JUDGMENT OF THE COURT (Sixth Chamber)
19 January 1995 *

In Joined Cases C-351/93, C-352/93 and C-353/93,

REFERENCES to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven, Netherlands, for preliminary rulings in the proceedings pending before that court between

H. A. van der Linde

and

Minister van Landbouw, Natuurbeheer en Visserij,

and between

Tracotex Holland BV

and

Minister van Landbouw, Natuurbeheer en Visserij,

* Language of the case: Dutch.

on (in Case C-351/93) the interpretation and validity of Article 2(3) of Commission Regulation (EEC) No 2237/85 of 30 July 1985 laying down detailed rules for the application of the minimum import price system for dried grapes (OJ 1985 L 209, p. 24) and on the interpretation of Article 9 of Council Regulation (EEC) No 426/86 of 24 February 1986 on the common organization of the market in products processed from fruit and vegetables (OJ 1986 L 49, p. 1); on (in Case C-352/93) the interpretation of Commission Regulation (EEC) No 994/88 of 15 April 1988 on the application of the countervailing charge pursuant to Regulation (EEC) No 2742/82 on protective measures applicable to imports of dried grapes (OJ 1988 L 99, p. 12), on the interpretation and validity of Article 4(3) of Commission Regulation (EEC) No 2742/82 of 13 October 1982 on protective measures applicable to imports of dried grapes (OJ 1982 L 290, p. 28), and on the interpretation of Article 14 of Council Regulation (EEC) No 516/77 of 14 March 1977 on the common organization of the market in products processed from fruit and vegetables (OJ 1977 L 73, p. 1); and (in Case C-353/93) on the interpretation and validity of Article 3(3) of Commission Regulation (EEC) No 1626/85 of 14 June 1985 on protective measures applicable to imports of certain Morello cherries (OJ 1985 L 156, p. 13) and on the interpretation of Article 18(2) of Regulation No 426/86,

THE COURT (Sixth Chamber),

composed of: F. A. Schockweiler, President of the Chamber, P. J. G. Kapteyn, G. F. Mancini, C. N. Kakouris (Rapporteur) and J. L. Murray, Judges,

Advocate General: W. van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— H. A. van der Linde, by T. R Ottervanger, of the Brussels Bar,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Greek Government, by V. Kontolaimos, Assistant Legal Adviser in the State Legal Service, and V. Pelekou, Legal Representative in the State Legal Service, acting as agents,

— the Commission of the European Communities, by T. van Rijn, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Tracotex Holland BV, represented by N. P. J. Ooyevaar and M. E. van Hilten, of KPMG Meijburg & Co, tax advisers, the Greek Government, represented by V. Kontolaimos, and the Commission of the European Communities, represented by T. van Rijn, at the hearing on 14 July 1994,

after hearing the Opinion of the Advocate General at the sitting on 27 September 1994,

gives the following

Judgment

1 By order of 23 April 1993 (Case C-351/93), received at the Court on 12 July 1993, the College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry), Netherlands, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation and validity of Article 2(3) of Commission Regulation (EEC) No 2237/85 of 30 July 1985 laying down detailed rules for the application of the minimum import price system for dried grapes (OJ 1985 L 209, p. 24) and on the interpretation of Article 9 of Council Regulation (EEC) No 426/86 of 24 February 1986 on the common organization of the market in products processed from fruit and vegetables (OJ 1986 L 49, p. 1).

2 By order of 23 April 1993 (Case C-352/93), received at the Court on 12 July 1993, rectified by order of 27 October 1993, received at the Court on 12 November 1993, the College van Beroep voor het Bedrijfsleven referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Commission Regulation (EEC) No 994/88 of 15 April 1988 on the application of the countervailing charge pursuant to Regulation (EEC) No 2742/82 on protective measures applicable to imports of dried grapes (OJ 1988 L 99, p. 12), on the interpretation and validity of Article 4(3) of Commission Regulation (EEC) No 2742/82 of 13 October 1982 on protective measures applicable to imports of dried grapes (OJ 1982 L 290, p. 28), and on the interpretation of Article 14 of Council Regulation (EEC) No 516/77 of 14 March 1977 on the common organization of the market in products processed from fruit and vegetables (OJ 1977 L 73, p. 1).

By order of 23 April 1993 (Case C-353/93), received at the Court on 12 July 1993, the College van Beroep voor het Bedrijfsleven referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpre-

tation and validity of Article 3(3) of Commission Regulation (EEC) No 1626/85 of 14 June 1985 on protective measures applicable to imports of certain Morello cherries (OJ 1985 L 156, p. 13) and on the interpretation of Article 18(2) of Regulation No 426/86, cited above.

4 The questions in Cases C-351/93 and C-352/93 were raised in two sets of proceedings between *inter alia* H. A. van der Linde, customs agent, and the Minister van Landbouw, Natuurbeheer en Visserij (Minister of Agriculture, the Environment and Fisheries) concerning the payment of a countervailing charge sought from Mr van der Linde on the ground that he had not respected the minimum import price for various consignments of dried grapes from Turkey.

