OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 26 November 1998 *

1. By order of 17 July 1997 the Pretura Circondariale di Bassano del Grappa (District Magistrate's Court, Bassano del Grappa) referred two questions to the Court for a preliminary ruling on the interpretation of Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector (hereafter 'Regulation No 3950/92'). [1] The first question concerns the concept of 'purchaser' within the meaning of Articles 2 and 9 of the regulation; the second question seeks to ascertain whether the purchaser is required, or merely authorised, to deduct the amount payable by way of additional levy pursuant to Article 2(2).

The relevant legislation

2. The 'additional levy' scheme was introduced by Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products [2] in order to reduce the imbalance between supply and demand on the milk and milk products market. Under this scheme, producers are allocated 'reference quantities' calculated on the basis of the production over a certain period; the milk produced above that quantity is consequently subject to the payment of a sum of money, namely the 'additional levy'.

That scheme was originally introduced for a duration of nine years and was extended for a further seven years by Regulation No 3950/92. The procedure adopted under Regulation 3950/92 to remedy the problem of excess milk production is the same as that already laid out in Regulation No 856/84 'consisting of the application of a levy to quantities of milk collected or sold for direct consumption above a certain guarantee threshold'. [3]

3. Article 1 of Regulation 3950/92 provides:

'For seven new consecutive periods of twelve months commencing on 1 April 1993, an additional levy shall be payable by producers of cow's milk on quantities of milk or milk equivalent delivered to a purchaser or sold

* Original language: Italian.

1 — OJ 1992 L 405, p. 1.

2 — OJ 1984 L 90, p. 10.

3 — See the third recital in the preamble to Regulation No 3950/92.

directly for consumption during the twelve month period in question in excess of a quantity to be determined.

The levy shall be 115% of the target price for milk.'

Article 2 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.

...

2. As regards deliveries, before a date and in accordance with the 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.

3. As regards direct sales, the producer shall pay the levy payable to the competent body of the Member State before a date and in accordance with rules to be laid down.'

4. For the purposes of the application of the regulation, Article 9 sets out the following definitions:

'For the purposes of this Regulation:

...

(c) "producer" means a natural or legal person or a group of natural or legal persons farming a holding within the geographical territory of the Community:

— selling milk or other milk products directly to the consumer,

— and/or supplying the purchaser;

(d) "holding" means all production units operated by the single producer and located within the geographical territory of the Community;

(e) "purchaser" means an undertaking or grouping which purchases milk or other milk products from a producer:

— to treat or process them,

— to sell them to one or more undertakings treating or processing milk or other milk products.

However, any group of purchasers in the same geographical area which carries out administrative and accounting operations necessary for the payment of the levy on behalf of its members shall be regarded as a purchaser ...;

(f) "undertaking treating or processing milk or other milk products" means an undertaking or grouping which is involved in collection, packaging, storage, chilling and processing operations or whose dairying activities are restricted to one of those operations;

(g) "delivery" means any delivery of milk or other milk products, whether the transport is carried out by the producer, a

purchaser, an undertaking processing or treating such products or a third party;

(h) "milk or milk equivalent sold directly for consumption" means milk or milk products converted into milk equivalent, sold or transferred free without going through an undertaking treating or processing milk or other milk products.'

5. 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 [4] is also relevant to these proceedings. Article 1 of that regulation provides:

'For the purposes of calculating the additional levy introduced by Regulation (EEC) No 3950/92:

1. within the meaning of Article 2(1) of that Regulation "quantities of milk or milk equivalent marketed" in a Member State means all quantities of milk or milk equivalent which leave any holding in the territory of that Member State.

Quantities presented by producers for treatment or processing under contract shall be deemed deliveries.'

Article 7 of Regulation No 536/93 provides:

'1. Member States shall take all the verification measures necessary to ensure payment of the levy on quantities of milk and milk equivalent marketed in excess of any of the quantities referred to in Article 3 of Regulation (EEC) No 3950/92. To that end:

(a) all purchasers operating in the territory of a Member State must be approved by that Member State.

...'

6. Pursuant to the provision just cited, Article 1(3) of Presidential Decree No 569/1993 (hereafter 'Decree 569/93') provides that every reference to purchasers of milk and other milk products is to be understood as including cooperatives that use or process cow's milk,

4 — OJ 1993 L 57, p. 12.

regardless of the legal nature of the relationship on the basis of which producers deliver milk and milk products to that cooperative.

The facts and the questions referred for a preliminary ruling

7. The dispute before the national court arose in the context of the abovementioned legislation.

The Consorzio Caseifici Altopiano di Asiago (hereinafter 'the Consorzio') is a grouping of several milk-producing cooperatives. It appears from the order for reference that the Consorzio itself had requested the status of "purchaser" within the meaning of Article 1(3) of Decree No 569/93 and had obtained recognition of that status.

By order of 29 May 1996 the Regione Veneto ordered the Consorzio to pay the sum of ITL 45 000 000 by way of administrative penalty for irregularities in the register of suppliers and for failure to set aside the additional levy in respect of those members who had exceeded their available milk quota.

