OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 17 FEBRUARY 1976 [1]

Mr President,
Members of the Court,

Article 19 of Regulation No 120/67 on the common organization of the market in cereals (OJ English Special Edition, 1967, p. 33) provides that the necessary measures may be taken when the cif price of one or more of the products mentioned in Article 2 — common wheat, durum wheat, barley, maize and rye — is appreciably higher than the threshold price, and that situation is likely to continue, thereby disturbing or threatening to disturb the Community market.

Basic rules made pursuant to this provision were adopted by Regulation No 1968/73 of the Council (OJ L 201, 1973 as amended by Regulation No 2632/73 of the Council (OJ L 272, 1973). Accordingly, where the conditions specified are met, export levies may be applied. Further, there are set out, *inter alia,* the factors which are to be taken into account when fixing the export levy. Of these I mention in relation to the products referred to in Article 1 (d) of Regulation No 120/67, which include cereal-based mixed animal foods, the factor referred to in Article 3 (2) (b), according to which there should be taken into account the 'amount of cereals required to manufacture those products, and, where appropriate, the value of by-products'.

A situation in which the introduction of an export levy in the cereals sector appeared appropriate arose for the first time in August 1973. In due course export levies were imposed in accordance with Regulation No 2207/73 of the Commission (OJ L 226, 1973) first for barley and maize. Subsequently the system was further and further extended. Under Regulation No 311/74 of the Commission (OJ L 34, 1974) which entered into force on 7 February 1974 it applied to cereal-based mixed animal food under tariff heading 23.07. A uniform rate of levy of 26·25 u.a. per metric ton for all products under the tariff heading was applied, and continued unaltered until 24 February 1974 by virtue of the subsequent Regulations Nos 317/74 (OJ L 35, 1974), 381/74 (OJ L 43, 1974), 410/74 (OJ L 46, 1974), and 427/74 (OJ L 49, 1974). Regulation No 433/74 of the Commission (OJ L 50, 1974) then introduced an amendment with effect from 25 February 1974. The levy nomenclature was altered, that is, the animal feedingstuffs were distinguished according to their content in cereal products within the meaning of Chapter 10 and tariff headings 11.01 and 11.02, except for tariff heading 11.02 G, and the levy was differentiated accordingly. In respect of goods having a content in cereal products of between 5 and 15 % by weight it was 3·50 u.a. and in respect of goods having a content in the cereal products in excess of 65 % by weight it was 24·50 u.a.

These provisions are important in the present case for the following reasons.

In the period from 7 February 1974 to 22 February 1974 the Firma Effem of Verden, which manufactures mixed animal foods for dogs and cats, exported mixed animal foods under tariff headings 23.07 B I a 1 and 23.07 B I b 1 to third countries. It had to pay an export levy on this as fixed in the abovementioned regulations of the Commission. Effem does not consider these levies to be

1 — Translated from the German.

lawful. In its opinion they are excessive; it says that all that would be lawful would be at most an amount such as that provided for in Regulation No 433/74 of the Commission in so far as the products exported by it had any cereals content at all, which was the case to an extent of, at most, between 5 and 15 % by weight.

Effem therefore appealed to the Finanzgericht Hamburg against the assessment to levy. In particular it claims that the Commission in adopting the regulations referred to in the order making the reference, did not follow the criteria in Regulation No 1968/73 of the Council, as amended by Regulation No 2632/73, and in particular failed to take account of the factors mentioned in Article 3 (2) (a) — (c). The levy should have been assessed according to the content in cereals components. Only goods under tariff heading 23.07 B I a 1 exported by it contained such cereals components. Products under tariff heading 23.07 B I b 1 contained starch but not cereals within the meaning of Chapter 10 and within the meaning of tariff headings 11.01 and 11.02. Moreover the Commission should have differentiated the levy according to the content in cereals components. A system of levies under which the amount of the levy far exceeds the value of the ingredients charged can in no way be regarded as permissible.

The Finanzgericht considers the doubts so expressed as to the validity of the rules relating to levies relevant in the present case as not unfounded. By order dated 5 August 1975 it therefore stayed the proceedings and referred the following question for a preliminary ruling under Article 177 of the EEC Treaty:

Are Regulations (EEC) Nos 311/74 of 6 February 1974, 317/74 of 7 February 1974, 381/74 of 14 February 1974, 410/74 of 18 February 1974 and 427/74 of 20 February 1974 of the Commission valid in so far as a uniform rate of levy of 26·25 u.a. per metric ton was fixed for the products listed in the annex to these regulations under tariff heading 23.07 without regard to the level of starch or should varying rates of levy have been fixed for products under this tariff heading as was done in the annex to Regulation (EEC) No 433/74 of 21 February 1974?

In judging the validity of the regulations of the Commission which have been mentioned the Commission is certainly right in remarking that it ought to take *preventive* action to protect the common market. It did not in any way have to wait for a dangerous trend in exports and react with specially adapted measures on the basis of its experience. On this point reference may be made to the basic rules on which the measures of the Commission are founded. Thus in Article 19 of Regulation No 120/67, as we have seen, mention is made not only of market disturbances but also of *threatened* market disturbances. Likewise Regulation No 1968/73 of the Council, which lays down basic rules on the matter, expressly mentions, among the factors to be taken into account, the need to *avoid* disturbances on the Community market.

