OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 4 July 1985 *

Mr President,
Members of the Court,

1. The questions which the Hessisches Finanzgericht [Finance Court, Hesse] has referred to the Court under Article 177 of the EEC Treaty by an order of 6 June 1984 concern the interpretation of several provisions of Regulation No 1608/74 of the Commission of 26 June 1974 containing 'special provisions in respect of monetary compensatory amounts' (Official Journal 1974, L 170, p. 38). Those provisions were introduced in order to ensure the smooth functioning of the common agricultural policy at a time when the frequent fluctuations to which several European currencies were subject were creating obstacles to trade in agricultural products. As stated in the fourth recital in the preamble, the main purpose of the regulation was to introduce 'a certain flexibility' into the Community rules by permitting the Member States to grant equitable relief after examining 'each individual case ... in the light of the loss suffered' by traders.

Article 1 determines the circumstances in which such relief may be granted: where monetary compensatory amounts are increased as a result of the amendment of the central rate of the currency of a Member State, the Member State in question is authorized 'to waive, on a discretionary basis and according to the following conditions, the monetary compensatory amount or so much thereof as corresponds to the increase'. According to Article 2 (2), such a measure may only be made use of 'at the request of the [trader] and if such party, at the time of making the request, furnishes proof that:

(a) in the case in question it is not necessary to levy the newly introduced or increased monetary compensatory amount to compensate for the effects of the monetary measures ... on the price of the product;

(b) to levy such an amount would constitute an excessive additional burden for him, which he could not avoid even taking all the necessary and normal care'.

Finally, Article 6 of the regulation provides that the abovementioned provisions apply to imports or exports carried out as from 4 June 1973.

2. Let us now turn our attention to the facts of the main proceedings. The adjustment made on 29 June 1973 to the central rate of the German mark brought about an increase in the monetary compensatory amounts. In a declaration of 3 July 1974 the German Government decided to avail itself of the provisions contained in Regulation No 1608/74 and, to that end, fixed a period of time within which applications were to be made. Such an application was made by Söhnlein Rheingold. That undertaking stated that on the basis of contracts concluded between November 1972 and March 1973, it had imported, between July and October 1973, a considerable quantity of table wine produced in France and Italy. It thus

* Translated from the Italian.

claimed that the increase in the monetary compensatory amounts brought about by the national monetary measure caused it to suffer an additional burden and since the conditions laid down in the Community regulation were satisfied it sought appropriate compensation for that loss.

The Hauptzollamt [Principal Customs Office] Wiesbaden rejected that application. Contending that it had a discretion as to whether the conditions laid down in the regulation actually existed, the Hauptzollamt alleged that Rheingold had not taken all 'necessary and normal care' to avoid the loss in respect of which it was seeking compensation. That decision, confirmed by the Oberfinanzdirektion [Principal Revenue Office] Frankfurt, was challenged by Rheingold in proceedings before the Hessisches Finanzgericht. In the judicial proceedings the Hauptzollamt repeated the arguments which it had already used in rejecting the complaint and added that equitable relief could not in any case be granted because Rheingold had entered into the import contracts before 3 June 1973 and they were thus not contracts to which the Community rules applied.

It was in relation to the arguments advanced by the Hauptzollamt that the German court considered it appropriate to refer the following questions to the Court of Justice:

(1) Must Regulation (EEC) No 1608/74 be interpreted as meaning that the waiver or refund on equitable grounds of monetary compensatory amounts levied on imports may be considered only where the contracts in pursuance of which the imports were carried out were concluded after 3 June 1973?

(2) Must Regulation (EEC) No 1608/74 be interpreted as meaning that, where the relevant conditions are satisfied, a right to the waiver or the refund of monetary compensatory amounts exists, or do the Member States have discretion as regards not only the decision concerning the application in principle of the regulation but also the decision as to the waiver or refund in individual cases?

3. The problem raised by the first question is simple. As I have already said, Article 6 of Regulation No 1608/74 makes the measures provided for in that regulation applicable as from 4 June 1973. The reason for the choice of that date is that it is the date of the entry into force of Regulation No 1463/73 of the Commission of 30 May 1973 laying down detailed rules for the application of monetary compensatory amounts (Official Journal 1973, L 146, p. 1). That regulation significantly modified the rules governing monetary compensatory amounts but, until the regulation under consideration in this case was adopted, it had not been followed up with provisions capable of aleviating the position of traders who suffered loss as a result of national monetary measures.

That was the reason why Regulation No 1608/74 was given retroactive effect. It should be noted, moreover, that the date at which the latter regulation came into effect is expressly related to 'imports or exports'. However, as the Commission observes, imports or exports carried out on 4 June 1973 or in the days immediately following presuppose of necessity contracts concluded before that date. The reply to the question raised by the national court cannot therefore be other than negative.

4. With regard to the second question, I note that according to the settled case-law of the Court, Regulation No 1608/74 'has given the Member States a margin of discretion which permits them to judge the application to each individual case of the discretionary measure, including the circumstances such as to justify the grant or refusal of an exemption' from the

compensatory amounts (see, in particular, judgment of 2 March 1978 in Joined Cases 12, 18 and 21/77 *Debayser* v *Commission* [1978] ECR 553; judgment of 10 May 1978 in Case 132/77 *Société pour l'exportation des sucres* v *Commission* [1978] ECR 1061).

The reason for that principle is obvious. Since it is based on equitable considerations, complete or partial exemption from the amount cannot be decided on the basis of abstract or pre-conceived presumptions but only in the light of the actual situation of the applicant and having regard to the damage which he has actually suffered. As we all know, equity is by definition justice in the individual case and it was precisely in order to do justice in the individual case that the Community legislature considered it appropriate to leave to the Member States the administration of the discretionary measure which permitted exemption to be granted. Only the national authorities are in a position 'to judge the circumstances and to verify the facts of the case' (see sixth recital in the preamble).

Rheingold does not agree. In its view, the discretionary measure must be applied in the same way in all the Member States and that implies that relief must be granted automatically. However, in addition to the points that I have already made, the fourth recital in the preamble to the regulation at issue also runs counter to that proposition. Far from guaranteeing traders protection of a general nature, and therefore a right, the legislature limited itself to introducing a 'certain flexibility' into the Community rules. 'Flexibility' can only mean that the national authorities are entitled to make an assessment as to the existence of the conditions which must be satisfied if the exemption is to be granted and, in particular, the degree of care which the trader showed in attempting to avoid or mitigate the excessive burden of which he is complaining.

5. On the basis of the foregoing considerations, I propose that the Court should reply as follows to the questions referred to it for a preliminary ruling by the Hessisches Finanzgericht by an order of 6 June 1984:

(1) Regulation No 1608/74 of the Commission of 26 June 1974 must be interpreted as meaning that the waiver or refund on equitable grounds of monetary compensatory amounts levied on imports may be granted even where the contracts in pursuance of which the imports were carried out were concluded before 4 June 1973.

(2) Under that regulation Member States have a discretion not merely as regards the application in principle of the provision on equitable relief but also as regards the decision to grant a waiver or refund of the monetary compensatory amounts on the basis of the circumstances of each individual case.