

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the question submitted to it by the Finanzgericht des Saarlandes by an order of 15 September 1977, hereby rules:

Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 is invalid in so far as it fixes compensatory amounts in respect of trade in powdered whey.

Kutscher	Sørensen	Bosco	Donner	Mertens de Wilmars
Pescatore	Mackenzie Stuart	O'Keeffe	Touffait	

Delivered in open court in Luxembourg on 3 May 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI
DELIVERED ON 11 APRIL 1978¹

*Mr President,
Members of the Court,*

1. The present case turns on the question whether it is lawful to apply monetary compensatory amounts to

imports into a Member State of powdered whey coming from another Member State.

It should be explained that whey, in its liquid state, is a by-product of the manu-

¹ — Translated from the Italian.

facture of cheese. It is used for animal feed by reason of its albumen content which amounts to between 10 and 12 %. In fact a part of the liquid whey produced in the Community is directly used for animal feed. Since the product is perishable it seems that its use is restricted to agricultural undertakings situated near cheese factories. The liquid is processed into powdered whey so that it may be transported and used over a longer period of time. Such processing accounts for approximately half of the whey available.

Let us consider the facts which gave rise to the present proceedings. In the course of 1975 the Hauptzollamt (Principal Customs Office) Saarbrücken, on the basis of Regulation (EEC) No 539/75 of the Commission of 28 February 1975, charged the Milac undertaking compensatory amounts on the importation into the Federal Republic of Germany of powdered whey acquired in France. The Milac undertaking unsuccessfully contested the decision of the Hauptzollamt Saarbrücken through administrative channels and then brought the matter before the Finanzgericht des Saarlandes (Finance Court of the Saarland) claiming that the said charge was unlawful because it was in breach of Regulation No 974/71 of the Council of 12 May 1971, the basic regulation on the system of monetary compensatory amounts. The undertaking maintained first of all that there had been a breach of Article 1 (2) (b) of that regulation, which permits compensatory amounts to be charged on products whose price depends on the price of products covered by intervention arrangements under the common organization of agricultural markets. Secondly the plaintiff maintained that the last subparagraph of the said article, which provides that compensatory amounts shall be applied only if the implementation of national monetary measures would lead to disturbances in trade in agricultural products, had also been infringed.

Subsequently the Commission, by Regulation No 1824/77 of 4 August 1977, laid down that monetary compensatory amounts should no longer be applied to powdered whey after 5 September 1977 since "in the present circumstances, the absence of compensatory amounts for these products is unlikely to disturb trade".

By an order of 26 October 1977 the Finanzgericht des Saarlandes referred the following preliminary questions to the Court of Justice:

1. Does Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 infringe Article 1 (2) (b) of Regulation (EEC) No 974/71 of the Council of 12 May 1971 in so far as it fixes compensatory amounts for the import of powdered whey, because the price of powdered whey does not depend upon the price of skimmed-milk powder?

If the answer to Question 1 is in the negative:

2. Does Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 infringe Article 1 (3) of Regulation (EEC) No 974/71 of the Council of 12 May 1971, according to which the provisions of Article 1 (1) (the charging and grant of compensatory amounts) are only to be applied where application of the monetary measures referred to in that provision would lead to disturbances in trade in agricultural products, or are compensatory amounts absolutely necessary:
 - (a) in order to compensate for the incidence of the monetary measures on the prices of basic products (in this case skimmed-milk powder) even if the market price of powdered whey falls to or below the production costs; or
 - (b) so as to avoid disturbances in trade caused by monetary measures, even if the market

price for the product fluctuates over a period of time and in amount so that monetary measures do not have any effect?

From the reasons set out in the order of the court making the reference it appears that the court considers that the price of powdered whey, which is subject to wide differences in the various Member States, does not depend on the price of milk. According to the Finanzgericht liquid whey has no market value and prior to the enactment of legislation to protect the environment it appears generally to have been discharged as waste into running water in so far as it could not be used directly for animal feed. The German court deduces from the statement submitted by the Commission to the Court of Justice on 29 July 1976 in Case 28/76, which the plaintiff has lodged on the file, that in the various Member States the price of powdered whey is dependent entirely on the production costs. Accordingly the court making the reference harbours doubts as to whether the conditions prescribed by Regulation No 974/71 for the application of monetary compensatory amounts to powdered whey are fulfilled.

