On those grounds,

THE COURT

in answer to the questions referred to it by the Rechtbank van Eerste Aanleg by judgment of that court of 8 May 1981, hereby rules:

Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Regulation No 1174/68 of the Council of 30 July 1968 on the introduction of a system of bracket tariffs for the carriage of goods by road between Member States.

Mertens de Wilmars Pescatore O'Keeffe

Everling Mackenzie Stuart Bosco Due

Delivered in open court in Luxembourg on 30 November 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 26 OCTOBER 1982 [1]

Mr President,
Member of the Court,

The case before the Court is a reference for a preliminary ruling by the Rechtbank van Eerste Aanleg [Court of First Instance], Ghent, which, as in Case 12/82 *Trinon*, concerns the rules on tariffs for the carriage of goods by road between the Member States, However, it differs from that case in two respects:

1 — Translated from the French.

Firstly, there is not doubt that the questions laid before the Court relate to the validity of Community rules;

Further, this case has its origin in the devaluation of the French franc in relation to the Belgian franc and the consequences for transport operators established in Belgium. It thus constitutes a new illustration of the legal problems posed by the monetary instability which affects relations between the currencies of the Member States.

The facts

The facts as they appear from the file on the case and from the oral argument are as follows:

Petrus Suys, a carrier of goods by road for remuneration, was charged before and found guilty as principal by the Politierechtbank [local court with jurisdiction in respect of minor offences] of having made five contracts of carriage from France to Belgium between 4 and 26 January 1979 at prices less than the lower limit of the compulsory bracket tariffs.

The same decision found the intermediaries between the French customers and Mr Suy's company to be accomplices and held the various companies in question to be liable in civil law.

The background to those charges seems to have been as follows:

French undertakings sold their products in Belgium inclusive of transport costs; thus, SECOPA of Clermont-l'Hérault sold wine to the GB supermarkets of Belgium;

They required a carrier and for that purpose contacted a Belgian undertaking which, acting as agent, made on their behalf a contract with the company of which Mr Suys is a director and which assumed responsibility for the carriage;

The French customers agreed to pay only in French francs at the minimum Franco-Belgian rate contained in the Royal Decree of November 1971 and expressed in French francs.

The Belgian agent who received payment changed the French francs into Belgian francs at the only rate available, namely the market exchange rate of FF 1 : BFR 6.85.

That sum converted into Belgian francs was paid to the company responsible for the carriage which entered it in its books of account.

When inspectors from the Belgian Ministry of Transport carried out checks at the registered office of the company they found that the amount was less than the lower limit of the tariff expressed in Belgian francs and that there was an infringement of the Royal Decree of 17 November 1971 as amended.

The carriers maintained before the Politierechtbank that the infringement was due solely to the artificial nature of the parity between the Belgian franc and the French franc adopted in the tariff which in addition led to a distortion of competition in relation to competitors established in France.

According to them, their customers in France insist on paying the costs of carriage in French francs at the minimum rate which places them in a specially unfavourable position.

The carrier established in France is paid in his own currency and runs no "risk" as regard exchange rates.

On the other hand the carrier established in Belgium has to convert the amount received in French francs into Belgian francs and can do so only at the market rate, namely FF 1 : BFR 6.85 (at the time in question).

He thus receives in Belgian francs a sum less than what he would receive under the parity adopted in the Royal Decree (FF 1 : BFR 9), whereas *only* the latter parity places him on an equal footing with his competitors established in France.

In addition he is in breach of the Belgian rules and the rate agreed in the contract leads upon conversion to a lower rate than that expressed in Belgian francs.

By judgment dated 15 April 1980 the Politierechtbank, Ghent, imposed fines on the defendants for contravention of the Royal Decree of 1971. In the grounds of its judgment the court recognized that the change in monetary parities placed the Belgian transport undertakings in a very difficult competitive position *vis-à-vis* French firms but considered that the provisions of the Royal Decree must be applied.

An appeal was made to the Rechtbank van Eerste Aanleg, Ghent.

That court found that the Belgian rules upon which the prosecution was based were a result of Regulation No 1174/68 which refers to Article 75 of the Treaty. After summarizing the argument of the appellants on the discriminatory effects of the minimum tariffs expressed in Belgian francs laid down in the Royal Decree of 1971 it cited the recital in the preamble to the regulation according to which the tariffs must avoid damaging competition and be fixed by reference to a base-rate, set with due regard to the cost of the relevant transport operations and to the state of the market and in such a way as to provide a fair return for carriers (fifth recital). The Rechtbank van Eerste Aanleg emphasized also "the mandatory nature of the bracket tariffs in relation to the carriage of goods between Member States."

