred to continued after that date. It follows that that complaint cannot be taken into account in assessing Italy's position in relation to its purported failure to comply with the legislation at issue.

86. None of the observations I have set out in points 79 to 85 above appears to me, however, to detract materially from the Commission's case.

76 See, among many, judgment of 7 June 2007, *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318, paragraph 28 and the case-law cited.

77 See points 67 to 70 above.

78 There must, in other words, be *concursus debiti et crediti*.

79 See point 29 above.

80 See point 74 above.

81 See point 42 above.

87. Looking at the wider context, the Court has held that the infringement procedure is objective in nature and that 'consequently, where a Member State fails to fulfil its obligations … the infringement exists regardless of the frequency or the scale of the circumstances complained of'.[82] It should also be noted that the Court has held that the time limits laid down in the legislation relating to the levy are mandatory[83] and that, as regards its collection, the Member States are bound by the obligation of general diligence in what is now Article 4(3) TEU.[84]

88. I have already mentioned that, whatever basis is chosen to calculate the sums owing, it is clear that, as at the deadline set out in the reasoned opinion, Italy had failed to recover substantial amounts of the levy due.[85] I have also concluded that the two general defences put forward by Italy should be rejected.[86]

89. The question remains, however, whether any of the specific defences advanced by that Member State are sufficient for the action to be dismissed, whether in whole or in part. And it is to these that I now turn.

Italy's specific defences

90. In response, Italy essentially puts forward four arguments. First, it contends that the Commission has failed to prove a breach of what it terms the obligation 'as to best endeavours' imposed on that Member State. It claims that the test is not whether it has recovered the levy in full but whether it has pursued the objective of recovery with proper diligence.

91. Second, it submits (perhaps a little surprisingly) that it is not possible to apply the principle, relevant in State aid cases, according to which a Member State may be relieved of its responsibilities under EU legislation if it can establish that recovery is both objectively and absolutely impossible.

92. From this it follows, according to Italy, that its recovery procedures have at all times been adapted to the continuous changes to the EU legislative framework, which it describes as 'complex and changing'. Court proceedings at national level have followed the same course and constant work on the part of both the administration and the legislature has led, over time, to the difficulties in that area being resolved. The current figure for unrecovered sums under the levy scheme amounts to only 21.85% of the total of the levies imposed during the years in question. Italy cannot therefore be accused of gross negligence in implementing the obligations imposed by EU law in the manner which the Commission alleges.

93. More specifically, Italy devotes a considerable proportion of its defence to narrating the (undeniably complex) history of the EU and national legislation relating to the levy. In that regard, it contends that this Court has on two occasions held that Italy's domestic laws complied with the requirements of the EU legislation then in force, namely in its judgments in *Gerekens and Procola*[87] and in *Lattepiù*,[88] each delivered in 2004. Italy also draws attention to what it considers to be a marked level of improvement in recoveries following the entry into force of Law No 119/2003, as a result of the devolution of responsibilities in that regard to the regions. The same could not be said in relation to off-set procedures, because the producer had an incentive to challenge those procedures before the courts. It blames that on what it terms 'a lack of clarity in the [relevant EU] legislation',

82 Judgment of 30 January 2003, *Commission* v *Denmark*, C-226/01, EU:C:2003:60, paragraph 32.

83 Judgment of 25 March 2004, *Cooperative Lattepiù and Others*, C-231/00, C-303/00 and C-451/00, EU:C:2004:178, paragraph 68.

84 Judgment of 13 November 2001, *France* v *Commission*, C-277/98, EU:C:2001:603, paragraph 40.

85 See point 48 above.

86 See points 54 and 57 above.

87 Judgment of 15 July 2004, C-459/02, EU:C:2004:454.

88 Judgment of 25 March 2004, *Cooperativa Lattepiù and Others*, C-231/00, C-303/00 and C-451/00, EU:C:2004:178.

since the requirement as to set-off was not introduced into that legislation until the adoption of Regulation No 1034/2008. Further improvements were made with a view to accelerating the recovery process and to manage disputes before the national courts, which Italy accepts were 'a major obstacle', by Law No 33/2009, in particular as a result of the further deferred payment scheme which that law introduced and participation in which was dependent on renouncing court proceedings. The success of those arrangements is recorded by the Commission itself in its reasoned opinion, which talks of 'a veritable revolution in favour of the administration as regards the suspensive phase'.

94. Third, Italy draws attention to the high proportion of cases where the recovery procedure is subject to challenge before the national courts and those courts have made a provisional order suspending the obligation to pay the levy until the dispute is resolved. In its view, no blame can attach to it as regards amounts unpaid in such circumstances.

