OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 6 DECEMBER 1972 [1]

Mr President,

Members of the Court,

I have to consider today two references for preliminary rulings by the Hessisches Finanzgericht. The underlying problems in each have some features in common. The Court has therefore directed by Order dated 18 October 1972 that the two cases be joined for the purpose of the oral proceedings and for this reason I propose dealing with them together in my opinion.

What is the issue in these applications?

They concern imports of maize from Italy into the Federal Republic of Germany and the amounts of the levy to be charged on importation. The first case (of the proceedings instituted by the Getreide-Import-Gesellschaft) is concerned with imports made at the end of 1965 under licences issued on 9 and 10 December 1965. In the second case (of the proceedings instituted by the Gesellschaft für Getreidehandel) imports were to be made from January to June 1966 under import licences at a predetermined levy issued from January to March 1966.

The all-important element in the calculation of these levies, as we know from a series of other proceedings, was the free-at-frontier prices as determined by a decision of the Commission with effect from 6 December 1965. In the second case decisions of the Commission on price determinations as reproduced in the Agricultural Supplements to the Official Journals of 12 January 1966, 2 February 1966, 23 February 1966, 2 March 1966 and 9 March 1966 had to be considered.

In regard to these decisions both firms of importers are of opinion that they were not given a correct determination of the free-at-frontier prices. In the first case, apart from other arguments submitted in the course of proceedings in the national court, it was contended that the Commission acted incorrectly in taking account of price quotations for imported North American maize which were below the Italian threshold price, instead of taking price quotations for maize produced in Italy, the latter course alone being permissible. In the second case the firm of importers likewise submitted that the Commission had incorrectly based its decision on price quotations for North American imported maize. Further however it objected to the Commission's choice of the most representative market for export to the Federal Republic of Germany within the meaning of Article 3 of Regulation 19 (Official Journal 1962, p. 933) and Articles 2 and 3 of Regulation 89 (Official Journal 1962, p. 1899) claiming that instead of the price quotations listed in Padua those listed in Milan should have been used. Finally the objection was raised, as in the main action in Case 17/72, that the conversion of the free-at-frontier prices expressed in Italian lire was made into DM on the basis of the exchange rate declared to the International Monetary Fund (IMF). In the opinion of the firm of importers the Commission in accordance with Article 2 of Regulation 129 (Official Journal 1962, p. 2553) should have authorised the actual current exchange rates, which were higher, as the basis for the conversion; this course would have meant a reduction in the amounts of the levy.

In view of these objections the Hessisches Finanzgericht, before which the firm of importers brought the case, has suspended proceedings by Orders

1 — Translated from the German.

dated 12 and 28 June 1972 and referred the following questions for a preliminary ruling:

1. (Case 41/72):

'Is the decision of the Commission of the EEC of 3 December 1965 (Official Journal (Agricultural Supplement) No 7/65 of 8 December 1965, p. 1612 and p. 1625, Table B), whereby it fixed the free-at-frontier price for imports of maize from Italy to the Federal Republic of Germany at 51 751 lire per metric ton as from 6 December 1965, valid or not?'

2. (Case 55/72):

'Are the decisions of the EEC Commission published in the EEC Official Journal (Agricultural Supplement) No 1 of 12 January 1966, p. 16/66 B; No 4 of 2 February 1966 p. 118/66 B; No 7 of 23 February 1966 p. 213/66; No 8 of 2 March 1966 p. 250/66 B and No 9 of 9 March 1966 p. 285/66 B, determining the free-at-frontier price for the import of maize from Italy to the Federal Republic of Germany, valid?'

We must now consider how these questions are to be answered.

