monetary union, can be interpreted as in themselves imposing on Member States a prohibition against altering the parity of the rates of exchange for their currency otherwise than by establishing a new fixed parity, which might be invoked by interested parties in the national courts.

Lecourt Donner Sørensen Monaco Mertens de Wilmars

Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 23 October 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 11 JULY 1973 [1]

Mr President,
Members of the Court,

The two joined cases referred for preliminary ruling by the Finanzgericht Baden-Württemberg (Cases 9/73 and 10/73) on 19 February 1973 were argued on 27 June in what might be called a single oral proceeding. For this reason and also because the content of the cases is in part indentical, in part closely related in their subject matter, I can permit myself to deal with the submissions in one combined opinion. Moreover as the problems of the cases now before us correspond in part with those of Case 5/73, it appears to me superfluous to specify the legal matters at issue in my indroduction. On these I refer to the opinion I gave on 26 June in Case 5/73.

I need only say now that the firms of Schlüter and Rewe-Zentral, the plaintiffs in the main actions were affected by the system of compensatory amounts introduced, after the floating of the exchange rates of the German mark and Dutch guilder, by Regulation No 974/71 (OJ 1971, L 106). Accordingly the firm of Schlüter, on importing Emmentaler and Gruyère cheese from Switzerland into the Federal Republic of Germany on 15 March 1972, had to pay a compensatory amount of DM 45·50 per 100 kg of cheese under Regulation No 501/72 (OJ 1972, L 60) of the Commission in force at the time. The same applied to the firm of

1 — Translated from the German.

Rewe-Zentral when it imported peach preserves from France. For these it had to pay the compensatory amount of DM 0·32 per 100 kg in force on the day of importation (16 May 1972).

The said firms consider that these charges are not permissible, on various grounds of Community law which we will go into later. They therefore applied to the Finanzgericht Baden-Württemberg with a view to obtaining a refund of the compensatory amounts they had paid. On the arguments put forward in course of the proceedings on the validity of the compensatory system, the Finanzgericht Baden-Württemberg suspended the proceedings by Orders of 8 November 1972 and put down a series of questions, which are recorded in the minutes of the Session, for a preliminary ruling.

We must now consider how these questions are to be answered.

1. I will begin by dealing with the first question in Case 9/73. This concerns the validity of Regulation No 974/71, so far as it authorizes the levying of compensatory amounts on import from third countries.

On this, as you know, problems arise concerning the application of Article 103 of the EEC Treaty (the provision on the enactment of measures of conjunctural policy) and the choice of the form of a Regulation. As these have been dealt with in detail in Case 5/73, I will not go over them again but will give you my views on the present case.

However, as to some of the arguments of the plaintiff in Case 10/73, which covers the same range of problems, two observations must be made by way of amplification.

The first concerns the plaintiff's view that recourse must be had to the Community law powers contained in Article 104 *et seq.* of the EEC Treaty for the solution of balance of payments problems and problems of altering rates of exchange; that is to say Article 107 (2) comes into play, under which the Commission is authorized to take action in certain circumstances. On this however it must be said that Article 107 (2) deals with the action which the Commission may take to meet a case of an alteration of exchange rates which is inconsistent with the objectives set out in Article 104. This was obviously not the position in May of 1971; indeed it was then recognized by the Community that a floating of exchange rates to meet an exceptional situation seemed justifiable. Moreover the effects on *conjunctural policy* of this measure in the field of agriculture had to be considered. In view of this fact it can hardly be regarded as objectionable that at that time the Community authorities had recourse to the provisions of the EEC Treaty or conjunctural policy and disregarded Article 104 *et seq.*

The second observation concerns the plaintiff's thesis that Article 103 must be interpreted in the light of Article 3 (g), that is to say of the provision which speaks of an 'application of procedures by which the *economic policies* of Member States *can be coordinated*'. Hence the need, within the framework of Article 103, to allow interference only within the smallest possible range. In my opinion it is obvious that this thesis is of no avail. It leaves out of account the fact that in the Treaty measures on conjunctural policy are distinct from those on economic policy. Within the framework of conjunctural policy the Community is empowered not only to effect coordination under Article 103 (1); it has more far-reaching powers to make regulations under paragraph (2) of this Article. In the field of conjunctural policy therefore relatively far-reaching interference with national affairs can certainly be made without the principle mentioned in Article 3 (g) being endangered.