If it is clear that the Commission was entitled to take preventive action, this means at the same time that it had to act on the basis of forecasts derived from a number of factors. When action of this kind is taken errors can never be excluded. If they do occur this does not necessarily mean that the objective sought by the Commisson is unlawful. In particular, such a conclusion cannot be justified solely retrospectively, that is to say, a simple comparison of Regulation No 433/74 adopted at the end of February, which is the result of experience acquired and possibly of a changed economic situation, with the regulations adopted at the beginning of February, does not justify a finding that the earlier regulations are illegal.

The Commission is, moreover, right when it points out that it has a large

measure of discretion in adopting measures of economic policy, as in the present case. The regulations of the Council laying down general rules to be applied in the event of disturbances in the cereals sector do not contain throughout precisely specified criteria; such vaguely worded factors as 'prevention of market disturbances' or taking account of 'the economic aspect of the export' have a part to play. So, too, do various aspects of the criteria laid down by the Council, which require to be balanced and set off against each other. In judging the matter this must be borne in mind as well as the other fact that in the sphere of these protective rules one cannot help proceeding in a comprehensive manner, as is generally the case in the organizations of the agricultural markets. It is therefore impossible to require of the Commission that it consider each product according to its special properties; it is necessary to acknowledge that it is entitled to proceed by grouping products if this appears appropriate in the situation of the market.

Nevertheless I have considerable doubts whether the measures taken by the Commission in the sector which concerns us here may be regarded as justified. In this connexion, as the plaintiff in the main action rightly pointed out, it is not a question of the assessment of the amount of the levy for tariff heading 23·07 which is based on the levy on maize and an average maize content of 75 %, but all that is important is whether the Commission could be required to differentiate according to groups of products within the said tariff heading.

Several considerations are relevant in this respect.

First, it is important that the export levy was not applied for the first time in the spring of 1974 – quite apart from the fact that it is in a way a mirror image of the import levies which have long been in existence. There was therefore no situation existing in February 1974 requiring the Commission to set up complicated machinery for a large number of products in quite a short time, which would naturally have justified individual products not having an excessive amount of time and attention devoted to them. The system had been operated since August 1973, if at first only for particular kinds of cereals, and its scope was gradually extended. In February 1974 the extension was basically the inclusion of tariff heading 23.07, as a comparison with the last regulation before Regulatin No 311/74, namely Regulation No 255/74 (OJ L 28, 1974), shows. The Commission was thus concerned with a relatively narrow question and this naturally calls for a stricter criterion of judgment, even if as a matter of principle it is acknowledged that the Commission enjoyed a wide discretion.

We have also learnt from the Commission that it was induced to take the measure in question because it was compelled to find that since September 1973 an increasing number of export licences had been applied for in respect of mixed animal food which at the time was still free from levy. It could not avoid the impression that the imposition of export levies to cereals had led to a switch to cereal mixtures, that is mixed animal foods under tariff heading 23.07, in exports. In my opinion the obvious course of action in this situation was to direct the measures first against such cereal mixtures, especially since an extension to related products could be undertaken very quickly, as is shown by the quick succession of the regulations of the Commission which have to be considered here. On the other hand it is not easy to see why the measures were taken on a general basis for all mixed animal foods under tariff heading 23.07, including those in which cereal products constituted only a small element, that is to say, where there was virtually no danger for the cereal market.

Further, for the purposes of judging the issue it is significant that Article 3 (2) (b) of Regulation No 1968/73, the relevant basic regulation of the Council, expressly provides that regard shall be had to the quantity of cereals necessary to manufacture the relevant products. It is true that this rule applies to all the products referred to in Article 1 (c) and (d) of Regulation No 120/67. I would not, however, infer from this that a differentiation according to tariff headings is sufficient in every case. If this results in a scheme which is clearly not sufficiently refined for the purposes of the levy machinery and if the circumstances allow a more detailed consideration of the important principle of proportionality, a differentiation made within the framework of an individual tariff heading is quite appropriate. Naturally no reasonable person will require that this should cover in precise detail every individual product included within a tariff heading, which, like tariff heading 23.07, includes numerous mixtures. I think, however, that the Commission was not unduly burdened in making a rough subdivision by reference to a few groups, as it did when laying down the nomenclature in Regulation No 311/74 by reference to the starch content or as it did in Regulation No 433/74 by reference to the content in cereal products.

Even if one proceeds on the assumption that the Commission has a wide discretion, it seems to me that having regard to the fact that the Commission at the beginning of February 1974, on including tariff heading 23.07 in the export levy system, did not make a rough differentiation and included goods in the levy system which contain either none or only very small quantities of the products liable to levy, the conclusion must be drawn that its measures are not consistent with the general rules laid down by the Council and with the general principle of proportionality. The regulations of the Commission mentioned in the order making the reference are accordingly illegal. On the other hand, a comparison of the rate of levy provided for in the contested regulations of the Commission for tariff heading 23.07 with the maximum rate of levy laid down likewise for this tariff heading in Regulation No 433/74 — the economic situation cannot basically have changed so much — justifies the conclusion that there can be no objection to the latter regulation of the Commission because it introduced a certain differentiation and under it products containing a small proportion of cereal products attracted a relatively low rate of levy or, where the proportion was very low, there was no levy at all.

In my opinion the question from the Finanzgericht Hamburg should be answered to the effect that Regulations Nos 311/74, 317/74, 318/74, 410/74 and 427/74 are invalid in so far as they prescribed a uniform rate of levy in respect of all goods under tariff heading 23.07 without regard to their content in cereals.