95. Fourth, Italy argues that the adoption of Decision 2003/530 would not have been possible had Italy been in breach of its obligations under EU legislation as regards recovery of the levy. It is not open to an institution to approve a State aid measure where a Member State is in default of its obligations.

96. I shall address these defences in turn.

97. First, as regards Italy's arguments concerning the obligation 'as to best endeavours', it is true that the Court held in *France* v *Commission*[89] that the obligation which Article 19 of Regulation No 1546/88 imposed on Member States to ensure collection of the levy was one to use best endeavours and not one to achieve a specific result.[90] That judgment was of course framed on the basis of the legislation as in force prior to the reform introduced by Regulation No 1788/2003, which imposed new duties on the Member States as to payment of the levy. However, even if it is assumed (probably correctly) that the tenor of the obligations as to recovery did not change as a result of those reforms,[91] I would note that a duty to use best endeavours is in any event a high one. Had the unrecovered amount of the levy stood at a figure which was indisputably low, Italy's defence might be due some serious consideration. Since I have indicated above that the outstanding figure is considerable,[92] I cannot see that it has any merit.

98. Second, as regards Italy's arguments concerning (essentially) the constant changes to the underlying EU legislative structure and the consequent administrative and legal difficulties of adapting to them, I should start by observing that I draw no guidance whatever from either of the two cases cited by Italy in support of its arguments. The *Gerekens and Procola* judgment involved an order for reference from a Luxembourg court concerning that Member State's legislation relating to the levy. The Court held that no Member State was precluded from adopting, in the place of initial rules held by the Court to be discriminatory, new rules applying retroactively to production in excess of the initial production quotas but in accordance with the national rules which had been replaced.[93] There is nothing in that judgment which would go in any meaningful way to supporting Italy's case. Whilst it is true that the Court held in *Lattepiù*[94] that the legislation in force in Italy at the relevant time did not contravene the then applicable Community legislation, it did so on the basis that a Member State's

89 Judgment of 13 November 2001, C-277/98, EU:C:2001:603.

90 See paragraph 36 of the judgment.

91 I should add for the sake of completeness that I do not see the requirement imposed by Regulation No 1788/2003 that Member States pay 99% of the levy to the EAGGF (see point 12 above) as translating into an obligation on them to recover that amount from producers.

92 See point 48 above.

93 Judgment of 15 July 2004, *Gerekens and Procola*, C-459/02, EU:C:2004:454, paragraph 38.

94 Judgment of 25 March 2004, *Cooperativa Lattepiù and Others*, C-231/00, C-303/00 and C-451/00, EU:C:2004:178.

legislation which corrected erroneous individual reference quantities in order to ensure that the arrangements for the implementation of the levy were properly implemented should be upheld. That legislation was accordingly proportionate.[95] The Court did not go on to make findings of the kind that Italy suggests.

99. More generally, it is true, as the background to EU legislation concerning the levy set out earlier in this Opinion makes clear, that its history has been far from straightforward. Nonetheless, as the Court has repeatedly emphasised, a Member State cannot plead practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under European Union law.[96] The fact that the levy appears to have proved problematic to administer at EU level does not give Member States carte blanche to reduce its effectiveness at national level.

100. Third, there remains, however, the question whether that reasoning extends to making the Member States responsible for the decisions of their national courts. It seems to me that in many cases they are not. Those courts are, after all, independent of the executive. The Member States cannot prevent one of their citizens from seeking to enforce a legal remedy which he perceives is available to him. It has been observed that considerable restraint should be observed in initiating infringement proceedings against Member States in that context.[97]

101. Nonetheless, the Court has accepted that there may be exceptions to that general proposition. As long ago as 1970, it held that a Member State's failure to fulfil obligations may, in principle, be established 'whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution'.[98] It applied that case-law in *Commission* v *Italy*, where it found that that Member State had failed to fulfil its Treaty obligations following a series of judgments by the Italian courts that led to the (then) Community law on the right to repayment of charges levied in breach of the applicable rules being, in practice, either impossible or extremely difficult to enforce. It noted that isolated or numerically insignificant judicial decisions should not be taken into account in that context and that national legislation should be sufficiently clear to ensure its application in compliance with Community law. The operative part of the Court's judgment is significant. It did not hold that Italy had infringed its Treaty obligations because of the actions of its national courts but rather that it had infringed those obligations by failing to amend the national legislation at issue, which had been construed and applied by the administrative authorities and a substantial proportion of the courts in such a way that the recovery of the charges concerned was made excessively difficult for the taxpayer.[99]

102. In my view, similar principles apply in this case. It is not the decisions adopted by the national courts, and the direct consequences of those decisions, that should contribute to a finding of infringement on the Member State's part. Rather, the question is: did the Member State fail to adopt legislation to implement EU law that was sufficiently clear in the first place or to take steps to amend its national legislation in the light of adverse decisions on the part of the national judicature? If Italy's conduct in enacting and implementing the legislation relating to the levy is measured against that yardstick, it seems to me that it can clearly be said to have failed.