As already set out in the opinion in Case 5/73 the answer to question 1 in Case 9/73 must therefore be that the validity of Regulation No 974/71 cannot be questioned purely because it rests on Article 103 of the EEC Treaty.

2. Let us now turn to question 1 in Case 10/73. This asks for clarification on the issue whether Regulation No 974/71 is valid in so far as it authorizes the levying of compensatory amounts within the Community.

On this the plaintiff in the main action advances the argument that Article 103 does not constitute a safeguard clause; according to its clear wording it gives no right to deviate from the strict rules of the EEC Treaty. It is particularly important that under Article 8 of the EEC Treaty 'the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the common market must be implemented'. Accordingly since 1 January 1970 customs duties and charges having equivalent effect in Community trade can no longer be deemed admissible. In this connection it must be remembered that the introduction of a compensatory levy for currency cannot be reconciled with the requirement of a conjunctural policy for the *whole* Community.

These objections are emphatically opposed by the Federal Government, the Council and the Commission. I have already indicated in my opinion in Case 5/73 that I do not consider them relevant. Now I must go into this in greater detail and offer the following observations thereon.

First we must not allow ourselves to be led astray by the choice of the term 'Angleichungszölle' (adjusting customs duties) for compensatory amounts, the former phrase being that found in the German implementing regulation made pursuant to Regulation No 974/71. This designation was chosen as we have heard, simply for technical legal reasons, viz. in order to indicate that certain specific customs regulations applied. Compensatory levies for currency cannot really be compared with customs duties because they have a special function: they are intended to compensate for the incidence of currency measures on trade and to ensure that after the floating of the exchange rate imports cannot be made below the level of Community prices.

Then too it must not be overlooked that Article 8 (7), to which the plaintiff has referred, contains a saving provision. In my opinion that refers *inter alia* to Article 103, because conjunctural policy, as already stressed in another connection, plainly goes beyond the establishment of the Common Market. Especially as regards the sphere of agriculture which is now the subject of argument, it is quite clear that the categorical prohibitions, referred to by the plaintiff, after expiry of the transitional period, are of no significance here. To this extent it was correctly observed that compensatory levies would be reconcilable with the Treaty under Article 40 (2) if a different form of organization had been chosen for the common organization of the markets; the point was made that within the framework of the common organization of the markets quantitative restrictions could still be conceivable after expiry of the transitional period, and reference was made to the continuance of minimum prices which restrict trade. Furthermore it is important to recognize in this connection that trade in the agricultural sphere is linked to a system of common prices and that the common agricultural policy with a price system linked to units of account has preceded the establishment of a monetary union. Thus it seems clear that in a situation in which the basis of a unified price system, attained through measures of monetary policy within the framework of a national economic policy, is lacking, trade in agricultural products is inevitably affected. In such a situation, as the Commission has observed, a common agricultural policy without a levy is really no longer feasible. Then too one must agree with the Council that the principle of free movement of goods is not so important in the field of

agriculture as in the field of industrial goods. The primary aim in the field of agriculture is not the creation of a system of free movement of goods but the realization of the objectives set out in Article 39 (a) to (d). In order that these ends may be attained, and not endangered by short-term fluctuations, the temporary introduction of a levy system can be justified, particularly a levy system involving less interference than quantitative restrictions and really making the exchange of agricultural products relatively free.

So in answer to question 1 in Case 10/73 it can be maintained that the validity of the measures taken under Article 103 cannot be questioned on the ground that they also include levies within the Community.

