

On those grounds,

THE COURT

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven by an order of 10 March 1978, hereby rules:

Consideration of Commission Regulation No 1356/76 has disclosed no factor of such a kind as to affect its validity.

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

Delivered in open court in Luxembourg on 14 December 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 14 NOVEMBER 1978¹

*Mr President,
Members of the Court,*

I shall not recite the facts from which the main action arose. They were set out clearly and fully in the report for the hearing.

I — Schouten B.V., the appellant in the main action, challenged the validity of Commission Regulation No 1356/76 of 11 June 1976 on monetary compensatory amounts and the differential amounts

applicable in respect of movements in the Irish pound and the pound sterling, on several grounds of complaint which form the basis of four partially overlapping questions by the College van Beroep.

It is alleged that the regulation is contrary to the basic regulation, Regulation No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation

¹ — Translated from the French.

for the currencies of certain Member States, as last amended by Regulation No 557/76 of 15 March 1976, inasmuch *inter alia* as the Commission was not empowered to adopt it. Where, as in this case, the Management Committee has not delivered an opinion Article 26 of Regulation No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals, if properly interpreted, requires the Commission to communicate the measure which it has adopted to the Council, which it failed to do in this case.

Furthermore, Regulation No 1356/76 is contrary to the provisions of Regulation No 1380/75 of the said Commission of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts.

Finally, the regulation is said to be contrary to two fundamental principles of the Treaty, the principle of legal certainty (because of the abruptness of its adoption) and the principle of equality before the law (because of the fact that the contested regulation related solely to the Irish pound and the pound sterling).

II — I shall begin with the interpretation of Article 26 of Regulation No 2727/75 of the Council. In my view, the scope of this question (the fourth one) extends far beyond the case which the national court has to decide, because it frequently happens that the Management Committees "do not deliver an opinion" (to give some examples among many others, Regulation No 722/75 of the Commission of 19 March 1975 and Commission Regulations No 1051/77 of 18 May 1977, No 1123/77 of 27 May 1977, No 2657/77 of 30 November 1977, and so on).

In my opinion of 26 January 1978 in Case 92/77 *An Bord Baine* (judgment of 23 February 1978 [1978] ECR 497, at p. 522), I said, "When the Management Committee had 'not delivered an opinion

within the timelimit set by its chairman', the traditional euphemism indicating that there had not been a sufficient majority to approve the Commission's draft, the measures adopted by the Commission *ought* to have been communicated by it forthwith to the Council". In fact, unlike for example Article 9 (4) and Article 10 (4) of Directive No 74/63 on feeding-stuffs, neither the terms of Article 30 of Regulation No 804/68, which was at issue in that case, nor Article 26 of Regulation No 2727/75 *impose any obligation* on the Commission forthwith to submit to the Council a proposal on the measures to be taken where no opinion or an adverse opinion is delivered by the Standing Committee (which has the same function as the Management Committee in the decision-making process). Like the corresponding provisions of the other regulations of the common organization of the markets, Article 26 of Regulation No 2727/75 of the Council requires that measures decided by the Commission must be communicated to the Council only where those measures are not in accordance with the opinion of the Committee.

The reason for this difference is not very clear to me; however I cannot but admit that in this area an "absence of opinion" cannot be treated as being the same as an adverse opinion.

I would add that I consider it unlikely that the Council was not informed of the measures decided by the Commission before they were published in the Official Journal on 12 June 1976 or before they entered into force on 14 June 1976, when the Netherlands intervention agency and the traders themselves were already acquainted with those measures, as is shown by the circular of 10 June 1976 and the objection which the appellant in the main action lodged on 11 June 1976, that is to say even before the regulation had been formally adopted by the Commission on that day. I am convinced that in fact on 9 June the Council was aware of the

result of the vote of the "Horizontal Management Committee".

Likewise, I consider it unlikely that the Council was not informed of the measure on the monetary compensatory amounts applicable in respect of movements in the French franc; which was laid down in Commission Regulation No. 283/78 of 10 February 1978, even though in that case as well the relevant management committees did not "deliver an opinion within the time-limit set by their chairmen".

Be that as it may, even where the Committee delivers an adverse opinion, the Commission may adopt measures which shall apply immediately: it resumes its full power of decision. Except where the Commission itself decides to defer application of the measures which it has adopted, the only way to stop it is for the Council to take a different decision within one month of the communication which was made to it. This must be the case *a fortiori* in the absence of an opinion by the Committee.