The Consorzio contested that order before the Pretura Circondariale di Bassano del Grappa, claiming that Presidential Decree No 569/93 should be disapplied in its regard since the Consorzio could not be regarded as a 'purchaser' within the meaning of Regulation No 3950/92. In any event, it argued, Community legislation does not require, but merely authorises, the purchaser to set aside the amount payable by way of additional levy.

8. The national court thereupon stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Must Articles 9 and 2 of Regulation (EEC) No 3950/92 of 28 December 1992 be interpreted as meaning that any person delivering milk, regardless of the legal nature of the relationship which gave rise to the delivery, may be treated as a "purchaser" liable to pay the additional levy and, in particular, as meaning that a group of cooperatives may be so regarded with respect to milk delivered, not sold, to it by members of the cooperative?

(2) Must Article 2(2) of Regulation (EEC) No 3950/92 of 28 December 1992 be interpreted as meaning that purchasers are actually and personally required to deduct from the amount paid to

producers the amount payable by way of additional levy, or that it is merely a right conferred in the purchaser's interests, failure to exercise which cannot entail penalties?'

The first question for a preliminary ruling

9. Firstly, I would observe that the referring court could have presented the facts more clearly for the purposes of the answer to the first question. In particular, nothing is said of the nature of the relationship which binds the Consorzio to its members, or of the role the Consorzio is called on to play in the marketing of the product. However, I believe that even the meagre indications provided in the order for reference provide us with the material to clarify the scope of the question and to provide the national court with a helpful answer.

In my opinion, the starting point must be the fact that, as the file shows, the Consorzio obtained approval of its status as a purchaser; that is to say, the very approval which the authorities of the Member States are required to give under Article 7 of Regulation No 536/93, cited above. However, in the main proceedings the Consorzio challenges the lawfulness of that approval, specifically the ground that, according to Regulation No 3950/92, the existence of a contract of sale is an essential prerequisite for a person to be regarded as a purchaser of milk or milk products. Accordingly, in the main proceedings the Consorzio argues that the section of Presidential Decree No 569/93 providing that cooperative societies — or groupings of cooperatives — are to be regarded as purchasers *regardless of the legal nature of the relationship which gave rise to the delivery*, is incompatible with the aforesaid provisions of Regulation No 3950/92. That is why the national court has found it necessary to refer to the Court the first question, designed essentially to ascertain whether a legal person such as the Consorzio can be held to be a 'purchaser' within the meaning of Regulation No 3950/92, even though the milk is supplied to the Consorzio by its members on the basis of legal relationships which differ from those under a contract for sale under national law.

10. In its written observations, the Consorzio suggests a reply in the negative, putting forward arguments based essentially on points of wording. According to that line of argument, the regulation in question employs semantic expressions which necessarily imply the existence of a contract for sale: the 'purchaser' is one of the two parties to that transaction. Moreover, Article 2(2) refers to the 'price' of the product and the price is also a key element of a contract for sale. It follows that a person can only qualify as a 'purchaser' within the meaning of the regulation if he receives the milk under the terms of a

transaction qualifying as a contract for sale under the national law in question.

The Regione Veneto and the Italian Government take the opposite view. They argue that the term 'purchaser', as used in the regulation, is not to be understood in the sense attributed to it in civil law, that is to say, a party to a contract for sale within the meaning of Italian Civil Code. In the case in point here, the scheme introduced by the regulation centres instead on the fact of delivery of the product; the 'purchaser' is therefore the person to whom the producer delivers the milk, regardless of the legal title on the basis of which that transfer is made.

11. For my part, I share that second view. First, so far as the scheme is concerned, it should be noted that the regulation in question provides for two possible forms of marketing: the first — which is not relevant here — is that of 'direct sales' where the producer sells the product directly to the consumer. The second — which is in point in these proceedings — is the one that involves the 'purchaser'. It is a form of marketing in which the product, instead of going directly to the consumer, passes through an intermediary. Accordingly, as the first form of marketing does not apply, the case in point need now only be examined in the context of the second.

That said, it remains to be seen whether in the regulation the purchaser is viewed as the second party under a contract for sale under national law or, in a more general sense, as an intermediary placed, in the marketing circuit, between the producer and the consumer. In my opinion, the second of these hypotheses is the correct one. The submission to the contrary, put forward by the Consorzio, is based exclusively on the textual argument that the term 'purchaser' must perforce be connected with a contract for sale. That might well be true in theory, but there is nothing in the scheme of the regulation which provides conclusive confirmation of it. The regulation seems to exclude the existence of contract for sale. Instead, in the case with which we are concerned here, Article 9(c) defines the producer as the legal person 'selling milk or other milk products directly to the consumer and/or *supplying* the purchaser'. [5] Here the only reference to a sale concerns the so-called 'direct sales', whereas, with reference to the situation involving a 'purchaser', the provision merely speaks of that person receiving 'supplies', without any further specification regarding the legal title on the basis of which that supply is made.

5 — Emphasis added. As regards the concept of 'producer', see Cases C-341/89 *Ballman* [1991] ECR I-25 and C-152/95 *Macon and Others* [1997] ECR I-5429.