95 See paragraphs 80, 84 and 85 of the judgment.

96 See, inter alia, judgment of 7 September 2016, *Commission* v *Greece*, C-584/14, EU:C:2016:636, paragraph 53. See also, in the context of the transposition of directives into national law, judgment of 7 May 2002, *Commission* v *Netherlands*, C-364/00, EU:C:2002:282, paragraphs 7 to 10, where the Court rejected the Netherlands Government's arguments concerning the no doubt considerable difficulties it faced in implementing a particular measure. It is also worth noting that, when asked a question at the hearing concerning the relative recovery rate in other Member States, the Commission replied that, for the years 2003/2004 to 2006/2007, the amount of the levy unrecovered in the Netherlands was nil. On that basis, full recovery becomes an achievable aim. See also, as regards the role of the national courts themselves in context of Article 267 TFEU, Opinion of Advocate General Tizzano in *Lyckeskog*, C-99/00, EU:C:2002:108, point 60 et seq.

97 See, in that regard, Timmermans, C.W.A., 'Use of the Infringement Procedure in Cases of Judicial Errors', *The European Union, an Ongoing Process of Integration*, T.M.C. Asser Press, The Hague, 2004, p. 155.

98 See judgment of 5 May 1970, *Commission* v *Belgium*, 77/69, EU:C:1970:34, paragraph 15.

99 Judgment of 9 December 2003, *Commission* v *Italy*, C-129/00, EU:C:2003:656, paragraphs 32, 33, 41 and operative part. The proposition is stated more succinctly in Opinion 1/09 (*Agreement creating a Unified Patent Litigation System*) of 8 March 2011, EU:C:2011:123, paragraph 87.

103. Fourth, as regards the Council's approval of State aid measures in Decision 2003/530, it seems to me that the starting assumption must be that an EU institution would never knowingly approve measures in respect of which a Member State is in default of its obligations under EU law. But Italy's argument seems to me to be based on the premiss that EU institutions other than the Court can be (and in this case were) the arbiter as to the lawfulness of that Member State's conduct. That cannot be so. That role is reserved entirely to the Court. I therefore reject Italy's argument in that regard.

104. It follows in my view that none of the specific defences put forward by Italy can succeed.

Costs

105. Under Article 138(1) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since I consider that the Court should grant the form of order sought by the Commission, Italy should pay the costs.

Conclusion

106. In the light of all the foregoing considerations, I am of the opinion that the Court should:

(1) declare that, by failing to ensure:

– that the additional levy payable in respect of quantities produced in Italy in excess of the national quota from the first year in which the additional levy was in fact applied in Italy (1995/1996) until the last year in which there was surplus production in Italy (2008/2009) was in fact charged to the account of the individual producers who had contributed to each of the production overruns

– and that the levy was paid at the appropriate time, upon their being given notification of the amount payable, by the purchaser or the producer in the case of direct sales

– or, where the levy was not paid within the period prescribed, that it was registered and, where possible, collected by way of enforcement from those purchasers or producers,

the Italian Republic has failed to fulfil the obligations imposed on it by the relevant provisions of EU law applicable in the years concerned, in particular: (i) Articles 1 and 2 of Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector, (ii) Article 4 of Council Regulation (EC) No 1788/2003 of 29 September 2003 establishing a levy in the milk and milk products sector, (iii) Articles 79, 80 and 83 of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products, and, with regard to the Commission's implementing provisions, (iv) Article 7 of Commission Regulation (EEC) No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products, (v) Article 11(1) and (2) of Commission Regulation (EC) No 1392/2001 of 9 July 2001 laying down detailed rules for applying Regulation No 3950/92, and (vi) Articles 15 and 17 of Commission Regulation (EC) No 595/2004 of 30 March 2004 laying down detailed rules for applying Regulation No 1788/2003; and

(2) order the Italian Republic to pay the costs.