not be affected by the character of the levy thus established as either a customs duty or a tax.

4. Pursuant to Article 6 (3) and (4) of Regulation No 22, the general methods of fixing the amounts additional to the levy are to be determined by the Commission or, if necessary, by the Council; the same provisions authorize the importing Member State to fix the amount additional to the levy, whilst it falls within the powers of the Commission or, if necessary, of the Council according to the procedure laid down in Article 17, when a decision has been taken to formulate a measure jointly.

5. The validity of Regulation No 135/62 of the Commission with regard to Regulation No 22 of the Council and Regulation No 109/62 of the Commission is not affected by the fact that it did not take into account the individual offer price in fixing the additional levy.

6. The liberty granted by the Treaty to the authors of a regulation to fix the date of its entry into force cannot be considered as excluding any review by the Court, particularly with regard to any retroactive effect.

In Case 17/67

Reference to the Court under Article 177 of the Treaty establishing the European Economic Community by the Bundesfinanzhof (the Federal Finance Court) for a preliminary ruling in the action pending before that court between

FIRMA MAX NEUMANN

and

HAUPTZOLLAMT HOF/SAALE

concerning the validity and interpretation of Regulation No 22, adopted on 4 April 1962 by the Council of the EEC (Official Journal, p. 959), and on the validity of Regulation No 135/62, adopted on 7 November 1962 by the Commission of the EEC (Official Journal, p. 2621);

THE COURT

composed of R. Lecourt (Rapporteur), President, A. M. Donner and W. Strauß, Presidents of Chambers, A. Trabucchi, R. Monaco, J. Mertens de Wilmars and P. Pescatore, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

On 19 November 1962, the Max Neumann undertaking of Frankfurt am Main imported from Poland into Germany slaughtered chickens treated so as to bring them under heading No 02.02 of the Common Customs Tariff. In addition to the levy (calculated on the basis of the rate in force since 5 November 1962) and the turnover equalization tax (Umsatzausgleichsteuer) (calculated on the value for customs purposes, excluding the levy), the Zollamt (customs office) claimed by a tax assessment of 13 December 1962 an additional amount of levy of 0.25 DM per kg. This additional amount had to be collected from 19 November 1962, under Regulation No 135/62 of the Commission, establishing the additional amount of the levy in respect of slaughtered hens and chickens imported from third countries (Official Journal of 7 November 1962, p. 2621) and of the order made in implementation of the said regulation by the Federal German authorities (Bundeszollblatt of 17 November 1962, p. 974).

Regulation No 135/62, dated 7 November 1962 and published in the Official Journal on the same day, entered into force on the date of its publication by virtue of Article 2 thereof. Paragraph 3 of the implementing provisions adopted by the German departments, dated 15 November 1962 and published on 17 November 1962, is worded as follows:

'3. The delay in publishing Regulation No 135/62 of the Commission of the EEC has resulted in a situation akin to that of a retroactive increase in a tax, which is questionable on the constitutional level. In order to permit the free movement of slaughtered poultry, the rates of levy and the provisions hitherto in force are therefore to be taken as applying when a valid claim for customs clearance has been presented before 18 November 1962 inclusive.'

Since the Neumann undertaking requested customs clearance for the chickens in question on 19 November, the Zollamt claimed an additional amount of levy, acting in accordance with the Community and German provisions. The said undertaking made an administrative appeal against this decision, which was dismissed. It then made the appeal which is at present pending before the court of last instance, the Bundesfinanzhof, Munich. In the course of the proceedings before the Federal court, the Neumann undertaking argues that Regulation No 135/62 was null and void on various grounds. It stated in particular that the system relating to the additional levy is contrary to Article 29 (a) of the EEC Treaty and that only the Member States are authorized to fix an additional levy under Article 6 (4) of Regulation No 22 of the Council (Official Journal 1962, p. 959).

It is indicated, moreover, that in its opinion Regulation No 109 of the Commission (Official Journal 1962, p. 1939), determining the additional amount referred to in Article 7 of Regulation No 20 of the Council and in Article 6 of both Regulations Nos 21 and 22 of the Council, makes it obligatory to take into account the individual offer price, that is to say, the purchase price of each individual importer. Regulation No 135/62 thus infringes Regulation No 109/62 on this point.

According to the Neumann undertaking, since Regulation No 135/62 provides in Article 2 thereof that it shall enter into force on the day of its publication

in the Official Journal, it does not provide for derogation either for contracts previously concluded or for goods in transit, etc. The Neumann undertaking concluded that the general levy system established by Regulation No 22 is null and void, as the levy comes under the fiscal sovereignty of the Member States and thus may only be made compulsory by the Community institutions by means of a directive and that the Council does not have the power under Article 43 of the Treaty to issue provisions derogating from Articles 12 et seq and 18 et seq. of that same Treaty.