5 The questions in Case C-353/93 were raised in proceedings between Tracotex Holland BV, a private limited company established in Rotterdam, and the Minister van Landbouw, Natuurbeheer en Visserij concerning the payment of a countervailing charge sought from Tracotex on the ground that it had not respected the minimum import price for various consignments of Morello cherries from the country then known as Yugoslavia.

6 By order of 6 September 1993 the President of the Court ordered, pursuant to Article 43 of the Rules of Procedure, the three cases to be joined for the purposes of the written procedure, the oral procedure and the judgment.

7 Since some of the questions relate to provisions of Community legislation which entered into force successively, the three cases should be considered in chronologi-

cal order of the relevant Community legislation. Case C-352/93 will therefore be considered before Cases C-351/93 and C-353/93.

Case C-352/93

The Community legislation

8 It appears from the case-file that the import which is the subject of the main proceedings took place in June 1984. The following provisions were applicable at that time.

9 Article 14(1) of Regulation No 516/77, cited above, provides that appropriate protective measures may be applied in trade with non-member countries if, by reason of imports or exports, the Community market in one or more of the products to which the regulation applies is or is likely to be exposed to serious disturbances which might endanger the objectives set out in Article 39 of the Treaty. According to the second subparagraph of Article 14(1), the rules for the application of that provision are to be adopted by the Council acting on a proposal from the Commission.

10 Article 14(2) of that regulation authorizes the Commission to take the necessary measures if the situation envisaged in paragraph 1 arises.

11 On the basis of Article 14(1), Council Regulation (EEC) No 521/77 of 14 March 1977 laying down detailed rules for applying protective measures in the market in products processed from fruit and vegetables (OJ 1977 L 73, p. 28) was adopted. Article 2(1)(c) of that regulation provides that, for all products, the measures which may be taken are:

'— the introduction of arrangements under which, if the price for an imported product falls below a certain minimum, a condition may be imposed whereby that product may be imported only at a price which is at least equal to such minimum,

— the total or partial suspension of exports.'

12 Following disturbances of the market in dried grapes during the marketing year 1981/82, the Commission adopted, on the basis of Article 14(2) of Regulation No 516/77, the said Regulation No 2742/82. Article 2 of that regulation fixes the minimum import price for dried grapes (paragraph 1) and the fixed rate countervailing charge which applies if the minimum price is not respected (paragraph 2).

13 Article 4(1) of that regulation, as amended by Commission Regulation (EEC) No 936/84 of 5 April 1984 (OJ 1984 L 96, p. 13), provides that the following factors are to constitute the import price: (a) the fob price in the country of origin, and (b) transportation and insurance costs up to the place of entry into the customs territory of the Community.

14 Article 4(3), also as amended by Regulation No 936/84, states that:

'If the invoice presented to the customs authorities has not been drawn up by the exporter in the country in which the products originated or if the authorities are not satisfied that the price declared reflects the fob price in the country of origin, the competent authorities of the Member State shall take the necessary measures to determine that price, in particular by reference to the importer's re-sale price.'

15 The fact that the countervailing charge was at a fixed rate gave rise to proceedings in which the validity of Regulation No 2742/82 was challenged. In its judgment in Case 77/86 *National Dried Fruit Trade Association* [1988] ECR 757 the Court held that Regulation No 2742/82 was invalid in so far as it established the countervailing charge at a fixed rate.

16 Following the judgment, the Commission adopted Regulation No 994/88, cited above. Under Article 1 of that regulation, operators who have paid the countervailing charge fixed by Regulation No 2742/82 are entitled to reimbursement of the difference between:

'(a) the countervailing charge levied pursuant to Regulation (EEC) No 2742/82 and, where appropriate, subsequent amendments, and

(b) the amount resulting from the difference between the minimum price applicable as fixed in Article 2(1) of the abovementioned Regulation and the import price on release for free circulation'.

The main proceedings and the questions referred for a preliminary ruling

17 Mr van der Linde, acting on behalf of Fitmay Ltd, imported into the Netherlands consignments of dried grapes originating in Turkey. The import declaration was made on 25 June 1984 and accepted by the customs authorities. However, after a verification, which had to be deferred because of investigations which were necessary, the Inspecteur der Invoerrechten en Accijnzen (Inspector of Customs and Excise, hereinafter 'the Inspector') by a decision of 17 February 1989 requested Mr van der Linde to pay a countervailing charge.

18 That decision was based on the results of an investigation carried out in 1984 and 1985 by the Fiscale Inlichtingen-en Opsporingsdienst (Fiscal Inquiries and Investigations Service, FIOD) into a possible fraud in connection with the import of dried grapes from Turkey. It appears from the case-file that, according to the defendant in the main proceedings, one of the reasons why that investigation was necessary was the fact that a countervailing charge had hardly ever been levied on imports of Turkish dried grapes into the Netherlands, although the market prices for such dried grapes were (far) below the minimum import price. The investigation showed that various subterfuges were resorted to in order to evade the countervailing charge. They consisted in particular of the interpolation of all kinds of foreign companies in the invoicing chain in order to create by artificial means a high import price exceeding the minimum import price. Fitmay Ltd was one of those interpolated foreign companies.

