OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 12 DECEMBER 1973 [1]

Mr President,
Members of the Court,

In respect of the payment of monetary compensatory amounts on imports from third countries made in accordance with Regulation No 974/71/EEC of the Council (OJ L 106/1/1971) and of Regulation No 2122/71/EEC of the Commission (OJ L 223/1/1971), the Hamburg Finanzgericht, making a reference to this Court in pursuance of Article 177 of the EEC Treaty, asks, firstly, a question relating to the validity of Regulation No 974/71. This Regulation, enacted on the basis of Article 103 of the EEC Treaty, concerns, as you well know, the adoption of national protective measures intended to avoid difficulties for the operation of the agricultural markets following the temporary widening of the margins of fluctuation for the currencies of certain Member States. The German court doubts whether Article 103 can constitute a sufficient legal basis.

In the Judgments of 24 October 1973 in Cases 5/73; *Balkan,* 9/73, *Schlüter* and 10/73, *Rewe* this Court has already given a ruling on identical requests. There is no reason for reconsidering the question since the reasons for doubt adduced by the Hamburg Finanzgericht in respect of the validity of the Regulation contain no new element over and above those put forward by the courts which had raised the same problem in the three cases cited above.

This case is concerned with the importation on 22 October 1971 of a certain quantity of common wheat into the Federal Republic from the USA. The importing company, the plaintiff in the main action, considers that the compensatory amount imposed on the wheat exceeds that prescribed by Article 2 (1) of Regulation No 974/71. Referring to that ground of criticism invoked by the plaintiff the Hamburg Finanzgericht, in its second question asks 'Did the compensatory amount of 19·20 DM per metric ton fixed by the Commission in Annex I to Regulation No 2122/71/EEC of 1 October 1971 (OJ L 223/3) in respect of common wheat from third countries comply at the time of the importations with the conditions of Article 2 of EEC Regulation No 974/71?'. Article 2 (1) provides that 'the compensatory amounts for the products covered by intervention arrangements shall be equal to the amounts obtained by applying to the prices the percentage difference between:

- the parity of the currency of the Member State concerned declared to and recognized by the International Monetary Fund, on the one hand, and
- the arithmetic mean of the spot market rates of the currency against the US dollar during a period to be determined'.

At the time with which we are concerned, the difference between the official parity of the German mark and the market rates of that currency against the US dollar was 9·4 %. The plaintiff in the main action maintains that that rate had been applied to an incorrect reference price. The Commission based its assessment of the levy on a price of 204·30 DM per metric ton of the product in question whereas the c.i.f. price in force at the date of importation was 193·10 DM per metric ton. That incorrect basis of assessment had meant that the compensatory amount of 19·20 DM per metric ton of common wheat fixed by Regulation No 2122/71 of the

1 — Translated from the Italian.

Commission was 1·05 DM higher than it ought to have been.

The Commission does not deny that the c.i.f. price of the product in question which had been adopted for the levy (slightly less than the actual c.i.f. price of 194·90 DM) was at the time more than 11 DM per metric ton less than the price which the Commission had used as a basis for fixing the sum of 19·20 DM as the compensatory amount for imports of common wheat to Germany from third countries during the period under consideration. Unlike the plaintiff in the main action, the Commission considers however that the price to which the provision of Article 2 of Regulation No 974/71 cited above refers, is not necessarily the c.i.f. price adopted (differing by up to 0·60 u.a. from the c.i.f. price) to assess the levy. The Commission is in fact contesting that that provision of Regulation No 974/71 must necessarily relate to a c.i.f. price. Moreover, as from March of this year the Commission has based its assessment of compensatory amounts on the intervention price but with appropriate correctives (see Article 5 (3) (b) of Regulation No 648/73 of the Commission, OJ L 64/73).