The VIIth Senate of the Bundesfinanzhof decided by an order of 25 April 1967 to put to the Court of Justice of the European Communities a series of preliminary questions on the basis of the third paragraph of Article 177 of the EEC Treaty.

After recalling the arguments put forward by the Neumann undertaking and the Federal Minister of Finance, who had been allowed to intervene in the proceedings in place of the Hauptzollamt concerned, the VIIth Senate of the Bundesfinanzhof declared that it was 'convinced that the doubts' expressed 'with regard to the constitutionality of the German law ratifying' the Treaty 'are unfounded' and set out the reasons on which it bases its view.

Furthermore, it gave its reasons for the choice of questions which it decided to put to the Court of Justice, wording them as follows:

'1. (a) Does the Treaty establishing the EEC confer on the institutions of that Community the right to establish systems of levy directly applicable in the Member States, as the Council has done by Regulation No 22 of 4 April 1962 (Official Journal, p. 959)?

(b) If the answer to Question (a) is in the affirmative: do the sums to be collected by way of levy constitute charges (Abgaben) in the sense of customs duties or taxation (Steuern) or, if neither, what are they?

(c) If the answer to the first proposition referred to in Question (b) above is in the affirmative: in those circumstances, does the Treaty establishing the EEC have the effect of transferring to the Community the power to legislate, as having partial sovereignty in fiscal matters?

2. If the answer to Question 1 (a) is in the affirmative: must Article 6 (3) and (4) of Regulation No 22 of the Council be interpreted as meaning that the power to fix an additional levy belongs solely to Member States to the exclusion of the Community institutions?

3. Does Regulation No 135/62 of the Commission (Official Journal, p. 2621) infringe Regulation No 22 of the Council and Regulation No 109/62 of the Commission (Official Journal, p. 1939), to which it expressly refers, on the ground that, although those two provisions provide for an additional levy should the offer price fall below the sluice-gate price, Regulation No 135/62 (according to the defendant's allegations) does not take into account—or does not take sufficiently into account—the offer price in fixing the additional levy?

4. Regulation No 135/62 of the Commission provides that it shall enter into force on the day of its publication in the Official Journal: does this affect its validity?'

The order of 25 April 1967 referring the matter was received at the Court Registry on 16 May 1967.

The Neumann undertaking, the Council and the Commission submitted observations under Article 20 of the Statute of the Court.

Mr Ditges and Mr Ehle (Cologne) appeared for the Neumann undertaking, Mr Wohlfahrt for the Council and Mr Ehlermann for the Commission.

After the hearing on 7 November 1967, which was devoted to hearing the parties under Article 20 of the Statute, the Advocate-General delivered his reasoned, oral opinion at the hearing on 21 November.

II — Observations submitted under Article 20 of the Statute

The first question

Having regard to the particular wording of this question and the attitude adopted by the Bundesfinanzhof with regard to the transfer of sovereignty and to Article 24 of the Federal constitution, the Neumann undertaking considers that the answer to be given must be that Article 43 of the Treaty only prescribes the procedure to be adopted for realizing the common agricultural policy. It is not for the Council to determine at its discretion, within the framework of Article 43 (2) of the Treaty, the form of the decision whereby the system of levies must be established. It is possible that the system of levies could only have been set up by means of a directive.

The Neumann undertaking indicates that many works have been written on the legal nature of the levy. In particular, Ebeling arrives at the conclusion that the levy constitutes neither a customs duty, nor a duty *sui generis,* but a tax. It remains to be seen whether, as Ebeling claims, the levy constitutes a tax on consumption. In fact it is rather a question of a tax *sui generis.* The levy constitutes a tax collected at the frontier, with the object of maintaining a certain level of prices. A reasonable comparison may be made with the German turnover equalization tax which, as a tax collected at the frontier, offsets taxes previously imposed on similar domestic products. In fact only the fiscal nature of the levy is important.

Fiscal sovereignty has not been transferred to the EEC and there is no difference of opinion in this respect. The sovereignty of the Member States with regard to customs duties has not been transferred to the EEC but remains within the competence of the Member States. In view of the absence of an appropriate legal basis this transfer was impossible. It follows from this that the levy cannot be retained even if, contrary to prevailing theory, it was claimed to constitute a customs duty. Sovereignty with regard to customs duties, moreover, constitutes only a part of fiscal sovereignty and is not separable from it.

The *Council,* which devotes its observations to replying to the first question, states first of all that it does not emerge clearly from this question whether the competence of the EEC to lay down provisions for the levy in order to realize the common agricultural policy is disputed in general or only to the extent to which those provisions are adopted in the course of the transitional period by means of regulations directly applicable to the Member States.