19 Specifically, according to the defendant in the main proceedings, the checks carried out had shown that Alpaslan Besikcioglu, a Turkish exporter of dried grapes, sold

the goods to Fitmay Ltd, a company established in London, at a price above the minimum import price. The invoice was attached to the declaration for release into free circulation, submitted by Fitmay Ltd as importer. After importation, the dried grapes were resold to Izmir Fig Packers, a Turkish undertaking in which Alpaslan Besikcioglu had a 99% holding. The resale price to Izmir Fig Packers was slightly higher than the purchase price paid by Fitmay Ltd. The dried grapes were then sold by Izmir Fig Packers to Stolp International BV, one of the main dried grape importers in the Netherlands, at a price much lower than the minimum import price. The price at which Stolp resold to its customers was also lower than the minimum import price. Izmir Fig Packers thus incurred losses on its resales. Those losses were covered *inter alia* by payments by Alpaslan Besikcioglu into the bank account of Izmir Fig Packers.

20 Fitmay Ltd and Mr van der Linde brought proceedings against the Inspector's decision before the College van Beroep voor het Bedrijfsleven. In those proceedings they argued *inter alia* that Commission Regulation No 994/88 could not be a legally valid basis for calculation of the countervailing charge. They also challenged the validity of Article 4(3) of Regulation No 2742/82 in so far as it gives the authorities of the Member States the power themselves to determine the import price if they are not convinced that the price declared is the true one.

21 In those circumstances the College van Beroep voor het Bedrijfsleven stayed the proceedings pending a preliminary ruling by the Court on the following questions:

'(1) Must Regulation (EEC) No 994/88 be interpreted as meaning that that regulation, in place of the provision in Regulation (EEC) No 2742/82 which was

declared invalid by the judgment of 11 February 1988 of the Court of Justice in Case 77/86, is to be regarded as the legally valid basis for the calculation of a countervailing charge which is levied for the first time?

(2) If Question 1 is answered in the affirmative, must the abovementioned regulation be interpreted as meaning that the countervailing charge must be calculated on the difference between the minimum import price and the established import price, or must the flat-rate charge rate declared invalid be taken as the starting point in order if necessary to rectify it afterwards under the provisions of the aforementioned regulation?

(3) Must Article 4(3) of Commission Regulation (EEC) No 2742/82 be interpreted as meaning that if the competent authorities are not satisfied that the price declared reflects the fob price in the country of origin,

(a) facts may be collected exclusively in order to determine which import price actually was agreed and paid, directly or indirectly, between the exporter and the importer;

or that

(b) the competent authorities are at liberty themselves to reconstruct an import price, within the meaning of Article 4(1) of Regulation (EEC) No 2742/82, for the transaction in question, and in so doing take account of

— transactions other than the transactions between exporter and importer which, in the authorities' opinion, were either exclusively or partly

aimed at ensuring that no countervailing charge had to be paid upon importation, or which, in any event, would not have been carried out if they had not made the collection of the countervailing charge wholly or partly impossible,

and

— changes in the price of the product which occurred after it was imported at subsequent stages in the commercial chain?

(4) Is the aforementioned provision invalid, under the hypothesis set out in Question 3 (b), on the ground that the Council regulation does not confer on the Commission the power to grant the competent national authorities such a large degree of discretion in determining whether or not the import price in a given case is below the minimum price?'

The first question

22 By its first question the national court wishes to know the legal basis for calculation of a countervailing charge levied for the first time after delivery of the judgment in the *National Dried Fruit Trade Association* case, cited above, declaring Article 2(2) of Regulation No 2742/82 invalid in part, given that Regulation No 994/88 only determined the amount to be reimbursed to operators who had paid the fixed-rate countervailing charge under the article declared partly invalid.

23 Mr van der Linde argues that Regulation No 2742/82, which introduced the countervailing charge, was declared invalid by the Court and that it is not possible to

make a 1988 regulation the basis for a countervailing charge levied in respect of goods imported in 1984. Moreover, a regulation concerning reimbursement by the Member States of the excess amount charged cannot serve as the legal basis for the initial obligation to pay.

24 The Netherlands Government and the Commission observe that in the *National Dried Fruit Trade Association* judgment the Court declared Regulation No 2742/82 invalid not in its entirety but only in so far as it established a countervailing charge at a fixed rate. It follows that Article 2(2) of Regulation No 2742/82 continues to exist as a legal basis but must be applied in a manner consistent with the Court's judgment. Regulation No 994/88 correctly specified in Article 1(1)(b) how the countervailing charge was to be calculated, following the Court's judgment. Consequently, the legal basis for a countervailing charge levied for the first time after the Court's judgment was constituted by the combination of Article 2(2) of Regulation No 2742/82 and Article 1(1)(b) of Regulation No 994/88.