1. Case 41/72

Here, as I have already said, the only problem is whether the Commission used the proper price quotations in fixing the free-at-frontier price ruling from 6 December 1965; as the plaintiff in the preliminary proceedings contends, these were the quotations for Italian produced maize and not the lower quotations for imported American maize. A lengthy discourse on this point is not called for. In the proceedings we were told that in fact up to 10 December 1965 the Commission used the prices for Italian maize supplied to it by the Italian Ministry of Agriculture and by the 'ONIC' and that only later did it change its practice and use the prices quoted for American imported maize. This appears to have satisfied the plaintiff in the main action, who learned of this from the Commission's pleadings, and has consequently abstained from repeating and elaborating in the oral proceedings before the Court the objections it raised in the main action. So, as the only objection raised by the plaintiff in the main action is invalid, the answer to the question raised by the Hessisches Finanzgericht in Case 41/72 is that there is no room for doubt about the validity of the free-at-frontier price as determined with effect from 6 December 1965.

2. Case 55/72

I must give more time to the examination of the question raised in the reference in Case 55/72. As we have seen, three problems arise here. Having regard to the fact that the Commission from 10 December 1965 onwards (including the period from January to March 1966) used the quotations listed in Padua for imported maize in fixing the free-at-frontier price, we must consider whether this changed method is compatible with the principles regulating the cereal market, namely those in Regulation No 89. Then we must show whether the choice of Padua as the most representative Italian market was justified or whether the Commission should have used the price quotations listed in Milan. Finally there is the question already raised in Case 17/72, whether the conversion of the free-at-frontier prices expressed in Italian lire was correctly made on the basis of the rate of exchange declared to the International Monetary Fund (IMF) or whether the Commission can be accused of wrongful neglect in the exercise of its discretionary powers, as the plaintiff in the main action thinks it can, in failing to authorise a conversion on the basis of the actual current exchange rates, which were higher.

Let us now see how matters stand.

(a) First as to the choice of the determinative price quotations. Before investigating this point we must start by

observing that there was at the relevant time a divided market in Italy, imported maize being quoted lower than maize produced in Italy. Further it must be maintained (as the plaintiff in the main action set out in its pleadings and indeed as might have been supposed) that this may not have been attributable to differences in quality and a uniform price level could have been arrived at by conversion based on the Italian standard quality. On this we have heard from the Commission in the proceedings that there were certain differences in quality but in its view there was nevertheless a price difference of about 3 000 lire between imported maize and Italian maize acquired in the open market in Padua. In fact this phenomenon of a divided market could not be fully elucidated in the proceedings. Possibly — as we heard — psychological reasons for the strong demand for Italian maize (which is insufficient for Italy's needs), and also the fact that it was dealt with in small quantities through many hands, all played their part. Perhaps too it is material that under the levy system then ruling (to which I shall return presently) the intra-Community levy applicable to home-grown cereals was reduced by a flat-rate amount resulting in a stronger demand by importers from other Member States for Italian maize than for maize imported cheaply from third countries because of a lower Italian threshold price. Be that as it may, the important fact is that there were unquestionably different prices ruling for Italian maize and for imported maize.

In these circumstances the Commission, as we know, relies first and foremost on the judgment in Case 16/65 (Recueil 1965, p. 1081) in its attempt to justify determination of the free-at-frontier price by reference to the quotations for imported maize. In this case also, you will recollect, the issue was the validity of a free-at-frontier price and the point there too was whether quoted prices for cereals harvested outside Member States which were being dealt in on the open market could be used for this purpose. As you know, the Court approved the argument that Regulation No 19 did not seek to distinguish between products harvested in the exporting Member State and those being dealt in on the open market there. If however this conclusion was applicable to barley exports from the Netherlands, then, in the opinion of the Commission, no different assumption can be made in the present proceedings in relation to maize exports from Italy.

Nevertheless certain objections must be raised against this line of argument, attractive as it is in itself, chiefly because the facts of the two cases are different. As I understand it, there were in Case 16/65 no price differences between home-produced and imported cereals, and the Commission has given evidence of this; rather has a uniform market price developed in the Netherlands on the principle that similar goods are interchangeable, and their prices on the market interact and level themselves out. The Advocate-General referred to this in his opinion, and in this light it can certainly be assumed that the Court too reached its decision by reference to this principle. The situation here is quite different. As we have seen, contrary to certain economic principles, two separate markets, one for home-produced maize and the other for imported maize, have built up in Italy. So it can be said that an uncertainty such as we now have to consider did not arise at all in Case 16/65, and on these grounds we should not try to solve the present case simply by invoking the judgment in Case 16/65, and holding, as was done in that case, that the validity of the decisions on free-at-frontier prices is not affected by their being based on prices quoted for imported maize.