In the first place it must be recognized that the Council's general competence to lay down provisions within the abovementioned limits is based on Article 40 (2) and (3) of the Treaty. The levies are the machinery for stabilizing imports or exports which makes it possible to attain the objectives defined in Article 39. This is also true of the additional levies provided for in Article 6 (3) of Regulation No 22. Since what is at issue is stabilizing machinery within the meaning of Article 40, levies on agricultural products may thus be established in accordance with the procedure referred to in Article 43 (2).

Secondly, with regard to the Council's competence to establish levies on imported agricultural products during the transitional period by means of regulations, the question which the Court must answer is whether legal measures ad-

dressed to the Member States should have been used instead of regulations. The plaintiff's argument assumes, *inter alia*, that the same rules of the Common Market in general should be applied to agriculture. This condition is clearly not satisfied, as the powers of the institutions of the EEC with regard to agriculture may, under Article 38 (2), be different from and wider than those with regard to the Common Market in general.

In fact, the rules laid down for the establishment of the Common Market (including those relating to the adoption of the Common Customs Tariff) are applicable to agricultural products 'save as otherwise provided in Articles 39 to 46'. This rule applies not only to the above-mentioned provisions of the Treaty but also to the legal measures issued in pursuance of them. Articles 44 to 46 concern transitional measures, whilst Articles 39 to 43 concern the implementation of the common agricultural policy.

The principal objectives of Article 38 (2) is therefore to authorize the Community institutions to adopt provisions within the sphere of agriculture, which may be different from those provided for the establishment of the Common Market in general.

The objectives of the agricultural policy, amongst which according to Article 39 (1) (c), stabilization of the market appears, and the various powers for implementing this policy are therefore different from those concerning the Common Market in general.

In other words, the common organization may involve all the measures necessary to attain the objectives defined in Article 39 without being subject in this respect to the restrictions which may be applied to the market in non-agricultural products.

Since Article 189 provides the power to issue certain legal measures 'in accordance with the provisions of the Treaty', reference should be made for the implementation of the common agricultural policy to Article 43 (2) which authorizes the Council during the transitional period to make regulations, issue directives or take decisions, even to make recommendations, all those legal measures being referred to on an equal footing.

With regard to the argument that the Community does not have fiscal sovereignty during the transitional period, the Council observes that if the authors of the Treaty had wished to make a distinction between the periods they would have done so expressly, as they have done in other spheres.

The Council considers that in this connexion it is unnecessary to enter into a discussion on the concept of fiscal sovereignty, all the more so as there is no indication in the request for the preliminiary ruling why fiscal sovereignty must remain wholly with the Member States.

Nor has it been explained why fiscal sovereignty is indivisible or why, unlike other sovereign rights, it should not be transferable.

For these reasons the Council is of the opinion that the reply to the question whether the institutions of the European Communities have the right in respect of levies to issue provisions directly applicable in the Member States must be in the affirmative.

The *Commission* remarks that the Bundesfinanzhof's first question in fact restates two objections raised by the Neumann undertaking against the validity of Regulation No 22. The Commission therefore examines separately the complaints that the levy system was only capable of being established by means of a directive.

With regard to the first complaint, the Commission considers that, having regard to the framework of the original dispute, an examination should be made exclusively of the system of levies on goods coming from third countries. In order to appraise the validity of Regu-

lation No 135/62, it is therefore only necessary to ascertain whether Article 6 of Regulation No 22 is valid.

Article 43 of the Treaty, the legal basis for Regulation No 22, contains the description of a power conferred as well as procedural provisions. It thus refers to Articles 38 et seq. and, in particular, to Article 40.

Since Article 38 (2) provides that 'Save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the Common Market shall apply to agricultural products', it must certainly be recognized that the derogations in question may be express or implied since they may be ascertained according to the accepted rules of interpretation (taking into account the context, the definitiveness of a text, the preparatory studies etc.).

The Court itself recognizes the existence of implied exceptions if they are clearly laid down (Joined Cases 90 and 91/63 [1964] E.C.R. 625). This decision is all the more significant inasmuch as it was taken in favour of exceptional measures adopted by Member States acting autonomously.

On the other hand the present case concerns exceptions in favour of measures adopted by Community bodies for the establishment of the common organization of the agricultural markets.

In interpreting Article 38 (2) account must be taken of a basic difference which is reflected in the provisions relating to agriculture. Part of them regulates the conduct of Member States during the establishment of the common organization of the agricultural markets, whilst another part deals with the establishment of the Common policy and especially with the functioning of the common organization of the markets.