25 It must be stated that in the *National Dried Fruit Trade Association* judgment the Court, after observing that the aim of the countervailing charge was to enforce the minimum price so as to ensure Community preference in the market for dried grapes, and not to inflict an economic penalty on the trader who had imported them below the minimum price, held that the introduction of a single, fixed-rate countervailing charge, imposed even where the difference between the import price and the minimum price was very small, amounted to an economic penalty (paragraph 32). Accordingly, the Court held that Regulation No 2742/82 was invalid in so far as it introduced the countervailing charge at a fixed rate.

26 It follows that Article 2(2) of Regulation No 2742/82 was not declared invalid as a whole but only in so far as the fixed rate of the countervailing charge provided for

therein exceeded the difference between the minimum price and the import price. Article 2(2) therefore continued, after the Court's judgment, to constitute the legal basis for a countervailing charge equal to the difference between those two prices.

27 Regulation No 994/88, based precisely on that finding, provided for the reimbursement to the operators who had paid the fixed-rate charge of that part of the amount paid which exceeded the difference between the relevant minimum price and the import price. That regulation thus did not affect the legal position of operators who at the date of the Court's judgment had not yet become subject to payment of the countervailing charge.

28 Consequently, the answer to the first question must be that Community law is to be interpreted as meaning that the legal basis for calculation of a countervailing charge imposed for the first time after delivery of the judgment of 11 February 1988 in the *National Dried Fruit Trade Association* case is Article 2(2) of Regulation No 2742/82, in so far as it was not declared invalid by that judgment.

The second question

29 Having regard to the answer given to the first question, there is no need to answer the second question.

The third question

30 By this question the national court asks whether Article 4(3) of Regulation No 2742/82 must be interpreted as meaning that in order to determine the import

price actually paid the competent authorities may take into account not only elements of fact relating to the price actually agreed and paid between the exporter and the importer, but also other factors such as other operations carried out in order to avoid payment of the countervailing charge and increases in the price of the product in commercial dealing after the import.

31 Mr van der Linde observes that the national authorities cannot rely on factors subsequent to the import to determine the import price. If they could, it would be contrary to the principles of legal certainty and non-discrimination and would have the effect of changing the Community system relating to the minimum import price into a system of minimum market prices for imported products.

32 The Netherlands and Greek Governments and the Commission, relying both on the wording of Article 4(3) of Regulation No 2472/82 and on the purpose of the Community legislation, consider that if the national authorities are not satisfied that the price declared is the true one, they can take all necessary measures, including reconstruction of the price actually agreed between the exporter and the importer.

33 It should be noted, firstly, that the protective measures should be such as to prevent imported dried grapes from being marketed at abnormally low prices and that that objective can be achieved by introducing a minimum price to be respected on import into the Community and by applying a countervailing charge to products which do not respect that price (third and fourth recitals in the preamble to Regulation No 2742/82).

34 Since the aim of the regulation is thus that the products in question are imported into the Community at a price at least equal to the minimum price, it is the actual import price which is of fundamental importance for the proper functioning of the system established.

35 Secondly, Article 4(3) of Regulation No 2742/82, as amended by Regulation No 936/84, expressly states that if the authorities are not satisfied that the price declared in the invoice presented reflects the fob price in the country of origin, 'the competent authorities ... shall take the necessary measures to determine that price, in particular by reference to the importer's re-sale price'.

36 It follows that if the competent authorities have doubts as to whether the price declared is the true one, they have power to establish the price actually paid by taking into account all the factors which may contribute thereto.

37 Accordingly, the answer to the third question must be that Article 4(3) of Regulation No 2742/82 is to be interpreted as meaning that if the competent authorities have doubts as to whether the import price declared is the true one, they may take all necessary measures to establish that price.

The fourth question

38 By this question the national court asks whether, in the light of the above interpretation of Article 4(3) of Regulation No 2742/82, that provision is invalid on the ground that Regulation No 516/77 does not give the Commission power to grant the national authorities such a wide discretion to establish the import price.

39 Mr van der Linde submits that that provision is invalid, since the basic Regulation No 516/77 does not authorize the Commission to confer a discretion on the national authorities.

40 The Dutch and Greek Governments and the Commission, on the other hand, consider that the provision is valid. They argue in particular that it is necessary to preserve the effectiveness of the Community rules relating to the minimum price, faced with the great variety of procedures used by traders to evade the countervailing charge. The Commission also bases its arguments on the sharing of powers in this field by the Community and the Member States.

41 It must be stated in this respect that, as can be seen from the second citation in the preamble, Commission Regulation No 2742/82 was adopted on the basis of Article 14(2) of Regulation No 516/77. That provision states that if, by reason of imports or exports, the Community market in one or more of the products falling under the regulation is or is likely to be exposed to serious disturbances which might endanger the objectives set out in Article 39 of the Treaty, 'the Commission, acting either at the request of a Member State or on its own initiative, shall decide what measures are necessary and communicate them to the Member States; such measures shall be immediately applicable'.

