OPINION OF ADVOCATE GENERAL TESAURO

delivered on 27 May 1993 *

Mr President,
Members of the Court,

1. In the present case, the Court is once again called upon to interpret Commission Regulation (EEC) No 1626/85 of 14 June 1985 on protective measures applicable to imports of certain Morello cherries. [1]

The regulation in question was adopted, on the basis of Article 14 of Council Regulation (EEC) No 516/77 of 14 March 1977, [2] in order to remedy the serious disturbances which were affecting the Community market because Morello cherries were being imported from non-member countries and marketed at abnormally low prices. Article 1 of the regulation lays down a minimum price at which Morello cherries may be imported into the Community and provides for a countervailing charge to be levied on those products which do not respect the specified price.

Article 2 of that regulation provides that the customs authorities are obliged, for each consignment at the time of completion of customs import formalities, to compare the import price with the corresponding minimum import price (paragraph 1); furthermore, the import price must be declared on the entry for free circulation, and the entry is to be accompanied by all the documents required to verify the price (paragraph 3).

The import price for Morello cherries from non-member countries is itself determined, in accordance with Article 3(1) of the regulation, by taking the fob price in the country of origin and the transportation and insurance cost up to the place of entry into the customs territory of the Community.

Moreover, Article 3(3) provides 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 competent authorities of the Member State consider that the price declared does not reflect the fob price in the country of origin, they are to take the necessary measures to determine that price, in particular by reference to the importer's resale price.

The regulation in question, applicable until 9 May 1986 (Article 5), was subsequently extended for one year by Regulation (EEC) No 1257/86. [3]

2. The facts of the case are relatively straightforward. From 1985 to 1987 Hans Dinter GmbH ('Dinter'), applicant in the

* Original language: Italian.

1 — OJ 1985 L 156, p. 13. See also Commission Regulation (EEC) No 1712/85 of 21 June 1985 amending the German, Greek, English, French, Italian and Dutch versions of Regulation (EEC) No 1626/85 (OJ 1985 L 163, p. 46).

2 — Regulation on the common organization of the market in products processed from fruit and vegetables (OJ 1977 L 73, p. 1).

3 — OJ 1986 L 113, p. 37.

main proceedings, imported into the Federal Republic of Germany various consignments of deep-frozen Morello cherries which originated in Yugoslavia but were exclusively purchased from an intermediary, namely Kraus & Kraus in Vienna. It is common ground that both the price paid by Dinter to the intermediary and Dinter's resale price exceeded the minimum import price. However, investigations carried out by the customs authorities revealed that the intermediary had purchased the goods in question at a price lower than the minimum import price.

The Hauptzollamt (Principal Customs Office) Bad Reichenhall based the comparison with the minimum import price on the (lower) purchase price paid by the intermediary and, in various decisions, demanded back payment from Dinter of countervailing charges amounting to DM 728 714.95.

3. In the action pending before the Finanzgericht München, Dinter challenged the legality of such a charge, because both the import price and the resale price exceeded the minimum import price. Furthermore, the applicant added that it had no knowledge of the purchase price paid by the intermediary, so that it could not have declared it. According to Dinter, ultimately its own resale price and not the purchase price paid by the intermediary should have been taken into consideration when comparing the import price with the minimum import price.

The Finanzgericht, considering that the outcome of the case depended on the interpretation of Regulation (EEC) No 1626/85, applied to the Court for a preliminary ruling on whether the said regulation should be interpreted as meaning that a countervailing charge cannot be levied in cases where both the import price and the importer's resale price exceed the minimum import price and, if so, whether the same rule can be applied when the sale which is the basis of the importation was concluded between the importer and a seller who is not established in the country of origin.

Accordingly, those questions are aimed essentially at identifying how the import price is to be determined when the importer has purchased the products from an intermediary who is not established in the country of origin of the imported products.