Therefore it is possible to transpose exactly what the Court held in its aforesaid judgment of 23 February 1978 (paragraphs 32 and 33 [1978] ECR at p. 515) in relation to the amount of aid granted for the private storage of butter: according to Article 6 (1) and (2) of Regulation No 974/71, detailed rules for the application of that regulation, and *in particular* the fixing of the monetary compensatory amounts, shall be adopted in accordance with the procedure known as the Management Committee procedure; that procedure "confers rule-making powers on the Commission" which enable it to adopt legislative measures which may comprise *other* derogations from the regulations relating to the common agricultural policy. Since Regulation No 1356/76 relates precisely to the system of monetary compensatory amounts, the submission of lack of competence made in the present case is without any legal foundation.

III — I now turn to the complaints against the substantive provisions of the Commission regulation.

These complaints, as well as the questions asked by the College, concern not the periodicity of the alterations of the compensatory amounts but the failure to take account of the difference in exchange rates which was, however, recorded during the reference period defined in Article 2 of Regulation No 1380/75, that is, the "neutralization" of a period during which the difference in exchange rates was not in the Commission's opinion "*representative*". The Commission could not derogate from the procedure which it had itself laid down in the abrupt way which it did, thus breaching the principle of legal certainty and that of equality before the law.

Let me point out that Article 2 (1) (b) of Regulation No 974/71 of the Council stipulates that the monetary compensatory amounts for Member States with a floating currency are to be calculated by reference to the spot market rates recorded in relation to the currencies in the "snake" over a *period to be determined*.

According to the recitals in the preamble to Regulation No 1380/75, "the period must be *sufficiently representative* to show trends in rates and must yet allow those rates to be reflected *as quickly as possible* in the fixing of the compensatory amounts". Articles 2 and 3 of Regulation No 1380/75 provide that the spot market rates deemed to be the most representative for the "floating" currencies against the currencies in the "snake" are those which result from the average of the rates recorded on the official foreign exchange markets from a Wednesday to the following Tuesday. There is no indication anywhere of the time from which the monetary compensatory amounts thus calculated are to apply. However, the settled practice of the Commission is to fix the amounts with

effect from the Monday following the Tuesday which marks the end of the reference period. The amounts so fixed are valid until further alteration. At the outset, therefore, this system lags behind economic reality to a certain extent.

Article 6 (2) of Regulation No 974/71 empowers the Commission, in its capacity as a "legislative" institution and within the framework of the Management Committee procedure, to adopt detailed rules for application, covering in particular the *fixing* of the compensatory amounts.

However, it includes the reservation that those detailed rules for application are not to cover the situation referred to in Article 3 of Regulation No 974/71, that is to say where the difference between the exchange rate resulting from the representative rate of the currency under consideration in relation to the central rate of each of the currencies in the "snake", on the one hand, and the official spot market rates for that currency in relation to each of the currencies which are in the "snake", on the other hand, (that difference being reduced however by 1.5 points) changes by at least 1 point from the percentage taken as a basis for the preceding determination; in that event the compensatory amounts shall be *altered* by the Commission in line with the change in the difference. When this provision is applied, the Commission is not strictly speaking adopting detailed rules for application, and it acts without calling upon the Management Committee. By contrast, when it decides *not to alter* the compensatory amounts or when those amounts are determined *otherwise* than they should have been under Article 3, the provision in Article 6 (1), which does not provide for any exception, must operate, and the Commission must seek the opinion of the Management Committee.

In this case the Commission did not introduce new amounts or increase the

old ones, but decided not to fix them as *in principle* they should have been fixed in line with the movements in the Irish pound and the pound sterling and simply to extend the term of validity of the amounts previously fixed.

There can be little doubt that Regulation No 1356/76, at least as regards its substance, constituted a derogation from the combined provisions of the second subparagraph of Article 1 (1a), the second indent of Article 2 (1) (b) and Article 2a of Regulation No 974/71 of the Council (as amended) as well as of Article 2 of Regulation No 1380/75 of the Commission.