2. With regard to the first question it must be recalled that Article 1 of Regulation No 974/71 provides *inter alia* that monetary compensatory amounts may be applied to imports into Member States whose currency increases in value in respect of products covered by intervention arrangements under the common organization of agricultural markets (paragraph (2) a)) or whose price depends on the price of the products mentioned in subparagraph (a) and which are governed by the common organization of the markets (paragraph (2) (b)).

Whey and products derived from it are not covered by intervention arrangements under the common organization of agricultural markets.

In order to show that powdered whey is a product to which monetary compensatory amounts may be applied it would however be sufficient to establish that its price depended on the price of the raw material, milk, a product for which intervention measures have been provided. The undertaking Milac maintains that there is no such relationship because the liquid whey used to produce powdered whey has no price or market value. As we have seen, the court making the reference shares this point of view. The plaintiff in the main action explains that cheese manufacturers who dispose of powdered whey only occasionally obtain anything for it, amounting at the most to half a pfennig per litre, but this must be considered not as a sale price, but rather as a mere reimbursement of the costs of collection and disposal of the product.

On the other hand the Commission considers that this charge must be regarded as the price of the whey, whilst conceding that it is not paid in every case. In particular where the undertaking producing the whey and the undertaking receiving it are situated within a given distance from one another the latter obtains the liquid whey free.

Let us concede for the sake of argument that the charge paid by the undertaking using the liquid whey to the cheese factory may properly be classified as the selling price of the whey. Even if this were so it would still be necessary to establish that the price of whey depends on the price of milk. In order to establish this it would be necessary to find a constant relationship between the two prices so that where the price of milk varied, at any rate in excess of a certain percentage, there would be proportionate variations in the price of liquid whey. However, it is not clear that this is the case. This also applies to the variations in the prices of milk and of powdered whey.

Thus with regard to the relationship between the price of the product in question and the price of the raw material it appears to me difficult to say that the former depends on the latter.

Nevertheless for the purposes of Article 1 (2) (b) of Regulation No 974/71 it is sufficient that the price of a product not covered by intervention arrangements depends on the price of another product which is so covered (and which is governed by the common organization of the agricultural markets); further it is unnecessary that this latter product should constitute the raw material from which the former is derived. The products in question might also be in competition with one another as long as it can be established that the prices of the product not covered by intervention arrangements are composed on the basis of the prices of the other product.

The Commission has maintained that the price of powdered whey depends to a certain degree on the price of skimmed-milk powder (which, since there is an excess of this latter product in the Community, is identical with the intervention price). The relationship between the two products is one of competition, albeit limited, since powdered whey is increasingly substituted for skimmed-milk powder in the composition of animal feeding-stuffs.

This view is directly opposed by Milac, which categorically denies that the products are interchangeable and emphasizes the problems which would follow from the very high percentage (70-75 %) of lactose contained in powdered whey. The Commission replies that modern techniques make it possible to reduce that percentage of lactose and to add other components to the powdered whey so that up to 60 % of the latter can be used in the composition of animal feeding-stuffs.

The decisive point, however, is the degree to which the price of powdered whey depends on that of skimmed-milk

powder. In this connexion it seems to me that two points call for emphasis. First the Commission itself concedes that the price of powdered whey is determined above all by the production costs, which are higher than the production costs of skimmed-milk powder. Secondly, the Commission admits that fluctuations in the price of powdered milk do not produce an automatic and constant effect on the price of powdered whey. Since, unlike skimmed-milk powder, powdered whey is not covered by intervention arrangements the price of the whey is formed freely on the market and is thus to a large degree influenced by supply and demand.