However, in the period which is relevant here the Commission was in the habit, in principle of basing its assessments on the c.i.f. price. But the requirements for the application of the machinery of compensatory amount made it inadvisable to adhere to the inflexibility which the method of computation of levies required. A method was needed which corresponded to the requirements of administration and which at the same time ensured a certain stability in the level of the compensatory amounts, in the interests of the trade itself. In this connexion the Commission stressed that in the system of monetary compensations there is no possibility of advance fixing, as exists, on the other hand, for levies. The Commission also emphasized that the compensatory system is in addition concerned with refunds on exportation and that here there does not exist the same inflexible system used for the other calculation. Besides this, there exists an important difference between the effects of the application of the system of monetary compensation and the effects of the levy. In the first case, the lower the c.i.f. prices serving as a basis, the lower the compensatory amount will also be, since the latter is calculated as a percentage of the c.i.f. price. In the second case, the opposite occurs. This shows that the consequences of using the c.i.f. price as a reference price differ from one system to the other.

The Commission concludes from the above considerations that the methods applied for computing the levy cannot be purely and simply transferred for use in the calculation of the monetary compensatory amount.

As the c.i.f. prices are subject to continual variations, the Commission, to avoid having to modify the compensatory amounts almost daily, deemed it appropriate, in defining the rules for implementing Regulation No 974/71, to calculate an average c.i.f. price on the basis of a reference period of one week corresponding to that adopted for the fixing of average rates of exchange (see Commission Regulations No 1013/71, OJ L 110/8, and No 1871/71, OJ L 195/1). In practice, the Commission's principle was then to modify the average c.i.f. price adopted as a basis for calculating the compensatory amount only when it fluctuated by 10 % or more, up or down. In that way, it was sought to secure a certain stability by a mechanism which avoided excessive complications for the administration.

On the other hand, the plaintiff in the main action refers to the final recital of Regulation No 974/71, according to which 'the compensatory amounts should be limited to the amounts strictly necessary to compensate the incidence of the monetary measures on the prices of

basic products covered by intervention arrangements'. In comparison with the general requirement defined by that recital the margin of 10 % fixed by the Commission is excessively wide.

The fixing of the compensatory amount at a level which is too high is said also to constitute an infringement of Article 110 of the EEC Treaty.

I would dismiss straight away the plea of invalidity based on Article 110 of the Treaty, for which, moreover, no reasons have been put forward, because I do not see how the fixing of a flat-rate criterion of that type can be prohibited by a rule like Article 110, which merely gives notice of the intention of the Member States to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.

In my opinion there is no doubt that the adoption of a flat-rate criterion for the calculation of the price, to which the monetary percentage difference referred to in Article 2 of Regulation No 974/71 is applied, fulfils the requirements of actual practice, whose importance, in this field, cannot be disregarded. A flat-rate system is also used on a parallel basis to calculate the spot market rates under the same provision; the plaintiff in the main action has not put forward any argument contesting the validity of this final point.

If one desires to adopt the c.i.f. price as a basis of assessment, the only alternative to a flat-rate system is the actual price of the product as determined in every single contract. The idea of greater adherence to reality which might have justified the choice of this method should however, to be consistent, lead to a consideration of the actual market rate applied to that particular transaction. It is unnecessary to emphasize the practical diffculties which ascertainment of such figures would have entailed, and the risks of fraud; these might well have prejudiced the manageability and efficiency of the system.

The Commission's arguments rejecting an automatic transfer of the criteria for assessing levies to the field of compensatory amounts now under consideration appear to me to be sound. Moreover, the Court in the aforementioned Judgments Nos 5/73, 9/73 and 10/73 recognized that, in assessing compensatory amounts, it was legitimate to adopt a simplified method in comparison with the system in respect of levies.

If one admits that the Commission held, in fixing the criteria for calculating the 'price' under Article 2 of Regulation No 974/71, a certain margin of discretion, it can also be admitted that it was able to use a flat-rate criterion of practical application and that the flate-rate criterion chosen corresponding to the average c.i.f. price fixed on a weekly basis, in conjunction with the average market rate, does not appear in principle to be contrary to the rules. Thus the only question we must determine is whether the margin of 10 % adopted as an additional guarantee of stability is not such as to exceed the margin of discretion marking the limits of the Commission's choice.