3. The second question in Case 9/73, to which we now turn, raises the problem whether the validity of Regulation No 974/71 is affected because the determination of the compensatory amounts as regards third countries is based exclusively on changes in the rate of exchange of those Member States authorized to levy them in relation to the dollar.

This question must be seen against the background of the fact that the German mark and Swiss franc, the currencies with which we are concerned, have appreciated uniformly in relation to the dollar and that the rate as between the DM and Swiss franc has remained the same. As a result of the relation to the dollar alone being taken into account, imports from Switzerland, particularly those made in early 1972, were subjected to compensatory amounts which considerably exceeded the incidence of the currency measures taken. In this the plaintiff obviously sees an infringement of the principle of proportionality and grounds for doubting the validity of the Regulation.

As you know, a similar problem relating to imports from Bulgaria and changes in the rate of Bulgarian currency (which have been much the same as those of the Swiss franc) was a material factor in Case 5/73. In looking into this I have come to the conclusion after considering all relevant aspects that, so far as we are here concerned, no objection can be raised to rules based solely on the DM/dollar exchange rate in Article 2 of Regulation No 974/71. No fresh aspects have come to the fore in this connection in the present case. I accordingly desire to maintain this view, and for the basis of it I refer to the detailed opinion in Case 5/73.

I accordingly submit that in Case 9/73 the question of the validity of Article 2 of Regulation No 974/71 can be answered in the affirmative.

4. The next question which arises likewise concerns only Case 9/73. According to this, the question must be examined whether Regulation No 974/71 and the consequential implementing Regulations on it issued by the Commission are valid in so far as they authorize the levying of compensatory amounts, in trade with third countries in Emmental and Gruyère cheese, which when added to the levy are above the consolidated maximum rates for customs duties in GATT.

In this connection it must first be remembered that the Community concluded an agreement with Switzerland on 6 October 1969 under Article 28 of GATT in which there are customs concessions for Emmental and Gruyère cheese (a definite ceiling was set to the relevant rates of customs duties). On the other hand it is correct that the levies to compensate for currency fluctuations together the levies for cheese from Switzerland show an amount in excess of the consolidated maximum rates of customs duties.

In the light of these facts the plaintiff in the main action points out that the abovementioned customs concessions are components in the schedule within the meaning of Article 2 of GATT and that the Community must accordingly respect

the provision therein that such products 'shall also be exempt from all other duties or charges of any kind on or in connection with the importation'. The plaintiff is also of opinion that the individual can call in aid the abovementioned provision of GATT and, if it is disregarded, question the validity of the Regulations affected by it. In any case in the plaintiff's opinion it is decisive that in Annex II of Regulation No 1/72 of the Council (OJ 1972, L 1) amending Regulation 950/68 (OJ 1968, L 172), the Regulation on the Common Customs Tariff, the consolidated rate of customs duty for Emmental and Gruyère cheese is mentioned. So this concession became part of the Common Customs Tariff and no less binding than the Customs Tariff itself. At least an importer must be able to call it in aid to show that these rates must not be exceeded by making compensatory levies for currency fluctuations.

As regards these contentions of the plaintiff it is then clearly correct — if we limit ourselves to the actual GATT argument — that the Community is also bound by the provisions of GATT as regards the concessions negotiated with Switzerland. This can be deduced from the recent judgment in Cases 21 to 24/72. Despite the far-reaching prohibition of Article 2 of GATT which I have quoted, it must nevertheless be open to doubt whether the compensatory levies for currency fluctuations are caught by it and whether it is shown that they are accordingly not reconcilable with GATT. That may be said as regards the special function of the monetary compensatory amounts to compensate for *advantages* enjoyed by imports in consequence of currency measures. In fact such levies were presumably not foreseen by GATT and it seems too that in GATT practice their use as a transitional measure is permitted to the extent that a currency measure has effect. Moreover it could be asked, as the Commission has shown, whether levies of this kind are not covered by Article II 2 (a) in conjunction with Article III of GATT are not covered as respects third countries. This could be a matter for consideration because levies as respects third countries are the equivalent of levies within the Community and because the maintenance of the agricultural market as part of a customs union certainly implies that goods imported from third countries do not receive better treatment than goods imported from Member States. (So here in fact there would be a justification at least to the extent that trade within the Community also is charged with compensatory amounts.) Finally, as the Commission has likewise shown, there could be justification under Article XIX of GATT, *viz.* under the provision for special measures in case of serious damage to domestic products. This of course would need to be shown for each individual product.