In my view we must definitely look to the system of regulating the levy, as we can deduce it from the relevant Community regulations, for the solution in the present case. In so doing we clearly cannot look in isolation at the instruction, contained in Regulation No 89, that the free-at-frontier price is to be determined on the basis of the price

most favourable to the importing Member State (which at that time was the price for imported maize). Such a view is contradicted by the important fact that Regulation No 86, issued at the same time, expressly created two different systems for intra-Community trade, one for produce harvested in a third country and the other for produce harvested in a Member State. In the latter case the intra-Community levy applied, that is a levy corresponding to the difference between the free-at-frontier price and the threshold price, less a flat-rate amount in the interests of intra-Community preference. Where on the other hand cereals not harvested in the exporting Member State were concerned, the higher levy for the produce of a third country was applicable. To ensure compliance with this differential treatment express provision was made that proof of the cereals' having been harvested in the exporting Member State should be given by production of the goods traffic certificate on Form DD 4; that the competent authorities of the exporting Member State should verify and certify the correctness of the relevant declarations of the exporter and that appropriate measures should be taken to prevent all risk of merchandise being substituted. In the light of these provisions it cannot be right, in conformity with the system, to ascertain an essential element (the free-at-frontier price) for the intra-Community levy reserved for home-produced cereals, by resorting to prices for imported cereals, for which there was a specific regulation. Moreover the method chosen by the Commission (consideration of the prices for imported cereals) could lead in some circumstances to intra-Community trade in home-produced cereals being considerably impeded or even stopped altogether. The plaintiff in the main action has sought to show how real was the fear that this could happen by citing on the one hand the considerable price differential that existed, over and above the flat-rate amount we have mentioned, between imported and home-produced cereals and on the other hand the exporter's considerably smaller profit margin taken into account in fixing the free-at-frontier price. Such an impediment to intra-Community trade in home-produced cereals could certainly not have been reconciled with the declared intention of Regulation No 19 to promote trade within the Community. It follows therefore from the system of regulating the levy, as there set out, that the only really feasible method of fixing the free-at-frontier price is one which, in an effectively divided market, looks only to prices which have ruled for produce harvested in the exporting Member State.

As against this however the Commission does advance an argument to which some weight must be given. It pointed to the fact that at the time when it calculated the Italian free-at-frontier price for maize on the higher prices quoted for Italian maize large-scale fraud was occurring, with importers falsifying goods traffic certificates or getting them surreptitiously by false declarations and taking imported maize into Germany on payment of the intra-Community levy. The control provided for in Regulation No 86 (Official Journal 1962, p. 1864) had not therefore been applied at all in practice and so the Commission must have had the right to fix the free-at-frontier prices on the basis of the prices at which the merchandise had actually entered the Federal Republic. This inevitably brings us to the question whether, at least in an exceptional situation of this kind, deviations from the system I have just indicated are permissible, and whether the fixing of the free-at-frontier price as practised by the Commission can be justified.

In my opinion the following detailed observations arise.