Framed in that manner, the question seems extremely simple but also rather delicate. There is no doubt that this Court cannot decide the question of what would have been opportune, but must only determine whether the Commission's use of the discretionary power conferred on it by Regulation No 974/71 of the Council was *ultra vires*. The important factors in this appraisal are, first, the practical requirements asserted by the Commission, both as regards action by the administration and as regards a certain guarantee of stability for trade, which, failing prior fixing as in the case of the levy, could be attained by fixing correctly a margin which is not too small and between whose limits the basic price for the assessment of the

compensatory amount would have remained fixed; and, secondly, the general criterion, referred to by the Community legislature in the final recital of Regulation No 974/71, that the compensatory amounts should be limited to the amounts strictly necessary to attain the aim sought by this Regulation.

I consider that, bearing in mind the limited context of these proceedings in which the Court has to consider the question of the validity of the compensatory amount in question, it can judge the method of fixing the compensatory amounts followed by the Commission to be illegal only if the quantitative criterion adopted by it in the exercise of its discretionary power to implement the Council Regulation, by means of the Management Committee procedure, emerges as clearly incompatible with the above limitation. It is useful to remember with regard to this matter that the margin of 10 % applies either way and thus the importer can be adversely affected where the actual c.i.f. price falls whereas he would be placed in an advantageous position when the average c.i.f. price, encountered on the market and adopted as the basis of assessment, subsequently rises by less than 10 %. This allows one to affirm that the rule followed is such as to guarantee effectively, within the limits allowed by the subject-matter and the conditions of the market, a certain stability in compensatory amounts avoiding further complications for the administration in the development of its already complex duties without being in any way calculated to operate to the disadvantage of the importer. On the contrary, the rule is based on a fair criterion which allows account to be taken of the objective requirements of the administration and of the common interest of trade. Seen in this light, the general limitation expressed in the final recital in Regulation No 974/71 is not infringed.

Would it have been possible for the system of compensatory amounts to function in the same way by fixing a margin of less than 10 %? That cannot be excluded; but here one is entering a field of appraisal of possibilities which lies outside the judgment of the Court. We are not concerned with deciding whether the Commission could have done better than it did, our task is only to check whether what it did is not illegal for the reasons indicated by the national court.

The criterion of a margin of 10 % applied in principle for determining the occurrence of an appreciable change in relation to the c.i.f. price previously fixed, could possibly be criticized not so much for the reasons invoked by the plaintiff in the main action, who had desired a closer adherence to the real position of prices actually in force on the world market, but rather since because of it the system might have been insufficiently transparent; especially as it appears exceptions are not lacking in the practical application of that criterion which moreover is not laid down in any legal text. Any lack of transparency can be regarded as inconsistent with general principles of good administration and with the requirement of certainty for trade, which has been invoked. Once it was apparent that the system, which had to be established urgently and thus necessarily in an imperfect manner, was destined to continue for longer than envisaged, it would perhaps have been desirable for the criteria of implementation followed to be better defined and brought to the notice of those concerned.

On the other hand, we cannot fail to recognize that the implementation of the system of monetary compensatory amounts has posed and continues to pose, in practical terms, extremely complicated problems for the Commission, which is often confronted with particular cases in respect of which it cannot be denied that in the interests of fair treatment for exporters and importers it is appropriate that the

bodies responsible for applying this complex machinery should have a wide margin of discretion.

These comments, which lie in that twilight zone between the area of discretion of the administration and the sectors regulated by specific binding rules, thus leave unaltered the reply to be given to the question of the Hamburg Finanzgericht considered above. That question concerns exclusively the legality of the compensatory amount fixed by Regulation No 2122/71 for common wheat, and not the global appraisal of the Commission's behaviour in implementing the basic rules and regulations.

As appears from the above discussion in respect of the particular point which is the subject of the second question by the German court, the defects invoked are not such as to invalidate the method adopted by the Commission which applies, in respect of the period under consideration, a compensatory amount of 19·20 DM per metric ton to imports of common wheat into Germany from third countries, such amount being fixed in accordance with Regulation No 2122/71 of 1 October 1971.

If, as I advise, you give that reply to the national court, an examination of the third question is superfluous.