42 It is not disputed in the main proceedings in this case that when Regulation No 2742/82 was adopted, the situation referred to in Article 14(2) of Council Regulation No 516/77 existed in the Community market in dried grapes. Nor is it disputed that the national authorities have the power to ascertain whether the price stated in the declaration for release into free circulation reflects the real price. The only question arising is whether the power conferred by the Commission on the national authorities to establish, in a doubtful case, the import price actually paid by taking all necessary measures is a necessary measure in the meaning of Article 14(2) of Regulation No 516/77.

43 Having regard, firstly, to the importance for the proper functioning of the protective system of the need to establish the actual import price and, secondly, to the variety and complexity of the situations which the national authorities are confronted with, the power conferred by the Commission on the national authorities to establish, if need be, the import price constitutes, in view of the need to ensure

the correct application of the measures taken to put a stop to the disturbance of the market in dried grapes, a necessary measure within the meaning of Article 14(2) of Regulation No 516/77.

44 Consequently, the answer must be that consideration of the question has disclosed no factor of such a kind as to affect the validity of Article 4(3) of Regulation No 2742/82.

Case C-351/93

The Community legislation

45 It appears from the case-file that the import which is the subject of the main proceedings took place in 1989. The following provisions were applicable at that time.

46 Regulation No 426/86, cited above, replaced the basic Council Regulation No 516/77, also cited above, from 1 March 1986.

47 Article 9(1) of Regulation No 426/86 provides for the application of a minimum import price for certain products, including dried grapes. That price is no longer imposed as a protective measure, but is permanent. Under Article 9(3) a countervailing charge is to be imposed if the minimum import price is not observed.

48 Under Article 9(5) of the regulation, the general rules implementing the article are to be adopted by the Council acting on a proposal from the Commission.

49 Council Regulation (EEC) No 2089/85 of 23 July 1985 establishing general rules relating to the system of minimum import prices for dried grapes (OJ 1985 L 197, p. 10), adopted pursuant to the earlier basic Council regulation, Regulation No 516/77, was maintained in effect by Article 25(2) of Regulation No 426/86, which states that 'citations of, and reference to, Regulation (EEC) No 516/77 shall be construed as referring to this Regulation'.

50 According to Article 1 of Regulation No 2089/85, the minimum import price for dried grapes is to be fixed before the beginning of the marketing year. Article 2(1) of that regulation provides that countervailing charges are to be fixed by reference to a scale of import prices.

51 Commission Regulation No 2237/85, cited above, was adopted on the basis of the former basic Council Regulation No 516/77. It was maintained in force by the said Article 25(2) of the new basic Regulation No 426/86. Article 1(2) of Regulation No 2237/85 provides that the following factors are to constitute the import price: (a) the fob price in the country of origin, and (b) transport and insurance costs to the point of entry into the customs territory of the Community. Paragraph 3 of that article defines the 'fob price'.

52 Article 2(2) of the regulation provides that the import price is to be declared on the entry for release into free circulation, which must be accompanied by all the documents required to verify the price.

53 Article 2(3) provides:

'The competent authorities shall:

(a) if the invoice presented to the customs authorities has not been drawn up by the exporter in the country in which the products originated,

or

(b) if the authorities are not satisfied that the price declared in the entry reflects the actual import price,

or

(c) if payment has not been effected within the time-limit provided for in Article 1(4),

take the necessary measures to determine the import price, in particular by reference to the importer's resale price.'

The main proceedings and the questions referred for a preliminary ruling

4 Mr van der Linde, acting on behalf of Fitmay Ltd, imported into the Netherlands consignments of dried grapes from Turkey. The import declaration was made on 15 February 1989.

55 Following a verification, the Inspector, by decision of 21 February 1989, requested Mr van der Linde to pay a countervailing charge. That decision was based on the results of the investigation carried out by the FIOD (see paragraphs 18 and 19 above).

56 Fitmay Ltd and Mr van der Linde brought proceedings against the Inspector's decision before the College van Beroep voor het Bedrijfsleven. In those proceedings they *inter alia* challenged the validity of Article 2(3) of Regulation No 2237/85, in so far as it gives the authorities of the Member States power themselves to determine the import price if they are not satisfied that the price stated on the declaration for release into free circulation reflects the actual import price.

57 In those circumstances the College van Beroep voor het Bedrijfsleven stayed the proceedings pending a preliminary ruling by the Court on the following questions:

'(1) Must Article 2(3)(b) of Commission Regulation (EEC) No 2237/85, in conjunction with Article 9 of Council Regulation (EEC) No 426/86, be interpreted as meaning that if the competent authorities are not satisfied that the price declared in the entry for release for free circulation reflects the actual import price,

(a) facts may be collected exclusively in order to determine which import price actually was agreed and paid, directly or indirectly, between the exporter and the importer;

or that

(b) the competent authorities are at liberty themselves to reconstruct an import price, within the meaning of Article 1(2) of Regulation (EEC) No 2237/85, for the transaction in question and in so doing take account of

— transactions other than the transactions between exporter and importer which, in the authorities' opinion, were either exclusively or partly aimed at ensuring that no countervailing charge had to be paid on importation, or which in any event would not have been carried out if they had not made the collection of the countervailing charge wholly or partly impossible,

and

— changes in the price of the product which occurred after it was imported at subsequent stages in the commercial chain?