First of all it does not seem to me completely clear from the arguments put forward in the present proceedings to what extent the provisions of Regulation No 86 have been evaded by importers. In claiming that large-scale fraud has

occurred, the Community plainly relies on two pieces of evidence, viz. the very considerable increase in maize imports from Italy and the level of the offer prices free at Kufstein as ascertained at that time. There are however good grounds for doubting whether this is sufficient to justify the Commission's claim. In this connection the plaintiff in the preliminary proceedings points with some justification to the fact that before the coming into force of the common market organization for cereals in 1962 the German national import regulations had almost completely stopped imports from Italy by 'third country' levies on imports, based on world market prices. Even if Italy is itself a country in which a subsidy is given for maize, it does not seem impossible that, after the setting up of the common market organization with the object of stimulating intra-Community trade, a considerable trade in maize especially between Northern Italy and Southern Germany, developed in a perfectly normal way. Moreover, as to the fixing of the offer price free at Kufstein, it is to be observed that the values mentioned in this connection (50 000 lire) taking into account a profit margin of 1 025 lire and also the considerably lower estimated transport costs to Kufstein than those to Emmerich (about 6 000 lire) do not exclude all possibility of their having been based on the prices ruling for Italian maize (about 45 000 lire). The least, then, that can now be said is that the position is not sufficiently clear for the conclusions drawn by the Commission to be accepted without further question.

So we can accept the plaintiff's view that if large-scale fraud did in fact occur an attempt should have been made in the first place to counter this fraud before measures were taken which must have impeded particularly intra-Community trade in Italian maize. No steps were taken in this direction. Nor can we accept without question that such steps must have been unavailing since in the control over certificates of origin — a material factor here — there were provisions fundamental in importance for the control of the market, and those engaged in this trade were seemingly in a position to distinguish between the products in question — an inference to be drawn from the different price quotations for maize in Italy.

There still seems to me however to be one essential point. If evidence had come to light that the system laid down in Regulation No 86 was not functioning properly, it could not simply be repealed tacitly by the Commission, by changing the method of calculating the free-at-frontier prices. According to Article 15 (4) of Regulation No 19, Regulation No 86 was made in the so-called management committee procedure, i.e., with the participation of the representatives of the Member States. On these facts, (assuming the position as described by the Commission was the true one), a proper solution could only be found by expressly setting aside this ineffectual system of control by the procedure laid down for that purpose, or by taking special safeguard measures, (unless, all things considered, it had become clear that some dislocation of the flow of trade, which did not in any true sense constitute disturbance of the market, was preferable to impeding or stopping altogether intra-Community trade in Italian maize). So long however as the system provided for in Regulation No 86 remained in force and there was no evidence that it had become completely unenforceable, the only course open to the Commission was to apply the provisions of Regulation No 89 as envisaged in the system.

If, then, we reach the conclusion that prices for Italian maize could alone be used within the levy system in fixing the free-at-frontier prices for the purposes of the intra-Community levy in a divided market, it immediately becomes clear that the Commission acted illegally in fixing free-at-frontier prices for Italian maize from 10 December 1965 on the basis of quoted prices for imported maize.

(b) As to the second matter, the choice of the most representative market in Italy, I can be more brief.

The plaintiff in the main action quite rightly says that the reference in Regulation No 89 to the 'most favourable prices' cannot be read in its literal sense so as to extend to prices in a small market town with an insignificant turnover. We must rather, as the term 'most representative markets' implies, look to see whether significant quantities are dealt in; in other words only such places can be taken into account as affect the behaviour of markets and prices over a large surrounding area.

Nevertheless let me say at once that on the basis of this test it can hardly be claimed that the choice of Padua was inappropriate as a representative market and that the state of prices in Milan should have been taken as a basis instead. (In the opinion of the plaintiff, who also looks only at localities in Northern Italy, this is the only place which should have been considered.) After all we have heard in the proceedings it cannot be accepted that Padua has only a provincial exchange of no significance outside its own locality. On the contrary the town lies at the heart of a maize growing area with important harvests, an area from which, as from other adjoining cultivated areas, substantial quantities of produce were presumably marketed through Padua. In addition substantial quantities of maize are imported through Ravenna, particularly for the processing industry there, and the price quotations for these correspond with those for home produce in Padua, this being the nearest cereal exchange. Moreover since the plaintiff could not disprove that the transport costs from Padua to the Federal Republic work out more favourably than those from Milan (a material point in Regulation No 89) and as the Italian Ministry of Agriculture has apparently always given Padua as the most representative market for export to the Federal Republic of Germany, there remains really nothing against the choice of this place for the purposes of Regulation No 89.