Throughout the first phase the exception is merely a delaying factor and is essentially negative. During the second, it facilitates the attainment of the objectives of the common agricultural policy and the ultimate common organization thus becomes the decisive criterion of interpretation. Consequently there is no doubt that the Council had the power to create the levy system with regard to third countries set up by Regulation No 22. This system forms part of the common machinery for stabilizing imports or exports which is expressly cited by Article 40 (3) as an example of a measure which the common organization may include. It thus constitutes a 'clearly laid down' exception to the general provision.

The unity of the customs system provided for in Article 18 et seq. cannot be invoked against the argument set out above. In fact, the various notes to List F of Annex I to the Treaty prove that the power to work out the common agricultural policy includes the power to amend the existing customs system and in particular to replace fixed customs duties by variable customs duties, and also to fix the whole system to be applied to imports from third countries. On the basis of Article 43 it is therefore possible to determine both the amount of the duties to be levied and their nature.

Furthermore it is possible to decide whether the Member States shall introduce those duties progressively, like the Common Customs Tariff under Article 23, or whether they must be applied immediately in their entirety. The objective of the organization implies of necessity that a derogation from the principle of the gradual introduction of common external protection is lawful. The fact that the first subparagraph of Article 40 (3) expressly provides regulation of prices as a measure to attain the objectives set out in Article 39 is only to be explained if the Community has the power to fix the exact amount which the Member States must levy on imports in order to prevent patterns of trade within the Community which might result in compromising the price guarantees. Consequently, even if the

levy system does not form an integral part of the regulation of prices, it is nevertheless a means indispensable to its functioning.

It is also clear from Article 43 (3) (b) that this Article gives the Council the power to regulate completely and in detail the system of imports from third countries. Since the common organization is required to protect the internal market by a uniform system of imports, the Council must consequently have the power, in accordance with Article 43, to set up this system.

Finally, since the common organization must, on the Community level, endeavour to carry out the duties assumed on the national level by the national market organizations, it must therefore have the same instruments as those organizations, an essential element of which is the system of imports.

For all these reasons the Commission considers it possible to find that it emerges clearly from the provisions quoted that the Council has the power, by virtue of Articles 43, to decide the system of imports with regard to third countries and even, if necessary, in derogation from Article 18 et seq. Since the system of levies provided for in Regulation No 22 can be adopted on the basis of Article 43, it is compatible with the Treaty and consequently valid.

With regard to the second complaint, according to which the system of levies could only have been established by means of a directive, the Commission formulates arguments comparable with those propounded by the Council.

It adds that important reasons militate in favour of the introduction of the system of levies applicable to third countries by means of a regulation, the principal reason being that the implementation of a system of levies would become extremely difficult, especially with regard to additional amounts, if it were to require the national legislature to intervene. The shorter the interval the more effective are both the measures and the prospect of adapting it exactly to the situation which it has in view.

Finally, if the complaint were justified, all the regulations issued by the Council concerning agriculture would be invalid and the common agricultural policy would have no basis.

Regulation No 22 is therefore valid.

The second question

The *Neumann undertaking* refers to the line of argument which it developed on this point before the Bundesfinanzhof. Regulation No 135/62 of the Commission exceeds the authority conferred by Article 6 (3) and (4) of Regulation No 22 of the Council. In any event, it must nevertheless be understood that the intention of the authors of Article 6 (3) of this regulation was to confer on a Member State the power to fix and collect the additional levy.

Although the sluice-gate prices must be fixed uniformly (Article 6 (1) and (2)), Regulation No 22 of the Council expressly confers on Member States the power to determine the additional levy which is in every case dependent on the level of the offer price.

The correctness of this interpretation is confirmed by the third indent of Article 6 (4), under the terms of which the additional amounts shall be determined and collected by the Member State. It is impossible to draw different conclusions from Regulation No 109/62 of the Commission, the authority for which is also founded on Article 6 of Regulation No 22. The preamble expressly refers in this connexion to Article 6 (4). Although the preamble to and the provisions of Regulation No 109/62 (especially Articles 5 and 6) declare that the additional amount shall only be fixed by the importing Member State until measures are determined jointly, those measures do not correspond to the extent of the power conferred by Article 6 (3) and (4). In any event Regulation No 135/62 exceeds the limits of the

provision conferring the power to adopt it and is therefore null and void.

The Commission considers that it was authorized to adopt Regulation No 135/62. The expression 'in each Member State' may be variously interpreted and is of no assistance in solving the problem. The third indent of Article 6 (4) of Regulation No 22 confers in two successive sentences one set of powers on the Member States and another on the Community. This wording reflects two stages in fixing the additional amounts: during the first the Member State is competent and, after notification, during the second stage the Community is competent.

This interpretation is confirmed by the draft versions of Regulation No 22 and by Articles 5 and 6 of Regulation No 109/62.