However, in my opinion, that derogation was covered by Article 6 (1) which provides that detailed rules for the application of Regulation No 974/71, which may include other derogations from the regulations on the common agricultural policy, thus also from the provisions of that regulation and those of Regulation No 1380/75 which I have just cited, shall be adopted in accordance with the Management Committee procedure. The effect of Regulation No 2746/72 of the Council of 19 December 1972, which is based on Articles 28, 43 and 235 of the Treaty and no longer on Article 103, as was the original Regulation No 974/71, was in fact *permanently to integrate* the system of monetary compensatory amounts *into the common agricultural policy*.

During the reference period laid down in Article 2 of Regulation No 1380/75, which ran from Wednesday 2 June to Tuesday 8 June 1976, the pound sterling and the Irish pound underwent exceptional speculative movements for very special reasons which are set out by the Commission. By Tuesday 8, the last day of the reference period, the pound had recovered and that improvement persisted during the following days, thus eliminating the disparity recorded in the above-mentioned period.

The Commission took the view that the rates recorded during the period in question could not be regarded as sufficiently representative, and on Friday 11 June after a vote by the Horizontal Management Committee on Wednesday 9 June it decided to extend as from Monday 14 June the term of validity of the compensatory amounts applicable on 7 June 1976.

This was not the first or the last time that the Commission has had occasion to adopt such a derogation. It had already had to resolve certain difficulties connected with the absence of a quotation for the Italian lira in Rome and Milan or with the existence of rates considered *unrepresentative*. Thus, in the same circumstances as those in which it adopted the regulation at issue, it adopted Regulation No 271/76 of 6 February 1976 changing the monetary compensatory amounts following changes in exchange rates for the Italian lira, from the preamble of which I cite the following recitals:

"The spot market rates for the Italian lira against each of the currencies of those Member States which keep their exchange rates within a spread at any given moment of 2.25 % should be calculated from quotations for the Italian lira recorded on the exchanges in these Member States ... For the first establishment of the monetary compensatory amounts, a period longer than that normally to be taken under Article 2 of Regulation (EEC) No 1380/75 should be referred to".

On 26 March 1976 the Commission adopted Regulation No 688/76 altering the monetary compensatory amounts, which contains the following recital:

"Because of the speculative movements which took place on exchange markets between 15 to 19 March 1976, the exchange rates recorded during that period shall not be considered as representative of the real value of the Italian lira; moreover, the exchange rates

for the latter have improved since then; the monetary compensatory amounts applicable in Italy from 29 March 1976 should therefore be calculated on the basis of the average exchange rates recorded on the Rome and Milan stock exchanges on 22, 23 and 24 March 1976".

On this occasion as well, the regulation was adopted after the concurring opinion of the relevant Management Committees had been obtained.

On 10 February 1978, in Regulation No 283/78, the Commission expressed the view that as from 1 February 1978 the French franc had undergone speculative movements and consequently it extended the term of validity of the "freeze" on the compensatory amounts beyond 13 February 1978.

Finally, on 7 March 1978, in Regulation No 478/78, the Commission, with a concurring opinion from the Management Committees, decided to extend this solution in a general way to all the floating currencies in the Community. Owing to exceptional fluctuations in the floating currencies which were likely to be temporary and did not appear to reflect the real situation of economic trends, the Commission took the view that in order to avoid disturbances of the agricultural markets it should be laid down that the reference period for the fixing of the compensatory amounts during March 1978 should extend over three weeks beginning on a Wednesday and ending on the Tuesday before the fixing, with the compensatory amounts continuing to take effect as from the Monday of the week following the Tuesday which marked the end of the reference period and remaining valid until their alteration. However, due to the length of the reference period to be taken into consideration and to the number of currencies concerned, this system was to apply for the first time only for the amounts applying as from 13 March 1978.

It seems to me that so far no one has called in question the validity of these measures. Just like Regulation No 1356/76, they are all derogations from Article 2 of Regulation No 1380/75 and they were all adopted on the basis of Article 6 of Regulation No 974/71 and according to the Management Committee procedure.

If the regulation at issue had not laid down the "derogation from the derogation" from the common agricultural policy consisting in the granting (or the levying) of compensatory amounts and the automatic readjustment of those amounts, the products at issue would have been in danger of becoming the subject of speculative transactions carried out to profit from "future new amounts", leading to deflections of trade and sales below the intervention price. Therefore the Commission was right to take as its criterion the *persistence* of a departure of more than 1 % from the percentage used for the previous fixing.

