

OPINION OF MR ADVOCATE GENERAL
DA CRUZ VILAÇA
delivered on 3 December 1987 *

*Mr President,
Members of the Court,*

1. A — The issue in these proceedings is essentially whether a Member State may adopt national rules concerning the marketing of fruit and vegetables of the kind at present contained in Article 7 (3) of the Belgian Royal Decree of 26 November 1982,¹ as amended by the Royal Decree of 12 January 1987, which extends to other products certain requirements laid down by the Community provisions with respect to only certain products. The Community regulations are contained, in particular, in Council Regulation No 1035/72 of 18 May 1972 on the common organization of the market in fruit and vegetables,² Council Regulation No 23 of 4 April 1962, Commission Regulation No 58/62 of 15 June 1962, Council Regulation No 183/64/EEC of 17 November 1964 and Commission Regulations (EEC) Nos 1641/71 of 27 July 1971 and 778/83 of 30 March 1983.³

2. On the same basis as in the administrative phase of the procedure before the matter came before the Court, which is described in the Report for the Hearing, the Commission brought its action in the first place against various provisions of the Royal Decree of 26 November 1982, which imposed a number of requirements additional to those then contained in the Community legislation.

3. As a result of the publication of the Royal Decree of 12 January 1987, which removed almost all the additional requirements created by the Royal Decree of 26 November 1982, the Commission withdrew most of its allegations, maintaining only the complaint concerning the obligation to indicate, in the case of products grown in Belgium, the minimum net weight, and the number of units or bundles contained in bulk packages of products.

4. Now that the causes for the possible application of Article 30 of the Treaty have been removed, the only question to be considered is the compatibility of the aforementioned provision of the Belgian legislation with the provisions on the common organization of the market in fruit and vegetables contained in Regulation No 1035/72, and in particular the quality standards adopted in the other regulations referred to earlier.

5. More specifically, the issue is whether the existence of Community rules on the common organization of the market in a number of agricultural products prevents the Member States from adopting legislation concerning the same sector.

6. B — In that connection, the Belgian Government contends that the common organization of the market in fruit and vegetables is incomplete, in so far as the obligation to give the information to which I have just referred on the packaging exists only with respect to four products: onions, artichokes, celery and headed cabbage.

* Translated from the Portuguese.

1 — *Moniteur belge* of 16 February 1983.

2 — Official Journal, English Special Edition 1972 (II), p. 437.

3 — Respectively, Official Journal, English Special Editions 1959-62, p. 97, 1959-62, p. 204, 1963-64, p. 229, and 1971 (II), p. 616, and Official Journal 1983, L 86, p. 14.

7. By extending that obligation to other products covered by the common organization of the market, Belgium maintains that, in the exercise of the residual power held by the Court to be vested in such cases in the Member States,⁴ it is completing that organization by adopting a measure which, in its view, is not contrary to the Community rules and is designed to pursue the full attainment of the objectives of the common organization of the market. Specifically, Belgium claims that the measure in question is designed to ensure the fairness of commercial transactions and the protection of consumers.

8. The Commission, on the other hand, takes the view that Belgium's contentions are based on a confusion between two totally different situations:

- (a) The first is an absence of the Community rules necessary for the proper functioning of the common organization of the market, with the result that it may be said that rules have yet to be adopted regarding part of the sector in question;
- (b) The second is the existence of a common organization of the market comprising detailed and complete rules governing the matters covered by it.

9. Only in the first case may the Member States, by virtue of the decisions of the Court of Justice, issue rules designed to make up for inaction on the part of the Community institutions, and in such cases those rules must be compatible with the principles of the common organization of the market.

10. However, in the Commission's view, that is not the case as regards the Belgian State's action with respect to the quality standards included in the common organization of the market in fruit and vegetables, which is governed exhaustively by the Community rules.

11. C — (a) The previous decisions of the Court provide sufficient guidance to decide this case.

12. (b) Initially, the Court took the view⁵ that 'in the sectors covered by a common organization of the market — even more so when that organization is based on a common price system — Member States can no longer interfere through national provisions taken unilaterally in the machinery of price formation as established under the common organization'.

13. (c) Subsequently, the Court, recognizing that certain common organizations of the markets were incomplete, conceded that additional national measures implementing or developing the Community legislation were possible, provided that certain conditions were satisfied.

14. Thus, in its judgment of 23 January 1975 in *Van der Hulst*,⁶ a case which involved certain levies collected by the Netherlands authorities in respect of trade in flower bulbs, the Court — despite considering it necessary to examine the various elements of the national intervention machinery in the light of the Community rules — recognized that machinery of the kind established by the Netherlands rules could in fact contribute to attainment of the objectives of the common organization of the market (specifically in order to promote the rational disposal of production and to ensure market stability). But, in paragraph 25 of the same judgment, the Court was

⁴ — Judgment of 7 February 1984 in Case 237/83 *Jongeneel Kaas*, [1984] ECR 483, paragraph 13; judgment of 28 March 1984 in Joined Cases 47 and 48/83 *Pluimveeslachterijen Midden-Nederland and Van Mient* [1984] ECR 1721.