Lastly all this may be clear, even if the considerations mentioned show that the plaintiff's deduction from the principles concerning the direct applicability of Community law does not hold, *viz.* the deduction that Article 2 of GATT in conjunction with the customs concessions for cheese is a clear, complete, definite and unconditional legal obligation appropriate for direct use by individuals. There is a further decisive point in relation to the GATT rules raised by the Federal Government, the Council and the Commission. It cannot really be admitted from basic considerations that individuals derive rights from GATT agreements and can thus question the validity of a Community regulation. The Court has drawn similar conclusions in the judgment in Cases 21 to 24/72 at least as regards Article 11 of GATT. The grounds of this judgment were however restricted to general terms. I would remind you of the reference to the meaning, structure and wording of GATT, its flexibility and the fact that it contains provisions concerning deviations from general rules, measures which

may be taken in cases of exceptional difficulty, and settling of differences between the contracting parties. These considerations can certainly be applied to Article 2 which is likewise fitted into this general scheme and for the non-observance of which the principle of self-help applies. It must accordingly be maintained as regards the GATT provisions cited by the plaintiff in relation to international law that only the obligations of states are at issue, the infringement of which can be dealt with on the level of international law, but that it is not appropriate to draw conclusions from their possible non-observance concerning the invalidity of Community Regulations in this field.

Moreover where the plaintiff invokes Regulation No 950/68 or No 1/72 concerning the Common Customs Tariff and the fact that it refers to GATT concessions and so incorporates them in the Regulations, the following observations arise.

Before any conclusions can be drawn in this connection from such a Community Regulation which of course is of direct application, it must be determined how the subject matter governed by this Regulation is to be defined. The Council and the Commission are surely right in pointing out that, since the legal basis of the Regulations is Article 28 of the EEC Treaty, their object is to establish the Customs Tariff with the rates of duty. References in these Regulations to other levies which, somewhat like the levies under consideration, have a special legal basis are only declaratory; they do not make the levies part of the Common Customs Tariff. So far as the maximum consolidated rate of duty in GATT for cheese set out in Annex II of the Common Customs Tariff is reproduced in Regulation No 950/68 this is only material for the purpose of *customs law* in the technical sense. It is for this reason that it was necessary, despite the reference to customs concessions in Regulation No 950, to prescribe in the common organization of the agricultural markets an express limitation of the levies to a corresponding extent (as is done for example in Article 14 of Regulation No 804/68, OJ 1968, L 148). Since on the other hand the comprehensive prohibition of Article 2 of GATT is not reproduced in the Common Customs Tariff it can be said that the Community authorities were not prevented by the subject matter governed by the Common Customs Tariff from introducing special kinds of import levies such as compensatory amounts for fluctuations in exchange rates, such amounts having special functions. As the Council and the Commission stress, there is no contradiction between Regulation No 950/68 and Regulation No 974/71, so far as it contains powers to levy compensatory amounts for fluctuations in exchange rates independently of the amount of the maximum consolidated rates of duty. That it was the Council's intention not to provide such a restriction in Regulation No 974/71 is evident from the Council's negative reaction to the Commission's proposal of May 1972 to set a limit to currency compensation in those cases in which tariff concessions were made for specific products within the framework of GATT. If on the other hand the Council had wished so to limit the frontier compensation it would have been necessary to provide for this *expressly* in Regulation No 974/71 in the same way as in the case of levies in the relevant organizations of the agricultural markets. Without such an express authorization the Commission was certainly not entitled in the implementation of the regulations for compensation to limit the compensatory amounts generally according to the standard of the GATT consolidations.