The intention of the authors of Regulation No 974/71 was that the amounts should be limited to what is strictly necessary to prevent trade to which the current exchange rate applies from being effected at a price, in national currency, lower than the intervention or buying-in prices laid down by Community rules on the basis of the official parity and to forestall a disruption of the Community intervention system and abnormal movements of prices jeopardizing a normal trend of business in agriculture.

On 13 March 1976, the Court of Justice held in Joined Cases 67 to 85/75 *Lesieur and Others* ([1976] ECR at p. 408) that "the object of the establishment [of the system of monetary compensatory amounts] was not ... additional protection for Community price levels but the maintenance of single prices", and that "the granting or the levying of compensatory amounts is acceptable in respect of a specific product only if trade in that product would be disturbed in their absence".

Therefore the derogation laid down in Regulation No 1356/76 is legally justified.

IV — In these circumstances, I can be brief as regards the breach of the "fundamental principles" of the Treaty which is pleaded by the appellant in the main action.

The appellant argues that since the monetary compensatory amounts cannot be fixed in advance, the system does not offer traders any guarantees against fluctuations of the exchange rates beyond what is provided for by Article 3; it acted on the basis of the figures foreseeable in the event of a *normal* application of the system.

It explains that the purchase price of the cereals which it exports to the United Kingdom is often above the intervention price, and that it arranges to be paid in pounds sterling by letter of credit in anticipation of the date on which the goods are imported or delivered; it resells the pounds thus acquired up to the amount of the intervention price before actually exporting to the United Kingdom. The contested regulation retroactively and unforeseeably altered the financial conditions on the basis of which the applicant had entered into its commercial undertakings.

However "none of the provisions of Regulation No 974/71 gives exporters the *right* to the retention in force of a given method of calculating compensatory amounts ...; in pursuance of Article 1 of the above-mentioned regulation the *right* to receive a compensatory amount or the duty to pay it is created only by the performance of the export transaction and only from the moment when this takes place" (judgment of 15 February 1978 in Case 96/77 *Bauche* [1978] ECR at p. 401). This rule is repeated in Article 8 of Regulation No 1380/75. Thus it is at most a question of prejudice to legitimate expectations (a mere expectancy) and not of breach of

the principle of legal certainty (a vested right).

However, the obligation to limit the compensatory amounts "to the amounts strictly necessary" to compensate the incidence of the monetary measures must not be assessed in relation to the particular situation of a specific group of traders or of one specific trader. In view of "the multiplicity and complexity of economic circumstances, such an evaluation would not only be impossible to achieve, but would also create perpetual uncertainty in the law" (judgment of 24 October 1973 in Case 5/73 *Balkan* [1973] ECR at p. 1112; judgment of 12 November 1974 in Case 34/74 *Roquette* [1974] ECR at p. 1229). As I said in my opinion in the *Union Malt* case (judgment of 26 January 1978 in Joined Cases 44 to 51/77 [1978] ECR at p. 94) it is the terms of the contract which must be in accordance with the rules and not vice versa. It is not possible to deduce from the arrangements adopted by a particular trader an interpretation of Community rules or an assessment of their validity which must necessarily correspond to his arrangements.

In adopting the contested regulation, the Commission took account of an overriding public interest. To require

that it should begin by adopting a "general" regulation derogating from Regulation No 1380/75 and only then adopt a "concrete" regulation to apply that derogative regulation would prevent it from reacting with the necessary rapidity in the event of excessive variations in the exchange rates of the floating currencies, and would condemn it to being able to shut the stable door only after the horse had bolted.

As to the breach of the principle of "equality before the law", the Commission appositely pointed out that it would have been wrong to bring floating currencies other than the pound sterling and the Irish pound within the scope of Regulation No 1356/76. Regulation No 283/78 likewise took account of the specific situation of the French franc. As regards "alteration" of the compensatory amounts, under the very terms of Article 5 of Regulation No 1380/75 such "discrimination" should be exercised where the condition laid down in Article 3 of Regulation No 974/71 is met only in respect of the Irish pound or the pound sterling: the compensatory amounts applied in both the Member States concerned are then to be altered in line with the changes recorded for each of the two currencies.

In all the circumstances, I am of the opinion that the Court should rule that consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Regulation No 1356/76.