Although this regulation was adopted by the Commission and not by the Council, it was nevertheless made in accordance with the Management Committee procedure, this body being composed of representatives of the Member States who participate in the Council's working parties. Regulation No 135/62 accords with the established practice of the Commission and of the Council and in the past the Council has twice given rulings on the fixing of additional amounts by the Commission.

The third question

The *Neumann undertaking* also refers to the line of argument expounded on this point before the Bundesfinanzhof.

The system of uniform levies established by Regulation No 135/62 is also contrary to Regulation No 22 of the Council and Regulation No 109/62 of the Commission, under which the additional amount shall be determined when the offer price falls below the sluice-gate price, then amended in the case of fluctuation in the offer price and finally abolished when it becomes clear that the recorded offer price has reached or exceeds the sluice-gate price.

The plaintiff concluded its contracts at the sluice-gate price for the imports on which the additional levy was imposed. Therefore there should not have been imposed on them the uniform levy fixed by Regulation No 135/62 which does not take into account—or does not take sufficiently into account—the offer price in fixing the additional levy.

The Commission observes that it was obliged to fix a uniform additional amount under Regulation No 135/62. Article 6 of Regulation No 22 is vague and badly translated and this is no less true despite the fact that paragraph (4) expressly provides that there are 'measures to be taken jointly'.

It is logical to dismiss the notion that the fixing of this amount could relate to the individual additional amounts, all the more so as it was adopted according to the Management Committee procedure.

Furthermore various passages of Regulation No 109/62 (Article 1 (2) and (3); Articles 2, 4, 6 and 7) prove that this regulation pre-supposes a general additional amount. In particular, Articles 4 and 7 would be meaningless if the additional amount were individual. In a judgment of 5 October 1966 (produced by the Commission) the Bundesfinanzhof reached the same conclusion. This judgment led to the same attitudes being adopted by the Federal Minister of Finance.

Finally comparison with the system of levies set up by other regulations proves that the individual levy does not appear in the general structure of the common organization of the agricultural markets.

The fourth question

The *Neumann undertaking* indicates, on the basis of a series of examples, that the procedure for issuing the regulations of the Council and of the Commission is open to criticism. Thus, some regulations only later became known to subscribers to the Official Journal of the

European Communities and others enter into force with retroactive effect.

In the present case Article 191 of the Treaty, which recognizes in principle the necessity of protecting the legitimate interests of those concerned by a new measure, was not observed since the disputed regulation entered into force on the day of its publication. Not only was the interval of 20 days ignored, but the regulation entered into force with retroactive effect, having regard to the fact that since the Official Journal (p. 2621/62) was printed in Luxembourg it could only reach the German subscribers some days later. It was only then that the regulation could be published in the German gazettes so that a regulation of the Federal Minister of Finance only entered into force on 19 November 1962. Nor did that regulation observe the interval of 20 days since it only gave an interval of 12 days. In the present case the principle of preservation of trust (Vertrauensschutz) required a considerably longer interval to be observed.

In the Federal Republic of Germany, before the Community levy under Regulation No 135/62, a national levy was imposed on the basis of the well-known regulation of 7 September 1962. This regulation was based on a quite different system, the relation between the import price and the customs value. Purchases were made on the basis of this relation, the validity of which was not questioned at the time. In other words the importers had in general purchased at the customs value.

After an interval of only a few days a temporary amendment entered into force, which no importer could have foreseen, involving the imposition of a fixed levy unrelated to the level of prices. This did not allow importers to amend their contracts with foreign sellers or in particular to eliminate the price increases due solely to the German procedure.

Account should therefore have been taken of this legal situation by fixing a later date of entry into force and granting an interval of at least sixty days.

According to the Neumann undertaking the chief complaint of the German importers is not however the introduction of an additional uniform levy (although it is contrary to the EEC) but the quite insufficient length of the transitional period which had repercussions in the five other Member States and breached the relationship of trust (Vertrauensschutz). In the Federal Republic this constitutes the violation of a principle.

The Neumann undertaking further relied on the second subparagraph of Article 12 (2) of Regulation No 22 which provides that 'The Member State(s) applying such [protective] measures shall make the necessary arrangements to assure that goods in transit are not affected' and that 'in the case of closing of the frontier, the time allowed for goods in transit shall be not less than three days'.

The Neumann undertaking deduces from this provision a principle which, if it is immediately put into force, requires an exception to be made for goods in transit or already purchased by the importer.