⁵ — Judgment of 23 January 1975 in Case 31/74 *Galli* [1975] ECR 47, paragraph 29 of the decision and paragraph 1 of the operative part.

⁶ — Case 51/74 [1975] ECR 79, 95, paragraphs 28 and 29.

careful to emphasize that 'once the Community has, pursuant to Article 40 of the Treaty, legislated for the establishment of a common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it'. The same reservation is expressed in the judgments in *Van den Hazel*, of 18 May 1977,⁷ *Pigs Marketing Board*, of 29 November 1978,⁸ and *Pigs and Bacon Commission*, of 26 June 1979,⁹ and, later, in *Jongeneel Kaas*, judgment of 7 February 1983.¹⁰

15. In the *Amsterdam Bulb* judgment, of 2 February 1977,¹¹ the Court took the view that a Netherlands provision concerning a matter covered by a common organization of the market, providing for minimum prices for exports to non-member countries of certain varieties of bulbs other than those for which the Commission had laid down minimum prices in Regulation No 369/75, was not incompatible with Community law (paragraph 30).

16. But it is important to note the circumstances in which the Court upheld that provision.

17. In the first place, the Court considered that the measure in question did not create exemptions from the Community system, did not limit its scope and sought to achieve the same aim (paragraph 30).

18. In addition, the Court took account of the fact that: (a) no Community provision

expressly prohibited such a measure; (b) it was not possible to deduce from the Community rules as a whole that the Commission wished to imply that the products not covered should be exported at prices decided freely by market forces; (c) that, on the contrary, it might be inferred from the rules drawn up by the Commission for implementing the system of minimum prices that the Member States could continue to impose minimum export prices until such time as the Commission had decided to impose such prices itself at Community level.

19. Later, in the judgment in *Jongeneel Kaas*, the Court conceded that the existence of a common organization of the market in cheese, provided for in Regulation No 804/68, did not prevent the Member States from adopting unilaterally in certain circumstances (see the latter part of paragraph 13 of the decision) rules concerning the quality of cheeses produced within its territory, with the purpose of promoting sales of cheese and cheese products.

20. However, it made that statement with respect to a common organization of the market which at that time did not contain any rule on the designation or quality of cheese and did not establish an intervention system for cheese (paragraph 9 of the judgment). In those circumstances, the Court considered that 'the fact that the legislation in question makes no mention of the designation and quality of cheese does not mean that the Community has consciously and of necessity decided to impose on the Member States in that sector an obligation to adhere to a system of absolute freedom of production'.

21. Similarly in its judgment of 13 March 1984¹² in *Prantl* the Court conceded that,

7 — Case 111/76 [1977] ECR 901, paragraph 13.

8 — Case 83/78 [1978] ECR 2347.

9 — Case 177/78 [1979] ECR 2161, paragraph 14.

10 — Case 237/83 [1984] ECR 483, paragraph 12.

11 — Case 50/76 [1977] ECR 137.

12 — Case 16/83 [1984] ECR 1299, at pp. 1324 to 1326.

by adopting provisions concerning the protection to be granted in respect of a particular shape of bottle for Alsatian wine, the Community legislature had not exhausted its powers concerning the designation and presentation of wines conferred upon it by Article 54 (1) of Council Regulation No 337/79 of 5 February 1979 on the common organization of the market in wine.

22. Accordingly, pursuant to that provision, and until such time as Community provisions had been adopted (for which negotiations had been in progress for several years) the Member States were entitled to maintain the existing national rules in force in relation to other types of wine bottles provided that they did not contravene Article 30 *et seq.* of the Treaty.

23. The Court concluded, then, that the Community legislation protecting the 'flûte d'Alsace' was not exclusive (paragraph 16 of the judgment).

24. It did so, moreover, after stating in general terms that 'once the rules on the common organization of the market may be regarded as forming a complete system, the Member States no longer have competence in that field unless Community law expressly provides otherwise' (paragraph 13).

25. In the same way, it was because of lacunae in Community law that, in the *Midden-Nederland* judgment of 28 March 1984,¹³ the Court considered to be compatible with Article 2 of Council Regulation No 2777/75 of 29 October 1975 on the common organization of the market in poultry-meat national measures laying down requirements concerning the quality and

marketing of slaughtered poultry and imposing penalties for the contravention thereof.

26. In that case, there was an almost total failure to act on the part of the Council which, in a sector governed by a common organization of the markets since 1967, had still not (contrary to the requirements of Article 2 of the regulation) brought into force the rules needed to enable the organization to function normally; the Commission itself, having encountered resistance in the Council, withdrew the proposals for regulations which it had submitted (paragraph 21 of the decision).

27. In that case too, the Court laid down the conditions under which intervention by the Member States is permissible: the measures to be taken may only be temporary and provisional in nature, since they are not based on the exercise of the Member States' own powers but rather represent fulfilment of their duty to cooperate under Article 5 of the Treaty (paragraph 23); the provisions adopted or maintained must be compatible with the principles of the common organization of the market and must not hinder imports (paragraphs 24 to 27).