4. Let me remark, by way of introduction, that the detailed rules for the application of the protective measures referred to in Article 14 of Regulation (EEC) No 516/77 have been laid down in Council Regulation (EEC) No 521/77 [4] of 14 March 1977, which specifies the conditions subject to which protective measures may be adopted, as well as the sort of measures which can be taken; it provides, in particular, that the measures in question may be taken only to such extent and for such length of time as is strictly necessary (Article 2(2)). Moreover, in accordance with the principle of proportionality — recognized by the established case-law of the Court as one of the general principles of Community law — the legality of measures imposing financial burdens on traders is conditional upon those measures being appropriate and necessary for the achievement of

4 — OJ 1977 L 73, p. 28.

the objectives legitimately pursued by the legislation in question, on the understanding that, where there is a choice between several appropriate measures, recourse should be had to the least restrictive of those measures and that the burdens imposed should not be disproportionate to the aims pursued. [5]

Since Regulation (EEC) No 1626/85, which is the subject of this request for interpretation, seeks to prevent the marketing in the Community of imported products at abnormally low prices by the levying of a countervailing charge, [6] it follows that, in principle, a countervailing charge may not be levied where it appears that the protective purpose pursued has been achieved when the goods are imported.

5. In the present case, it is clear from the order for reference that the applicant paid a price higher than the minimum price for the goods which it imported into the Community. Moreover, investigations carried out by the customs authorities revealed nothing to suggest that the prices invoiced to the applicant were not the prices actually paid by the latter; in particular, those investigations did not lead to a finding that the applicant's resale prices were lower than the minimum import price.

In those circumstances, as the national court rightly pointed out, the aim of the protective measures in Regulation (EEC) No 1626/85, which is to shield the market from serious disturbances and to exclude the marketing of the products in question at abnormally low prices, must be considered as having been achieved and nothing would seem to justify the levying of a countervailing charge. Where the importer's purchase price and resale price are both higher than the minimum import price, it is impossible to see how there can be any detriment to the common market.

The regulation in question certainly does not aim to impose a minimum 'Community' price throughout the world, but only on the Community market: what matters therefore is that the products in question are imported and marketed in the Community at a price higher than the minimum import price. This minimum price must, consequently, be compared with the price paid by the importer, and not that paid by the intermediary.

6. In this respect, it should be emphasized that Article 3(1) of Regulation (EEC) No 1626/85, which defines the import price as the fob price in the country of origin, plus the transportation and insurance cost up to the place of entry into the customs territory of the Community, cannot be considered relevant if the sale which is the basis of the importation was concluded between the importer and a seller who is not resident in the country of origin. Such a provision can only apply to the classic situation where importation is directly from the country of origin, particularly since it would be

5 — See the judgment in Case C-24/90 *Werner Faust* [1991] ECR I-4905, paragraph 12, as well as the judgment in Case C-265/87 *Schrader* [1989] ECR 2237, paragraph 21.

6 — See the third recital.

unrealistic to require the importer to know and to declare the purchase price paid by the intermediary as the import price pursuant to Article 2(3) of the same regulation.

In such a case, the relevant provision is Article 3(3), which provides that *if the invoice presented has not been drawn up by the exporter in the country in which the products originated* the competent customs authorities are to take the necessary measures to determine the import price, taking as a basis the importer's resale price. That provision shows that the regulation in question has actually anticipated, albeit indirectly, the situation where an intermediary is involved in the transaction and has resolved it by providing that the import price is to be determined by reference to the importer's resale price. The result is that if the documents presented show, as they do in the present case, that the actual resale price exceeds the minimum import price, the latter price must be considered as having been respected and no countervailing charge may be levied.

That conclusion, which is compatible with the aim of the protective measures, is moreover confirmed by Articles 6 and 7 of Commission Regulation (EEC) No 2053/89 [7] of 10 July 1989 which now governs the subject and which is even clearer on the point in question.

7. In the light of the above considerations, I propose that the Court answer the questions submitted by the Finanzgericht München as follows:

Commission Regulation (EEC) No 1626/85 of 14 June 1985 on protective measures applicable to imports of certain Morello cherries must be interpreted as meaning that a countervailing charge cannot be levied where the sale which constitutes the basis of the importation has been concluded between the importer and a seller who is not resident in the country of origin of the imported products, when both the import price and the importer's resale price exceed the minimum price.

7 — Regulation laying down detailed rules for the application of the minimum import price system for certain processed cherries (OJ 1989 L 195, p. 11).