This is moreover clear from the Commission's table on the composition of prices for the two products for the period 1971 to 1977. It is to be noted for example that in 1974, when the intervention price for powdered milk was 66 units of account per quintal, the market price in Germany for powdered whey was 20.68 units of account per quintal; on the other hand in 1975 powdered whey registered an appreciable fall in price (to 15 units of account) as compared with an appreciable rise in price (to 88.70 units of account) for the intervention price of powdered milk. Furthermore, whilst in 1971 the price of powdered whey on the German market was equal to one third of the intervention price for skimmed-milk powder, in 1977 it had fallen to a little less than one fifth.

It is to be regretted that the Commission failed to supply an appropriate explanation for this, the more so since not only the undertaking concerned but the court making the reference takes the view that the price of powdered whey does not depend on that of skimmed-milk powder and indeed it appears from the wording of the first question that the latter accepts as an established fact that there is no such dependence.

I think that if these facts are accepted and if, as I have suggested, it is held that the price of the product in question does not depend on the price of the raw material, milk, the first question submitted by the Finanzgericht des Saarlandes should undoubtedly be answered in the affirmative: Article 1 of Regulation (EEC) No 539/75 of the Commission appears to contradict Article 1 (2) (b) of Regulation (EEC) No 974/71 of the Council where it fixes compensatory amounts for the import of powdered whey. Nevertheless doubt may still arise from the widely-diverging positions adopted by Milac and the Commission with regard to a series of technical points which cannot be examined in detail on the basis of the information on the file. I therefore consider it appropriate to pass on now to consider the problem posed by the second question from the German court since the answer thereto may render superfluous further consideration of the first question.

3. Let us begin by considering that part of the second question submitted by the Finanzgericht des Saarlandes in which the Court of Justice is asked whether having regard to the last subparagraph of Article 1 of the said Regulation No 974/71 of the Council, compensatory amounts may be applied to products whose derived market price does not exceed the level of the production costs or fluctuates so often and to such a degree as to render monetary measures ineffective.

It should be recalled that in accordance with the said provision compensatory amounts may be imposed only if the application of the monetary measures mentioned in paragraph (1), that is the adoption of an exchange rate in excess of the margin of fluctuation permitted by international rules, would lead to "disturbances in trade in agricultural products".

In my view the circumstance referred to by the court making the reference, that the relevant product is generally sold on objective marketing criteria at a price equal to or less than the production cost, does not itself suffice to rule out the application to that product of compensatory amounts. Compensatory amounts do not in fact require that an undertaking should have a given profit margin and are merely intended to prevent the occurrence in trade and, as a result, in the operation of the intervention arrangements of disturbances which might follow from the combined effect of variations in the actual rates of exchange between the currencies of the Member States and of the continuing existence of different rates of exchange for fixing common agricultural prices. Compensatory amounts are so called precisely because they constitute compensation for the difference between the actual rate of exchange of the currency and the rate of exchange for agricultural purposes.

Even if an agricultural product is sold at less than the cost price the possibility remains that currency fluctuations, by making it profitable to export that product from States with weak currency to other Member States with strong currency, will have an effect on trade and the operation of the intervention arrangements in such a way as to cause disturbances.

Similar considerations also apply to rule out the view that the system of compensatory amounts cannot apply to a product simply because there are wide fluctuations in its selling price when subjected to the free play of supply and demand.

However, I consider much more important the problem, which is also raised in the second question, of the existence or not, with regard to powdered whey, of a danger of disturbances in trade as a result of the incidence of national monetary measures.

In order to obtain a proper understanding of the scope of the provision in which reference is made to the danger of disturbances in trade (the said last subparagraph of Article 1 of Regulation No 974/71 of the Council) regard should be had to the last recital in the preamble to that regulation in which the Council states that "the compensatory amounts should be limited to the amounts strictly necessary to compensate the incidence of the monetary measures on the price of basic products covered by intervention arrangements" and that "it is appropriate to apply them only in cases where this incidence would lead to difficulties". It must be emphasized that the Community legislature regarded these provisions as exceptional measures and that consequently their application must be strictly limited. These features have also been reflected in the case-law of the Court of Justice. The exceptional nature of the system of monetary compensatory amounts and the consequent need to apply it restrictively have been upheld in the judgment of 24 October 1973 in Case 43/72 *Merkur* ([1973] ECR 1055, especially at p. 1073, paragraph 23) and in its judgment of 15 May 1975 in Case 74/74 *CNTA* ([1975] ECR 533, especially at p. 547, paragraph 20). In the latter case Mr Advocate General Trabucchi, having analysed the function and the nature of the arrangements in question, stated that "despite the length of time they have been applied, compensatory amounts must, accordingly, be regarded as exceptional measures which derogate from the system and for this reason, pending the emergence of a more developed Community system enabling the inconvenience, both of fluctuations and of compensatory amounts, to be avoided, they are justified only to the extent to which they are indispensable in preventing the worst, by eliminating any possibility that currency fluctuations may jeopardize the proper functioning"