As regards, then, the choice of the most representative export market, no objection can arise to the validity of the free-at-frontier prices now under consideration and this, may I add, even if, contrary to my arguments, it is considered permissible to take account of the prices for imported cereals in fixing the free-at-frontier price.

(c) A final point in the decision referring the questions concerns the question of conversion of free-at-frontier prices, which were made according to the exchange rates declared to the International Monetary Fund (IMF) and not, as the plaintiff considers correct, on the basis of the actual exchange rates, which were higher.

On this the Commission observes, and rightly so, that the problem is not one of the validity of the free-at-frontier prices, which as we know were expressed in lire. It maintains that the question of conversion is material only in relation to certain elements (freight and transhipment costs) in the calculation, on which however the plaintiff makes no complaint.

Nevertheless no objection can be made in the present proceedings, any more than in Case 17/72, to the problem raised by the plaintiff being included for consideration, since the legality of the calculation of the levy by the national authorities depends on the choice of the rate of exchange, and thus on the question whether the Commission improperly failed to authorize the use of the actual exchange rates, as is provided under certain conditions in Regulation No 129 of the Council.

Let us then consider the position.

In so far as the plaintiff refers in this connection to Regulation No 67 (Official Journal 1962, p. 1860) no lengthy exposition is necessary. It is an established fact that a like argument in Case 17/72 has already been rejected. So it is clear, as already shown in the conclusions, that the sole purpose of Regulation No 67 is to make a change in

the levy rates only in case of certain minimal variations in individual elements in the calculation, in the interests of simplifying administration. On the other hand it cannot be inferred from this Regulation that when such variations occur they must always be considered as disturbing the market and that from this a general principle applying in other connections can be inferred. For dealing with the problem in hand as little help is to be obtained from Regulation No 67 as it was in Case 17/72.

Moreover, let me say at once that I am not impressed by the plaintiff's argument that there must be included in the variations permissible under Regulation No 67 those arising from the variation of the actual exchange rates from those declared. If we proceed thus and consider that a tolerance limit of 0·75 units of account was valid for the Federal Republic on the basis of Regulation No 67, we arrive in some circumstances at a complete change in the order of magnitude of the profit margin taken into account in fixing the free-at-frontier price, which precludes the transaction of business and so constitutes a self-evident disturbance of the market within the meaning of Regulation No 129. Actually this reasoning has only a semblance of logic. For it is conceivable that the margins of tolerance in Regulation No 67 could redound to the advantage of the importers; on the other hand it would have to be known, before a precise conclusion could be drawn in the sense proposed by the plaintiff, whether favourable buying prices in an individual case, favourable transport facilities and the possibility of financing in the futures market did not permit business on a satisfactory scale in spite of unfavourable exchange rates. As to this we know nothing. All we know is that although the Commission has made no use of the powers contained in Regulation No 129, no serious difficulties have been encountered so far by reason of differing exchange rates; certainly there has never been any threat to the functioning of the Common Market, and this alone would be a condition for the application of Regulation No 129. Moreover as the variations of the exchange rates put forward by the plaintiff in the present case, if I understand correctly, were smaller in scope than those mentioned in Case 17/72, there is just as little occasion as in that case to argue for a misuse of discretionary power by the Commission in applying Regulation No 129 which could have affected the legality of the levy.

3. Now let me sum up.

(a) As to Case 41/72, it emerges that the validity of the determination of the free-at-frontier price in this case cannot be in doubt, because up to 10 December 1965 the Commission, as has been shown, worked on price quotations for Italian maize.

(b) As to the relevant decisions on free-at-frontier prices in Case 55/72, it must be said that they cannot be taken as valid in law because the Commission, contrary to the system created in Regulation No 86 which provides a distinct separation of the levy schemes, took account of quoted prices for imported maize which were considerably below those ruling for maize produced in Italy. There remain, however, no other effective arguments against the validity of the free-at-frontier price decisions.