The *Commission* considers that it was possible for Regulation No 135/62 to enter into force on the day of its publication in the Official Journal. It distinguishes between the problem of the immediate entry into force of certain regulations in general and the problem of the immediate entry into force in the particular case of Regulation No 135/62. In general it is possible for all Member States to bring a provision into force on the day of its publication. There has however been no violation of the general principle of legal certainty, a rule of law to be upheld in the application of the Treaty, (judgment in Case 13/61, [1962] E.C.R. 45) and the different forms of its application such as the principle of foreseeability, the possibility of assessing in

advance the effects of the new provision and the protection to be given to confidence in the existing legal position.

The legal concept of the Commission and of the Council corresponds to that of the Member States as it emerges from the practice and from the declaration of the Council and of the Commission adopted at the 207th meeting of the Council on 8 and 9 February 1967; in its fourth paragraph this declaration recognizes that a regulation might lawfully enter into force on the day of its publication. Nevertheless it is clear from this declaration that the institutions of the Community are fully conscious of the fact that entry into force on the day of publication is undesirable. They were however unable to avoid this because of the risk of speculation.

The Finanzgericht (Finance Court) Nürnberg, also indicated in the course of the present proceedings that amendments to customs duties and taxes must be put into force immediately in order to avoid sharp practices.

Owing to its economic function the levy is comparable to customs duties and must be adapted, depending on the nature of the product concerned, at short notice to the variations in the market situation. This notice was for example twenty-four hours in the case of cereals. In Case 16/65 (Rec. 1965, p. 1096) it was expressly recognized that an adaptation had been necessary. Those grounds are also valid for fixing an additional amount.

The validity of the substitution of a general additional amount for the individual additional amounts fixed by the German authorities cannot be questioned because of the rash of careless behaviour of importers; the last three sentences of Article 6 of Regulation No 22 and Articles 5 and 6 together with the sixth recital in the preamble to Regulation No 109/62 show clearly that the fixing of an additional amount might form part of the 'measures to be taken jointly'.

Article 12 of Regulation No 22 deals exclusively with goods in transit, but not with goods purchased. This derogation must be restrictively interpreted. Its extension to purchased products is legally unjustifiable no matter what grounds might be put forward on the basis of analogy or of economics. The importers must—and up to the conclusion of the contracts of purchase can —take into account the fact that an additional amount might be fixed. The difficulties which this causes are justified by the considerable risks involving the markets in the Community if this action is not taken. In fact those markets would then become uncontrollable and the national producers would suffer the consequences.

Grounds of judgment

By order of 25 April 1967, received at the Court on 16 May 1967, the Bundesfinanzhof referred to the Court, under Article 177 of the Treaty establishing the EEC, four preliminary questions regarding the validity and interpretation of Regulation No 22 of the Council of 4 April 1962 and the validity of Regulation No 135/62 of the Commission of 7 November 1962.

Under the terms of that order the legal background to those questions is the application to imports of slaughtered chickens from third countries of an 'additional amount' to the levy fixed by Regulation No 135/62 of the Com-

mission under Regulation No 22/62 of the Council together with Regulation No 109/62 of the Commission.

The first question

The first question asks whether the Treaty confers on the institutions of the Community 'the right to establish systems of levy directly applicable in the Member States, as the Council has done by Regulation No 22 of 4 April 1962', and, if the answer is in the affirmative, whether the levies constitute customs duties or taxation and finally whether the Treaty 'had the effect of transferring to the Community the power to legislate' on matters coming under the fiscal sovereignty of the States.

Under Article 38 (2) of the Treaty, save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the Common Market shall apply to agricultural products. These provisions as a whole may constitute a derogation from any of the said rules, including those set out in Article 18 et seq. Consequently an argument may not be based on the fact that those articles were not expressly mentioned as exceptions to the rule propounded in Article 38 (2) to conclude that it was necessary to apply to agricultural products the rules of the Common Customs Tariff alone instead and in place of a special system of levies. In paragraph (4) of the same Article 38 it is stipulated that the operation and development of the Common Market for agricultural products for which the very general provisions of paragraph (2) have provided, 'must' be accompanied by the establishment of a common agricultural policy among the Member States.

After prescribing as the particular objectives of the common agricultural policy the rational development of agricultural production and the stabilization of markets, the Treaty provides in Article 40 (2) that in order to attain those objectives 'a common organization of agricultural markets shall be established'. Finally Article 40 (3) expressly lays down that the common organization in question may include all measures required to attain the objectives set out in Article 39 and 'in particular' regulations of prices and common machinery for stabilizing imports or exports.

The systems of levy resulting from Regulation No 22 of the Council are intended to attain the objectives defined in Article 39 and come within the measures provided for in the subsequent articles. In fact although those systems appear to conform essentially with Article 40 (3) both as methods of regulating prices and as common machinery for stabilizing the import of agricultural products, it should also be observed that the said article does not set

out those concepts restrictively. By establishing with regard to agricultural products a system regulating prices and stabilizing the market, the system of levies constitutes one of the bases of the 'common organization of agricultural markets' prescribed by Article 40 (2).