of the common organizations of the market ([1975] ECR 555). The Court of Justice previously stated: "... compensatory amounts are conducive to the maintenance of a normal flow of trade under the exceptional circumstances created temporarily by the monetary situation. They are also intended to prevent the disruption in the Member State concerned of the intervention system set up under Community regulations" (judgment of 24 October 1973 in Case 5/73 *Balkan Import-Export* [1973] ECR 1091, especially at p. 1113, paragraph 29).

It is well known that the incidence of currency fluctuations on patterns of trade produces, as a short-term result at least, a tendency to increased imports on the part of countries whose currency appreciates and correspondingly an increase in exports by countries whose currency depreciates. That natural tendency assumes particular importance in the operation of the Community system in the case of products to which intervention arrangements apply. In that case, in the absence of a flexible relationship between the national currency and the unit of account in which the common agricultural prices are expressed the application of compensatory amounts to exports or imports serves to prevent the intervention agencies of the State whose currency has appreciated from receiving offers of vast quantities of goods from other Member States, especially from States whose currency has depreciated.

Powdered whey, however, is not covered by intervention arrangements so that from that point of view there is no danger of a speculative race by French producers, for example, to sell to German intervention agencies.

The Commission, in an endeavour to justify its own provisions, has stated that if compensatory amounts had not been applied to powdered whey "the incidence of the monetary measures

would have caused disturbances in trade which would ultimately have jeopardized the operation of the intervention arrangements for skimmed-milk powder”.

Relying on the discretionary power which it enjoys in appraising the risk of disturbances in trade in agricultural products as a result of monetary measures (cf. the judgment in the *CNTA* case [1975] ECR 547, paragraph 21) the Commission thus restricts itself to a mere assertion without explaining the factors on which its appraisal is based.

It might have been expected that the Commission, faced with questions from a national court casting serious doubt on the validity of one of its measures, would have put forward a greater number of arguments to justify its course of action. It has completely failed to do so. In those circumstances we cannot avoid embarking on a consideration of whether the provision in question is in accordance with its legal objective, which is to prevent disturbances in trade.

4. Since skimmed-milk powder is a product of which there is a structural surplus in both France and Germany, it may be supposed that a large part of the production in both of those countries goes to local intervention agencies. This makes it difficult to imagine how, if compensatory amounts were not applied to powdered whey, disturbances in the trade in skimmed-milk powder could have occurred between the Member States.

In fact the danger referred to by the Commission appears chiefly to concern the working of the intervention arrangements for powdered milk. We must therefore wonder how the working of the intervention arrangements could be jeopardized by the incidence of monetary measures on the marketing of powdered whey.

Let us however accept that the use of powdered whey in animal feeding-stuffs, which the Commission states was increasing, might result in a fall in the use of skimmed-milk powder for this purpose and accordingly in slower disposal of the stocks held by the intervention agencies. On this view there is a relationship between imports of powdered whey into Germany and the operation of the German intervention agencies with regard to skimmed-milk powder. The application of a monetary compensatory charge might then take on a protective function not, indeed, in respect of German producers of skimmed-milk powder, who in any event enjoyed the guarantee provided by the intervention price, but rather in respect of the intervention agencies operating in the Federal Republic.

Does this constitute a valid justification for the application of monetary compensatory amounts? In order to answer this point it should be repeated that the system of monetary compensatory amounts may be applied only in order to counter difficulties in patterns of trade and in the operation of the intervention arrangements resulting from the incidence of monetary measures on the price of basic products. On the other hand the system cannot be used to make certain products less competitive as against surplus products which burden the intervention agencies irrespective of any specific relationship of dependence of the prices of the former on the prices of the latter.