The irrelevance of the legal characterisation of the relations between producer and purchaser is confirmed by Regulation No 536/93. Article 1 of that regulation states that: 'quantities of milk or milk equivalent *marketed* in a Member State' within the meaning of Article 2(1) of Regulation No 3950/92 'means all quantities of milk or milk equivalent *which leave any holding* in the territory of that Member State'. [6] Here again, therefore, the Community legislature seems to be wholly unconcerned with the definition under national law of the relationship between 'producer' and 'purchaser'. Instead, the Community legislation is inspired by a quite broad criterion of marketing, hinging on the event of supply by the producer, regardless of the legal title on the basis of which the product, once it leaves the producer, is then transferred to the producer.

I take the view, therefore, that to be regarded as a 'purchaser', it is necessary and sufficient for the person in question to be supplied with milk or with other milk products by the producer. It is true that mere supply alone cannot qualify the recipient as a 'purchaser' within the meaning of Regulation No 3950/92. As Article 9(e) specifically provides, he must also receive the products in order 'to treat or process them' or 'to sell them to one or more undertakings treating or processing milk or other milk products'. If those conditions are satisfied, however, the legal title under which the supply is made is of no account.

12. As regards, specifically, the question whether a grouping of cooperative societies can also be regarded as a purchaser, I would observe that that is a matter specifically for the national court to resolve in the light of the factual and legal aspects of the case before it. All the Court can do here is to provide a general interpretation, to the effect that the status of 'purchaser' within the meaning of Regulation No 3950/92 does not depend on there being a contract for sale under which the producer supplies the goods to the purchaser against payment of a price. Under the scheme of the regulation, therefore, there is, in theory, nothing to preclude an association which receives goods by way of contribution from producers that are members of it, who in their turn receive a deferred consideration in accordance with the procedures established under the terms of association, from being regarded as a purchaser. It makes no difference that such contribution does not qualify as a contract for sale under national law.

The second question referred for a preliminary ruling

13. The second question referred for a preliminary ruling concerns Article 2(2) of Regulation No 3950/92, and specifically the obligation to pay the additional levy. Under the

6 — Emphasis added.

regulation in question that obligation rests on the purchaser. The reasons for the Community legislature's choice in this respect are set out in the eighth recital in the preamble to the regulation: 'in order to avoid, as in the past, long delays between collection and payment of the levy, which are incompatible with the scheme's objective, provision should be made for the purchaser, who seems in the best position to carry out the necessary operations, to be liable for the levy, and for him to be given the means to collect the levy from the producers who owe it'. Article 2 has therefore provided that it is the purchaser who is liable for payment of the levy and, for that purpose, has specified that he is to deduct the amount payable from the price of the milk paid to the producers who owe the levy. However — and this is the subject of the second question at issue — the referring court harbours doubts as to whether the purchaser is *required* to make that deduction or whether the regulation confers on the purchaser merely the *right* to do so.

The parties which have submitted observations are at one in contending that the purchaser is not required to deduct the amount payable by way of additional levy, but merely has the right to do so. I share that view. Whilst providing for the possibility for the purchaser to deduct the amount of the levy from the price payable to the producer, Article 2(2) adds that '*failing this*', he may collect such amount '*by any appropriate means*'. Therefore, the wording of the provision in question allows for the possibility of no deduction being made and of the amount of the levy being recovered in other ways. Moreover Article 2(2), subparagraph 3, provides that: 'where quantities delivered by a producer exceed his reference quantity, the purchaser shall be *authorised*,[7] 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'. The provision in question does not, therefore, impose any obligation on the purchaser, but simply *authorises* him to deduct the amount payable from the price due to the producer. What is concerned, therefore, is merely a right, failure to exercise which cannot entail penalties; however, the purchaser is liable for payment of the additional levy and, if he chooses not to use the right to effect such a deduction, he must nevertheless collect the amount owed by the producers by any appropriate means.

To conclude, I am of the opinion that the second question must be answered to the effect that the purchaser is liable for payment of the additional levy, but that it is not mandatory for him to collect that levy from the producer by deducting the corresponding amount from the price owing to the producer.

7 — Emphasis added.

Conclusion

14. In view of the foregoing, I propose that the Court answer the questions referred by the national court as follows:

(1) Articles 2 and 9 of Council Regulation (EEC) No 3950/92 of 28 December 1992 must be interpreted as meaning that a person pursuing the activities listed under the first and second indents of Article 9(e) and to whom milk or other milk products have been supplied by a producer must be regarded as a purchaser, and hence liable for payment of the levy, irrespective of the status in law of the relationship which gave rise to the supply. It is, therefore, not necessary for the supply to be made under a contract classified as a contract for sale under national law.

(2) Article 2(2) of Regulation No 3950/92 must be interpreted as meaning that the purchaser is required to collect from the producer the amount of the levy which is owed by the producer but for the payment of which the purchaser himself is liable. However, the purchaser does not necessarily have to collect that amount by deducting it from the price payable to the producer but may instead collect it by 'any appropriate means'.