28. Finally, mention should be made of the judgment in Case 148/85, *Marie-Louise Forest*,¹⁴ in which the Court stated that Regulation No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals does not prevent the adoption by a Member State of a system of quotas for the milling of wheat applying only to domestic human consumption in the Member State concerned (paragraph 15).

¹³ — [1984] ECR 1721, 1740, paragraph 29.

¹⁴ — Judgment of 25 November 1986 [1986] ECR 3449.

29. But that case concerned an area — the flour-milling sector — in which the Community legislature had not adopted rules (paragraph 14 of the judgment) and, moreover, the Court was able to conclude that, within that system, the total quantity of quotas exceeded the quantity necessary to meet domestic consumption to such an extent that it neither constituted a factor limiting wheat production nor adversely affected agricultural productivity.

30. (d) The case now before the Court is very different.

31. As we know, only certain vegetables (four) are covered by the 'Community' obligation to indicate on the packaging the weight and number of units or bundles, which the contested national provision extended to all products.

32. The fact that in this case there is no lacuna resulting from a lack of foresight on the part of the legislature is apparent from the previous decisions of the Court.

33. In the *Apple and Pear Development Council* judgment of 13 December 1983,¹⁵ the Court considered that 'the rules on the common organization of the market in fruit and vegetables provide for an exhaustive system of quality standards', and the Member States are precluded (subject to any provision to the contrary) from unilaterally adopting provisions in that regard (paragraph 23); such provisions may only be adopted in accordance with the established Community procedures.

34. Confirming that approach, the Court stated, in its judgment of 25 November

1986 in Case 218/85 *Association comité économique agricole régional* [1986] ECR 3513 that: 'In the light of the exhaustive nature of the Community system of quality standards, rules on grading, size, weight and presentation laid down by producers' organizations for products to which Regulation No 1035/72 applies cannot be made compulsory for producers who are not members, since such an extension is not provided for by the relevant provisions of Community law' (paragraph 16).

35. It should be noted that the regulations on that common organization of the market practically all contain detailed rules and comprehensive annexes relating to quality standards for a large number of products, including in particular the information which must be shown on packagings, and thus it cannot even be said that there is the appearance of a lacuna. The position simply is that the quality standards for the various products are different.

36. Furthermore, the Commission has provided the Court with information as to the origin and history of the Community provisions concerning the details to be indicated on the packages of products with which the present case is concerned. From that information it is apparent that the limitation thereof to four of the products covered is, for the time being, a conscious and deliberate choice on the part of the Community legislature.

37. It appears that the Commission, having considered extending the obligation to indicate the weight and quantity to other products, abandoned its plan to do so because of strong resistance encountered within the Management Committee for Fruit and Vegetables. The reason for that resistance was the fact that certain Member States found it difficult to accept the extension of that obligation on account of the excessive packaging work that it would entail and the risk that, in view of the possi-

¹⁵ — Case 222/82 [1983] ECR 4083, 4121, paragraph 23.

bility of loss of weight during transport, objections might be made when the products reached their destination.

38. The Commission's failure to extend the obligations laid down for four of the products covered by the common organization of the market to other products was therefore the result of a deliberate choice and not an accidental omission or a mere instance of political obstruction.

39. For similar reasons — 'the absence of measures concerning the withdrawal, where necessary, of products from the market does not stem from an omission or from an intention to leave measures of this nature to the appraisal of the Member States but is rather the consequence of a considered choice of economic policy' — the Court stated, in the *Van den Hazel* judgment, cited earlier, that national measures imposing a quota on the slaughtering of poultry were incompatible with Regulation No 123/67 on the common organization of the market in poultry-meat.

40. That being a matter falling within the powers of the Community, the Member

States are not entitled to impose obligations for which no provision was made and thus to bring into being differing rules governing the same matter.

41. D — In view of the foregoing considerations, it is not even necessary to examine the Belgian Government's arguments relating to the fairness of transactions and consumer protection or the analogous application of Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer.

42. Besides the fact that this case concerns packagings which are as a rule intended to be used at the wholesale stage, the arguments put forward are not valid in relation to the exhaustive rules of the common organization of the market; they would seem to be rather more pertinent to a discussion of Article 30 of the Treaty and, as the Commission pointed out on several occasions at the hearing, that article is not at issue.

43. E — Accordingly, I propose that the Court should declare that by adopting and maintaining in force provisions (Article 7 (3) of the Royal Decree of 12 January 1987) requiring the minimum net weight, and the number of units or bundles to be indicated on bulk packages of products grown in Belgium — requirements which are laid down by the Community rules for only four products — the Kingdom of Belgium has failed to fulfil its obligations under the Treaty and those deriving from the regulations on the common organization of the market in fruit and vegetables, in particular Regulation No 1035/72 of the Council of 18 May 1972, Council Regulation No 23 of 4 April 1962, Regulation No 58 of the Commission of 15 June 1962, Regulation No 183/64/EEC of the Council of 17 November 1964, Regulation (EEC) No 1641/71 of the Commission of 27 July 1971 and Commission Regulation No 778/83 of 30 March 1983.

44. Consequently, the Kingdom of Belgium must be ordered to pay the costs.