In fact, however, it is not clear that the application of compensatory amounts has had the effect of discouraging the production of powdered whey in the Community. The production of powdered whey has registered a continuous increase from 414 million tonnes in 1973 to 527 million in 1976; and in the Federal Republic of Germany from 75 million tonnes in 1973 to 101 million in 1976, a rhythm and

percentage of increase very close to the Community level. In my view this shows that the system of compensatory amounts has not affected the level of such production.

On the other hand the disturbances in trade which the Community legislature feared and which it wished to counter by compensatory amounts consist in sudden, large-scale movements of goods to States whose currency has appreciated, determined chiefly by speculative motives relating to differences in the rates of exchange; such movements, in view of their size and speed, not only burden the finances of the Community, but may cause serious difficulties for the intervention agencies.

In the present case it is not clear that the pattern of exports of powdered whey from France to Germany would have entailed the risk, in the absence of compensatory amounts, of increasing excessively and of occasioning indirectly great difficulties for the German intervention agencies in the disposal of stocks of skimmed-milk powder.

Finally, as is clear from the last recital in the preamble to Regulation No 974/71, compensatory amounts should be limited to the amounts strictly necessary to compensate the incidence of currency fluctuations on the prices of basic products covered by intervention arrangements. This is in accordance with the requirement contained in Article 1 (2) (b) of that regulation: that there should be a relationship between the price of the product in question and the price of the basic product covered by intervention arrangements.

In the present case I have already ruled out the dependence of the price of powdered whey on that of milk. Furthermore I have observed that even where liquid whey is disposed of for a modest sum the incidence of that sum on the price of the end-product is extremely small compared with the incidence of

the production costs. Having regard to the fact that 16 litres of liquid whey are necessary to produce a kilogram of powdered whey the incidence of the cost of the raw material on the production of powdered whey must in general be less than ten marks per quintal. It is clear from the table of compensatory amounts applied to that product in the course of the years 1974 to 1977 (see p. 11 of the Commission's observations), that the level of such amounts is very much higher than the cost of the raw material. Such amounts accordingly appear far in excess of what might seem necessary to compensate for the incidence of monetary measures on the price of the basic product.

5. To all those considerations, which indeed indicate that the measure in question was not necessary having regard to the objective set out in the last subparagraph of Article 1 of Regulation No 974/71 of the Commission, is to be added the fact that the Commission, by Regulation No 1824/77, abolished the imposition of the compensatory amount on powdered whey with effect from 5 September 1977. I have already said that the Commission stated as the justification for that provision that "in the present circumstances, the absence of compensatory amounts for these products is unlikely to disturb trade". If there are no grounds for considering that statement to be incorrect there are on the other hand reasons for calling in question the accuracy of the opposite appraisal which formed the basis of the earlier Regulation No 539/75 of the Commission.

Milac has already maintained before the national court that the economic and monetary situation affecting the product in question, in connexion with which situation the Commission adopted the two successive regulations, did not differ in essentials between 1975 and 1977. The Commission has not provided any evidence capable of disproving that

statement. It appears to me possible to infer from what has been said by the Commission in the course of these proceedings that its recent suspension of compensatory amounts in respect of the product in question was chiefly due to a change in policy concerning the application of the system of compensatory amounts. If this is so it may be held that the application of that system to powdered whey was not indispensable, even at the time when Regulation No 539/75 was adopted. Having regard to the need strictly to limit the application of the system of compensatory amounts because of its exceptional and derogative nature the fact that the application thereof to powdered whey effected by Regulation No 539/75 was not strictly necessary means that that part of the regulation is invalid.

6. For the foregoing reasons I conclude by suggesting that the Court should reply to the questions submitted by the Finanzgericht des Saarlandes in its order of 26 October 1977 by ruling that Article 1 of Regulation (EEC) No 539/75 of the Commission of 28 February 1975 is invalid in so far as it imposes compensatory amounts on the importation of powdered whey.