(2) Is the aforementioned provision invalid, under the hypothesis set out in (1)(b) above, on the ground that the Council Regulation does not confer on the Commission the power to grant the competent national authorities such a large degree of discretion in determining whether or not the import price in a given case is below the minimum price?'

The first question

58 Apart from the provisions cited, the wording of this question and that of the third question in Case C-352/93 are similar. In particular, the relevant provisions of Regulation No 2237/85, although different from those referred to in the third question in Case C-352/93, are substantially the same as them. In any event, hav-

ing regard to the facts in the two cases, the few differences in the wording are not such as to affect the interpretation given above. For that reason the parties each submitted one set of observations for the third question in Case C-352/93 and the present question.

59 Only the following difference need be pointed out. As can be seen from the second citation in the preamble, Regulation No 2237/85 — an interpretation of Article 2(3) of which is sought — was adopted on the basis of Article 4a(7) of the basic Regulation No 516/77, as introduced by Article 1 of Council Regulation (EEC) No 988/84 of 31 March 1984 amending Regulation (EEC) No 516/77 on the common organization of the market in products processed from fruit and vegetables and Regulation (EEC) No 950/68 on the Common Customs Tariff (OJ 1984 L 103, p. 11). On the entry into force of the new basic Regulation No 426/86, the reference to Article 4a of Regulation No 516/77 in the second citation in the preamble to Regulation No 2237/85 was replaced by a reference to Article 9 of Regulation No 426/86, whose content is identical to that of Article 4a of Regulation No 516/77 (see Article 25(2) of Regulation No 426/86 and the correlation table in Annex V to that regulation). For that reason the question refers to Article 9 of Regulation No 426/86.

60 In those circumstances, and for the reasons stated in paragraphs 34 to 36 above which apply *mutatis mutandis*, Article 2(3) of Regulation No 2237/85 is to be

interpreted as meaning that if the national authorities have doubts as to whether the import price declared is the true one, they may take all necessary measures to establish that price.

The second question

61 Apart from the provisions referred to, the wording of this question is identical to that of the fourth question in Case C-352/93. The parties each submitted one set of observations for the fourth question in Case C-352/93 and the present question.

62 Article 9(6) of Regulation No 426/86 provides that 'minimum import prices, the amount of the countervailing charge and other detailed rules for the application of this Article shall be adopted in accordance with the procedure provided for in Article 22'. That procedure is the 'Management Committee' procedure whereby the Commission adopts measures which apply immediately but which, if they are not in accordance with the opinion of the Committee, are to be communicated to the Council forthwith; the Council may take a different decision within one month.

63 The question arises whether Article 2(3) of Commission Regulation No 2237/85, as interpreted in paragraph 60 above, is a detailed rule for application within the meaning of Article 9(6) of Regulation No 426/86.

64 Having regard, firstly, to the importance for the proper functioning of the minimum price system established by Article 9 of Regulation No 426/86 of the need to establish the actual import price and, secondly, to the variety and complexity of the situations which the national authorities are confronted with, the power con-

ferred by the Commission on the national authorities to establish, if need be, the import price constitutes, in view of the need to ensure the correct application of the provisions of Regulation No 426/86 on the minimum price, a detailed rule for application within the meaning of Article 9(6) of that regulation.

65 Consequently, the answer must be that consideration of the question has disclosed no factor of such a kind as to affect the validity of Article 2(3) of Regulation No 2237/85.

Case C-353/93

The Community legislation

66 This case concerns the import of Morello cherries from what was then Yugoslavia in the period from December 1986 to August 1988. The following provisions were applicable at that time.

67 Article 9 of Regulation No 426/86, cited above, which provides for a minimum import price for certain products, does not apply to Morello cherries. However, the obligation to observe a minimum import price was imposed for Morello cherries, as a protective measure, by the following provisions.

68 Paragraph 1 and the first subparagraph of paragraph 2 of Article 18 of Regulation No 426/86 provide as follows:

'1. If by reason of imports or exports, the Community market in one or more of the products specified in Article 1 is exposed or is likely to be exposed to serious disturbances which might endanger the objectives set out in Article 39 of the Treaty, appropriate measures may be applied in trade with non-member countries until such disturbances or the threat thereof has ceased.

The Council, acting by a qualified majority on a proposal from the Commission, shall adopt rules for the application of this paragraph and shall define the cases and the limits within which Member States may take protective measures.

2. Should the situation referred to in paragraph 1 arise, the Commission, acting either at the request of a Member State or on its own initiative, shall decide what measures are necessary and communicate them to the Member States; such measures shall be immediately applicable.'

69 Article 25 of that regulation repealed Regulation No 516/77 and stated that citations of and references to that regulation were to be construed as referring to Regulation No 426/86.

70 By virtue of that provision, Article 14(2) of Regulation No 516/77, which is mentioned in the second citation in the preamble to Regulation No 1626/85, cited above, corresponds to Article 18(2) of Regulation No 426/86.