Whilst, then, it can be said that there is no contradiction between Regulation No 974/71 and the Regulation on the Common Customs Tariff with its references to the concessions in GATT it should be added that, even if there were such a contradiction, the conclusions

drawn by the plaintiff on the validity of the compensatory rules are unjustified. In that case we could not fail to recognize that Regulation No 974/71 with its comprehensive special powers in relation to Regulation No 950 is *lex specialis* as well as *lex posterior*. Because it is not based on Regulation No 950, its validity cannot be judged by the rules in the latter.

So on the third question for preliminary ruling in Case 9/73 there remains only to observe that the validity of the compensatory rules as regards third countries can be disputed neither in relation to Regulation No 950/68 nor by reference to the GATT rules on maximum consolidated rates of duty.

5. The next question for investigation has been raised in the same terms in both cases. According to this the Baden-Württemberg Finanzgericht requires to know whether the power contained in Regulation No 974/71 for the levying of compensatory amounts at the time of importation (that is to say on 15 March 1972 or 16 May 1972) was no longer in force, either because Member States were again applying the international rules on the margins of fluctuation around official parity or because it was established, at the latest following the Washington conference of 18 December 1971, that the Member States would not revert to the old parities.

On this question, or at any rate on the first part of it, I can be brief because it was a matter for investigation in Case 5/73 and because nothing really fresh has come up in the two cases with which we are dealing.

According to that case, it is conclusive — and this is the plain meaning of Article 8 of Regulation No 974, which has been invoked — that the compensatory rules become superfluous only when fresh rates of exchange are introduced and fixed margins of fluctuation are observed. There could be no question of this after the Washington Gentlemen's Agreement. The Washington resolutions were of a precarious nature because they were not embodied in a convention: they were not therefore comparable to international rules within the meaning of Regulation No 974. Moreover these resolutions deal with *guiding rates* set up by the Directorate of the International Monetary Fund which are of a different legal nature from the official parities. (They have for example only to be reported to the International Monetary Fund and come into force if they are not declared unsatisfactory by the latter, while the alteration of the official parity requires the approval of the International Monetary Fund.) Finally not only do the guiding rates which most contracting parties have applied vary from the official parity — and some of them vary considerably; it is also an essential factor that substantially widened margins for these were introduced, which led to even France and Italy having to be brought into the compensatory system after the Washington resolutions on currency.

In this light a lapsing of Regulation No 974/71 following the Washington resolutions could not seriously be contemplated and in reality after all the arguments put forward there was also no occasion for such lapsing following the decision taken in March 1972 on the narrowing of the margins of fluctuation, a decision too which afforded no immediate securing of currencies.

Moreover within the scope of this question there still arises the problem whether a lapsing of the powers in Regulation No 974/71 can be considered seeing that the Washington resolutions established that there was no question of a return to the old parities. No lengthy exposition on this problem is necessary. Actually it may be observed, in line with the Commission's view, and by way of answering this question in the negative that such a return in May 1971, that is at the time when Regulation No 974/71 was made, was extremely improbable. On the other hand it is material that the requirements of Article 8 of Regulation

No 974 can only be considered as fulfilled if, as was not clear even after the Washington resolutions, fresh *parities* were established.