A system of levies which fulfils those conditions is in accordance with the Treaty and, under the express provision of the third subparagraph of Article 43 (2), may form the subject-matter, during the transitional period, of the Council's regulations.

Since the levy is based on the Treaty and not on national law, is applicable simultaneously in all Member States and not only in one, acts as a regulatory device for markets not in a national context but in a common organization, is defined with reference to a price level fixed in the light of the objectives of the Common Market and since its rate is flexible and may vary in terms of the hazards of the market, it therefore appears as a charge regulating external trade connected with a common price policy, whatever similarities it may have to a tax or a customs duty.

According to Article 189, Regulation No 22, establishing the system of levies is 'binding in its entirety and directly applicable in all Member States'. This system must therefore be applied with the same binding force in all the Member States within the context of the Community legal system which they have set up and which, by virtue of the Treaty, has been integrated into their legal systems. The states have thus conferred on the Community institutions power to take measures fixing the levy such as those which form the subject-matter of Regulation No 22, thus submitting their sovereign rights to a corresponding limitation. More particularly to the extent to which this concerns fiscal sovereignty, such a result is perfectly in accordance with the system of the Treaty.

It is clear from all those factors that the validity of the said Regulation No 22 of the Council may not be affected by the character of the levy as a customs duty, taxation or otherwise.

The second question

The Court is asked to rule whether Article 6 (3) and (4) of Regulation No 22 must be interpreted as meaning that the power to fix an additional levy belongs solely to the importing Member State to the exclusion of Community institutions.

Article 6 (3) provides that 'Should the offer prices free-at-frontier for imports fall below the sluice-gate price, the amount of the levy . . . shall be increased in each Member State by an amount equal to the difference between the offer price free-at-frontier and the sluice-gate price'.

Paragraph (4) of the same article provides that the 'methods of fixing' additional amounts shall be determined by the Commission or, if necessary, by the Council, after taking the opinion of the Management Committee following the procedure laid down in Article 17. The same provision gives the importing Member State the power to determine and collect those additional amounts, provided that the Commission and the other Member States are immediately notified. Finally the 'measures to be taken jointly by the Member States shall be determined according to the procedure laid down in Article 17'.

Those provisions distinguish between determining the 'methods of fixing' the additional amounts, on the one hand, and fixing their actual amounts and collecting them, on the other. The procedure for determining the general methods of fixing the additional amounts pertains to the Commission or, if necessary, to the Council after the opinion of the Management Committee has been obtained; this procedure formed the subject-matter of Regulation No 109/62 of the Commission. Fixing the actual amounts is a matter for the importing Member State which has decided to take the measure, whilst it falls within the powers of the Commission or, if necessary, of the Council when a decision has been taken to formulate a measure jointly. The collecting of the additional amounts is a matter for the importing Member State.

There is no contradiction between those distinctions and the provision in Article 6 (3) whereby the amount of the levy shall be increased 'in each Member State' by an additional amount. In fact this provision does not define any powers vesting in the Member State but merely lays down the geographical bounds of the measure. Regulation No 109/62 organized the procedure for fixing the said amounts on the basis of the powers of the importing Member State, to which must be added the powers of the Commission or, if necessary, the Council in connexion with the measures to be taken jointly within the framework of Article 17 of Regulation No 22.

It is clear, moreover, from the preamble to Regulation No 135/62 that this was the procedure followed in fixing the additional amounts in dispute since, after finding that the Federal Republic of Germany 'is already imposing additional amounts on imports of slaughtered hens and chickens from third countries', the Commission fixed a uniform additional amount in accordance with the procedure in Article 17 of Regulation No 22.

It is clear from those various factors that Article 6 (3) and (4) of Regulation No 22 of the Council empowers the importing Member State to fix the additional amount of the levy, subject to the measures to be taken jointly within the framework of the procedure laid down in Article 17.

The third question

The third question asks whether Regulation No 135/62 infringes Regulation No 22 of the Council and Regulation No 109/62 of the Commission, 'on the ground that, although those two provisions provide for an additional levy should the offer price fall below the sluice-gate price, Regulation No 135/62 (according to the plaintiff's allegations) does not take into account—or sufficiently into account— the offer price in fixing the additional levy'.

Under Article 6 (3) of Regulation No 22, the levy shall be increased when 'the offer prices free-at-frontier for imports fall below the sluice-gate price', this increase being 'equal to the difference between the offer price free-at-frontier and the sluice-gate price'. It was in implementation of those provisions, in accordance with Article 6 (4), that the measures prescribed to be taken jointly by the Member States were taken by Regulation No 135/62, the validity of which is questioned.