71 Article 1 of Regulation No 1626/85 determines the minimum import price for Morello cherries (paragraph 1) and provides for the application of a countervailing charge if the minimum price is not respected (paragraph 2).

72 Article 3(1) and (3) of that regulation provides:

'1. The following factors shall constitute the import price:

(a) the fob price in the country of origin;

and

(b) transportation and insurance costs up to the place of entry into the customs territory of the Community.

2. ...

3. If the invoice presented to the customs authorities has not been drawn up by the exporter in the country in which the products originated or if the authorities are not satisfied that the price declared reflects the fob price in the country of origin, the competent authorities of the Member State shall take the necessary measures to determine that price, in particular by reference to the importer's resale price.'

The main proceedings and the questions referred for a preliminary ruling

73 Tracotex, acting as a customs agent, made a number of declarations for the release into free circulation of consignments of Morello cherries from the country which was formerly Yugoslavia. It was acting on behalf of the importing company, De Leeuw's Handelsonderneming BV, established at Barendrecht (Netherlands).

74 The import declarations were made during the period from 17 December 1986 to 8 August 1988. Some of the declarations were accompanied by an invoice from a seller not established in Yugoslavia. The other declarations were accompanied by an invoice from a seller who was established in Yugoslavia but requested in the invoice that payment be made into the account of a third undertaking, established in Germany or at any rate not established in Yugoslavia.

75 During 1989 the FIOD carried out an investigation into the importing company. By decision of 23 November 1989 the Inspector requested Tracotex to pay a countervailing charge.

76 Tracotex brought proceedings against the Inspector's decision before the College van Beroep voor het Bedrijfsleven. In those proceedings Tracotex *inter alia* challenged the validity of Article 3(3) of Council Regulation No 1626/85, cited above, in so far as it gives the authorities of the Member States power themselves to determine the import price, if they are not satisfied that the price declared is the true one.

77 In those circumstances the College van Beroep voor het Bedrijfsleven stayed the proceedings pending a preliminary ruling by the Court on the following questions:

'(1) Must Article 3(3) of Commission Regulation (EEC) No 1626/85, in conjunction with Article 18(2) of Council Regulation (EEC) No 426/86, be interpreted as meaning that if the customs authorities are not satisfied that the price declared reflects the fob price in the country of origin,

(a) facts may be collected exclusively in order to determine which import price actually was agreed and paid, directly or indirectly, between the exporter and the importer;

or that

(b) the competent authorities are at liberty themselves to reconstruct an import price, within the meaning of Article 3(1) of Regulation (EEC) No 1626/85, for the transaction in question and in so doing take account of

— transactions other than those between exporter and importer, including in particular transactions at various stages of the commercial chain between the exporter and the importer,

and

— the importer's resale price, in a manner involving deduction from that price of a number of flat-rate items for costs (fixed amounts per 100 kg

gross) and profit (8% in the case of the intermediary trade), not deriving from the records of the importer and/or the intermediary?

(2) Is the aforementioned provision invalid under the hypothesis set out in 1(b) above on the ground that the Council regulation does not confer on the Commission the power to grant the competent national authorities such a large degree of discretion in determining whether or not the import price in a given case is below the minimum price?

(3) Must Article 3(3) of Commission Regulation No 1626/85 be interpreted as meaning that "the exporter in the country of origin" is to be understood exclusively as the exporter whose undertaking is established in the country of origin?'

The first question

78 Apart from the provisions referred to, the wording of this question and that of the third question in Case C-352/93 are similar. The relevant provisions of the basic Regulation No 426/86 and of Regulation No 1626/85 are identical in content to Article 14(2) of the basic Regulation No 516/77 and Article 4(3) of Regulation No 2742/82, as amended by Regulation No 936/84, respectively. The Commission and the Dutch and Greek Governments each submitted a single set of observations for the third question in Case C-352/93 and this question.

79 During the oral procedure, Tracotex submitted that this case is different from the other two. It pointed out in particular that it is not associated with the intermedi-

ary from which it purchased the Morello cherries and is not associated with the resellers either. Moreover, it was established that its principal, De Leeuw's Handelsonderneming, had bought and resold the Morello cherries at a price higher than the minimum price.

80 Tracotex submitted that in this case the import price had been reconstructed, not because it was impossible to establish the price actually paid, but merely because the price had been established by an intermediary. That method of proceeding was contrary to the interpretation of the Court in Case C-81/92 *Dinter* [1993] ECR I-4601.

81 In any event, reconstruction of the import price had to be done in a reasonable, non-arbitrary fashion. To allow the customs authorities a complete discretion in that respect would be contrary to legal certainty and would displace trade flows.

82 It must be noted to begin with that in the *Dinter* judgment the Court held (in paragraphs 17 and 18) that the method of determining the import price, applicable in accordance with Article 3(3) of Regulation No 1626/85 if the invoice presented to the customs authorities has not been drawn up by the exporter in the country in which the products originated, applies only if there are no other elements or if the customs authorities have doubts as to the price stated on the invoice. Also in that judgment the Court held that the countervailing charge cannot be levied, even where the goods have been bought by the importer from an intermediary who is not established in the country of origin of the goods, if it is certain that both the price paid to the intermediary by the importer and the resale price then charged by the importer are higher than the minimum price, since in that event the objective of protection pursued by the protective measures is attained.