Lastly in this connection an observation made only by the plaintiff Rewe-Zentral, must be investigated. This refers to the decision of the Council of 9 May 1971 and the statement it contains 'that the present situation and the foreseeable development of the balance of payments of the Member States does not justify an alteration of the parities of their currencies'. On the strength of this and in the conviction that the decision expresses the intention that there should be a return to the old parities, this plaintiff takes the view that by reason of the Washington resolution an essential condition for this decision has disappeared and so the ground has been cut away from Regulation No 974/71 which was founded on it. This thesis is however obviously untenable. In my opinion it is sufficient that the decision expressed only an expectation. In any event it seems misleading on this point to attribute a binding force to the decision such that a formal act of the Council, passed in accordance with it and itself containing precise conditions for its lapsing, should lapse if the expectation was not fulfilled.

Finally therefore it is established that nothing can be said for the supposition that the powers in Regulation No 974/71 were no longer in force when the paintiffs in the main proceedings effected their imports.

6. Again in both cases the further question was raised in identical terms, whether at the time of importation (that is on 15 March or 16 May 1972) the Member States were prohibited from floating their exchange rates, either under Article 107 of the EEC Treaty or by reason of the decision of the Council of 22 March 1971 on the gradual realization of the Economic and Monetary Union or under Article 5 of the EEC Treaty.

This question was raised in relation to the interpretation of a national enabling provision relevant in this connection, and is probably not necessary for the court's decision, in view of the arguments adduced by the Commission on the possibility and necessity of a possibly retrospective correction of the enabling provision in question. This must not however deter us from investigating the problem of the floating of the exchange rates. Moreover on this we can take account in part of what has already been put forward on a corresponding question in Case 5/73.

Then, so far as reference was made to the requirements of the Agreement on the International Monetary Fund, which is binding on all Member States, and it was concluded from this that the Fund recognized only an alteration of the parities of exchange and not a a floating of them, three observations arise. It is important to note that so long as currency policy is not unified within the framework of the Community, the Member States bear the rights and duties of the Agreement and that the Community itself is not bound by the Agreement. So then what has been done in execution of the GATT requirements can be applied to present circumstances and it can be established that the individual cannot call in aid in national courts the rules of the Agreement on the International Monetary Fund. Finally it is significant that the Agreement in no way excludes floating of currencies. This can be deduced from the practice followed since 1948 and to this extent it is also significant that the International Monetary Fund did not oppose the floating of currencies with which we are now concerned. It is thus of no avail to quote this Agreement as an answer to the question before us.

Then as regards Article 107 of the EEC Treaty it was already clear in Case 5/73 that no diminution of the means of execution of currency policy by the Member States in the sense meant by the plaintiff can be deduced from that

Article. Anyhow no use can be made in this connection of paragraph 2 of the Article, which provides only for counter-measures on the part of the Community in case of abuse and so only indicates an indirect limitation of the powers of Member States in relation to currency policy. So even if floating of exchange rates can hardly be reconciled in the long term with the EEC Treaty, a complete prohibition in case of an abnormal situation cannot be deduced from Article 107.

Then too I have already considered, in the opinion on Case 5/73, the argument based on Regulation No 129. For simplicity's sake may I just refer to it.

We must then again consider the reference to the decision of the Council of 22 March 1971 and the argument taken from Article 5 of the Treaty, that is from the provision whereby Member States share a general obligation to act in a way favourable to the well-being of the Community. On this the following points arise.

As to the decision of the Council of 22 March 1971 and that of 21 March 1972 as well, the Commission in my opinion has convincingly shown that these were not binding legal acts. It is noteworthy as to the first decision that the narrowing of margins provided for required agreed intervention by the central banks as regards the dollar. This condition was unfulfilled in May 1971. The narrowing of the margins of fluctuation on the contrary was not due to come into operation until 15 June 1971 and was then overtaken by that year's events in the currency market which are sufficiently well known. As regards the second decision it must be recognised that like the first decision it only provided for currency fluctuations to be kept within narrow margins *experimentally* and that following it the central banks were merely asked to introduce an intervention system *experimentally*. So it is rightly concluded that the Member States did not want to limit their independence in relation to currency policy in this way and the subsequent conduct of several Member States which afterwards came to light is in line with this conclusion. It cannot therefore be inferred from these decisions that floating of currencies was not permissible.