It is clear from the joint nature of the said measures that they cannot depend on the offer price free-at-frontier of a given import. Moreover, Article 6 (3) of Regulation No 22 refers not to an individual offer price but to 'offer prices' free-at-frontier in accordance with the general reference to the world market contained in the preamble. This is then the meaning of Regulation No 109/62 which emphasizes in its preamble that fixing the additional amount may only be effected 'in a uniform manner' for all imports to all Member States. The offer price fixed according to this procedure is to continue until it is amended or abolished in accordance with Article 2 of Regulation No 109/62.

Consequently, the carrying out of an individual import at a price higher than the offer price laid down by Regulation No 135/62 cannot result in calling in question the validity of the latter price which is unaffected by the circumstance put forward in the judgment referring the matter whereby the said regulation did not take into account—or did not sufficiently take into account —the offer price of a given import, effected moreover after the said regulation.

The fourth question

The fourth question asks whether the validity of Regulation No 135/62 is affected by the provision laying down that it shall enter into force on the day

of its publication in the Official Journal of the European Communities. It was in fact maintained that an immediate entry into force gives rise to legal uncertainty, that Article 191 of the Treaty, moreover, stipulates that in principle and in the absence of any provision to the contrary regulations shall enter into force on the twentieth day following their publication and finally that the second subparagraph of Article 12 (2) of Regulation No 22 excludes goods in transit from the application of the protective measures.

Under Article 191 of the Treaty regulations 'shall enter into force on the date specified in them, or in the absence thereof on the twentieth day following their publication'. Consequently the Treaty entrusts the institution issuing the regulation with the task of specifying therein the date of their entry into force. Only if the date is not specified in the regulation will it be fixed as the twentieth day following its publication.

This wide liberty granted to the authors of a regulation cannot, however, be considered as excluding all review by the Court, particularly with regard to any retroactive effect. An institution cannot, without having an adverse effect on a legitimate regard for legal certainty, resort without reason to the procedure of an immediate entry into force.

Although the preamble to Regulation No 135/62 is silent in this respect, the Court nevertheless finds in the provisions which it enacts serious reasons for holding that any interval between the publication and the entry into force of the regulation might in this case have been prejudicial to the Community. Such a delay in fact would have run the risk of causing a hasty and concentrated flow of transactions which would have interfered with the very implementation of Article 6 (3) of Regulation No 22.

Finally no analogy can be made between the rules described in Article 191 of the Treaty regarding the entry into force of a regulation and the provisions of Article 12 (2) of Regulation No 22 exempting goods in transit from the effects of the protective measures taken by a Member State, the special provisions of which may not be extended beyond their own subject-matter. The validity of Regulation No 135/62 is thus not affected by the conditions of Article 2 thereof which provides that it shall enter into force immediately, as any transaction which had already taken place and been executed at the moment of its entry into force would be excluded from its application.

Costs

The costs incurred by the Council and by the Commission of the European Communities which submitted observations to the Court are not recoverable

and 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 Bundesfinanzhof, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the Council and the Commission of the Communities and those of one of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 18, 23, 38 to 46, 177 and 191 of the Treaty establishing the European Economic Community together with Annex I thereto;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to Regulation No 22 of the Council (Official Journal 1962, p. 959); Regulation No 135/62 of the Commission of the EEC (Official Journal 1962, p. 2621) and Regulation No 109/62 of the Commission (Official Journal 1962, p. 1939);
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it for a preliminary ruling by the Bundesfinanzhof by decision of 25 April 1967, hereby rules:

1. **The Treaty establishing the EEC conferred on the institutions of that Community the right to establish systems of levy directly applicable in the Member States, as the Council has done by Regulation No 22 of 4 April 1962; consequently the validity of the said regulation cannot be affected by the character of the levy thus established as either a customs duty or a tax;**

2. **Article 6 (3) and (4) of Regulation No 22 authorizes the importing Member State to fix the amount additional to the levy, subject to measures to be taken jointly within the framework of the procedure laid down in Article 17;**

3. **The validity of Regulation No 135/62 of the Commission with regard to Regulation No 22 of the Council and Regulation No 109/62 of the Commission is not affected by the fact that it did not take into account the individual offer price in fixing the additional levy;**

4. The validity of Regulation No 135/62 of the Commission is not affected by the provisions of Article 2 thereof which lays down that it shall enter into force immediately.

The decision on the costs of the present case is a matter for the Bundesfinanzhof.

Lecourt Donner Strauß

Trabucchi Monaco Mertens de Wilmars Pescatore

Delivered in open court in Luxembourg on 13 December 1967.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 21 NOVEMBER 1967[1]

Summary

1 — Translated from the French version.