83 On the other hand, if there is doubt as to whether the price declared is the true one, having regard to the identical content of Article 3(3) of Regulation No 1626/85 and Article 4(3) of Regulation No 2742/82, the reasoning underlying the interpretation of the latter provision (see in particular paragraphs 34 and 36 above) is also valid for the former provision.

84 Consequently, the answer to this question must be that Article 3(3) of Regulation No 1626/85 is to be interpreted as meaning that if the competent authorities have doubts as to whether the import price declared is the true one, they may take all necessary measures to establish that price.

The second question

85 Apart from the provisions referred to, this question is identical to the fourth question in Case C-352/93. The relevant provisions of the basic Regulation No 426/86 and of Regulation No 1626/85 are also identical in content to the corresponding provisions referred to in that fourth question. The Commission and the Dutch and Greek Governments each submitted a single set of observations on the fourth question in Case C-352/93 and on this question.

86 During the oral procedure Tracotex submitted that Regulation No 426/86 does not allow the Commission to confer on the national authorities such extensive power with respect to the determination of the import price.

87 Having regard to the reasons stated in paragraphs 41 to 43 above, which apply *mutatis mutandis*, the answer must be that consideration of the question has disclosed no factor of such a kind as to affect the validity of Article 3(3) of Regulation No 1626/85.

The third question

88 The Dutch Government and the Commission consider that the exporter referred to in Article 3(3) of Regulation No 1626/85 can only be a person established in the country of origin of the goods.

89 Tractotex suggests that the question should be answered in the negative. It asserts that having regard to the purpose of Regulation No 1626/88 and the *Dinter* judgment, the place of establishment of the intermediary is not a relevant criterion for the application of Article 3(3), if it is established that the importer bought and resold the goods at a price higher than the minimum price.

90 That objection is based on the interpretation that it is enough for the exporter not to be established in the country in which the products originated for a countervailing charge to be levied. That interpretation is not correct. As can be seen from the *Dinter* judgment, cited above, the countervailing charge cannot be levied if it is certain that both the price paid to the intermediary by the importer and the resale price then charged by the importer are higher than the minimum price (see paragraph 82 above).

91 Moreover, it suffices to note that in view of the clear, non-ambiguous wording of Article 3(3) of Regulation No 1626/85, the phrase 'the exporter in the country in which the products originated' can only refer to an exporter whose undertaking is established in the country of origin of the goods.

92 Consequently, the answer to this question must be that Article 3(3) of Regulation No 1626/85 is to be interpreted as meaning that the phrase 'the exporter in the

country in which the products originated' refers exclusively to an exporter whose undertaking is established in the country of origin of the goods.

Costs

93 The costs incurred by the Dutch and Greek Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven by three orders of 23 April 1993, hereby rules:

Case C-352/93

1. **Community law is to be interpreted as meaning that the legal basis for calculation of a countervailing charge imposed for the first time after delivery of the judgment of 11 February 1988 in Case 77/86 National Dried Fruit Trade Association [1988] ECR 757 is Article 2(2) of Commission Regulation**

(EEC) No 2742/82 of 13 October 1982 on protective measures applicable to imports of dried grapes, in so far as it was not declared invalid by that judgment.

2. Article 4(3) of Regulation No 2742/82 is to be interpreted as meaning that if the competent authorities have doubts as to whether the import price declared is the true one, they may take all necessary measures to establish that price.

3. Consideration of the question has disclosed no factor of such a kind as to affect the validity of Article 4(3) of Regulation No 2742/82.

Case C-351/93

1. Article 2(3) of Commission Regulation (EEC) No 2237/85 of 30 July 1985 laying down detailed rules for the application of the minimum import price system for dried grapes is to be interpreted as meaning that if the national authorities have doubts as to whether the import price declared is the true one, they may take all necessary measures to establish that price.

2. Consideration of the question has disclosed no factor of such a kind as to affect the validity of Article 2(3) of Regulation No 2237/85.

Case C-353/93

1. Article 3(3) of Commission Regulation (EEC) No 1626/85 of 14 June 1985 on protective measures applicable to imports of certain Morello cherries is to be interpreted as meaning that if the competent authorities have doubts as to whether the import price declared is the true one, they may take all necessary measures to establish that price.

2. Consideration of the question has disclosed no factor of such a kind as to affect the validity of Article 3(3) of Regulation No 1626/85.

3. Article 3(3) of Regulation No 1626/85 is to be interpreted as meaning that the phrase 'the exporter in the country in which the products originated' refers exclusively to an exporter whose undertaking is established in the country of origin of the goods.

Schockweiler Kapteyn Mancini

Kakouris Murray

Delivered in open court in Luxembourg on 19 January 1995.

R. Grass

Registrar

F. A. Schockweiler

President of the Sixth Chamber