Finally as regards the reference to the general rule in Article 5 of the EEC Treaty, this can likewise be disposed of briefly. Indeed, as the plaintiffs claim, it cannot be contested that the propriety of the floating of currencies and the compensatory system which rests upon it may appear doubtful considered in isolation in the light of some of the aims of the Treaty (for example of Article 3 (a) (d) and (f)). It can be said however that certain distortions in competition arising from the floating of exchange rates were counteracted by the compensatory system and that this system should ensure in the long run the implementation of the agricultural policy with its common price system. Moreover if a prohibition of the floating of exchange rates cannot be deduced from the special provision of Article 107 of the EEC Treaty, recourse certainly cannot be had to the general provision of Article 5 as grounds for such a prohibition.

So in the end the answer that must be given to the court requesting the preliminary ruling on these questions, if this should be necessary, is that there was no prohibition under Community law on the floating of exchange rates either on 8 March 1971 (the date on which the German customs law was amended) or at the times when the plaintiffs made their imports.

7. In case 9/73 a further remark was made in the proceedings with reference to Article 1 of Regulation No 974/71 according to which the inclusion of Swiss cheese in the compensatory system must be prohibited because there was no risk of disturbance in trade.

The Finanzgericht Baden-Württemberg has not however raised any question on

this and there is therefore no occasion to go into this problem in the present proceedings.

If nevertheless it be thought that this problem should be considered, I would refer on this point to the statements I gave in my opinion in Case 5/73 on a similar problem concerning the importation of Bulgarian cheese of sheep's milk. I may add to these statements that the danger of distortion which might arise from types of cheese imported from Switzerland could appear greater than the disturbance of the Common Market from Bulgarian cheese of sheep's milk. Further the Commission's statement about the difficulties which could arise if Swiss cheese was freed within the framework of the compensation system appears to me enlightening. Such matters were rightly borne in mind in connection with the discretionary consideration taken into account by the Commission under Article 1 of Regulation No 974.

So if the Court wishes to make a declaration in Case 9/73 on Article 1 of Regulation No 974 as well, it should be maintained that the point of view of the Commission, according to which Swiss cheese was included in the compensatory rules and was not freed until the spring of 1973 cannot be objected to, having regard to the discretion available to the Commission, which includes considerations of trade policy.

8. All this leads me in the end to propose in conclusion the following answer to the questions raised by the Finanzgericht Baden-Württemberg.

(a) On Case 9/73:

(aa) No grounds have become apparent in these proceedings whereby the validity of Regulation No 974/71 can be questioned, so far as it authorizes the levying of compensatory amounts on imports from third countries. From this it follows in particular that the Council was entitled to enact this Regulation under Article 103 of the EEC Treaty and, for the purpose of fixing the compensatory amounts to use generally the relationship of the floating Community currencies to the US dollar.

(bb) The validity of Regulation No 974/71 and the implementing regulations made in under it is not affected by the fact that these authorize the levying of compensatory amounts on the importation of Emmental and Gruyère cheese from third countries which, together with the original levy, exceed the consolidated maximum customs duties in GATT.

(b) On Case 10/73:

No grounds have become apparent in these proceedings whereby the validity of Regulation No 974/71 can be questioned so far as it authorizes

the levying of compensatory amounts within the Community. From this it follows in particular that the Council was entitled to base the measures it took on Article 103 of the EEC Treaty.

(c) Common to both Cases:

(aa) It is not possible to proceed from the basis that the authorization granted by Regulation No 974/71, in the light of the resolutions of the Washington monetary conference of 18 December 1971 and their application by the Member States, had lapsed on 15 March 1972 or 16 May 1972.

(bb) From the point of view of Community law it cannot be accepted that Member States were prohibited from floating their rates of exchange on 15 March 1972 or 16 May 1972.