For those reasons the Rechtsbank queried the validity of Regulation No 1174/68, stayed the proceedings, and requested this Court, pursuant to Article 177 of the Treaty, to give a preliminary ruling on the following questions:

"1. Is Regulation No 1174/68 of the Council of 30 July 1968 compatible with Article 75 of the EEC Treaty if no provision is made to eliminate the disparity in currencies between Member States?

2. Is the regulation compatible with its aim that tariffs must be drawn up in such a way as to avoid both abuse of

dominant positions and damaging competition?

3. As a measure adopted by the Council, must the regulation still be regarded as valid if instead of producing harmonization it leads to excessive discrimination between the inhabitants of the various Member States?"

Before considering the answers which may be given to those questions it is appropriate to set out the legislation applicable to the case.

The relevant legislation

A — (1) Although it was no longer in force at the material time Regulation No 1174/68 of the Council of 30 July 1968 must be considered here. The majority of its provisions setting up a system of compulsory bracket tariffs for the carriage of goods by road between Member States were repeated in the regulation which replaced it. Moreover the original version of the Belgian Royal Decree, which is the basis of the charges which have given rise to the proceedings, was adopted on the basis of Regulation No 1179/68.

All relevant operations between the Member States were subject to this *compulsory* system of tariffs. [1] It was called a "bracket" system because the rates for each transport operation had to be fixed within a margin, called the "bracket spread", between the upper and lower limits of the tariff. [2]

"The bracket spread" was "23% of the maximum rate". [3]

Each tariff had to be drawn up by reference to a base-rate, which was the middle point of the bracket. The base-rate was fixed "having regard both to the average cost of the transport operation concerned, including the general expenses of the business, for a properly managed undertaking enjoying normal conditions of use of its carrying capacity and to market conditions, and shall be such as to provide a fair return for carriers". [4]

Finally it is necessary at this point to mention Article 4 of the regulation wich I have already mentioned in my Opinion in the *Trinon* case. That article provides:

"Tariffs shall be fixed or amended by agreement between the Member States directly concerned, that is the State on whose territories the goods are to be loaded or unloaded", and that "Each Member State shall bring such tariffs into force within two months following the conclusion of negotiations for the fixing or amendment of tariffs or, as the case may be, following the completion of the procedure referred to in paragraph (2) (b)." [5]

The latter provision concerns the settlement of differences which may arise between the countries directly concerned by the fixing or amendment of the tariffs. It refers to arbitration by the Commission to which "the dispute may be referred ... at the request of any of the Member States concerned".

After consulting a special committee composed of government experts the Commission has to take a decision "which

1 — Article 1 (2) and (3).
2 — Article 2 (1) and (3).
3 — Article 2 (2).
4 — Article 3 (1).
5 — Article 4 (1).

shall be notified to the Member States concerned and at the same time communicated to the other Member States.

This decision shall take effect after the expiry of a period of twenty days unless before the expiry of that period the matter is referred to the Council by a Member State.

In such a case the Council shall give its decision by a qualified majority within twenty days". [1]

Let me observe further that the Commission may participate in an advisory capacity in negotiations for the fixing or amendment of tariffs and submit to the Member States directly concerned proposals designed to produce agreement.[2]

2. In implementation of that regulation Belgium adopted two Royal Decrees.

The Royal Decree of 25 October 1971 in particular implements Regulation No 1174/68. It is general in scope and designates the supervisory authorities provided for by the regulation, lays down the procedures for publication of the compulsory tariffs and fixes the penalties for infringement.

The Royal Decree of 17 November 1971 brings into force the transport rates between Belgium and France. The actual text of this is confined essentially to referring to a voluminous annex divided into several parts. Let me refer to Article 6 of Part I.[3]

Article 6 (3) reproduces Article 2 of the Council Regulation and provides:

"transport rates may be freely determined by mutual agreement between the parties within a bracket spread of 23 % of the maximum rate".

Article 6 (4) allows the parties to the contract to express the transport rates "in Belgian francs or French francs and centimes".

Parts II and III of the Annex relate respectively to the classification of goods and tables of distances. Part IV specifies in Belgian and French francs the schedules applicable to the transport of different goods over various distances. The schedules represent the upper limit of the bracket. Expressed both in French and Belgian francs they are intended to specify in the two currencies a single value for one and the same transport operation and are based in that respect on a parity of FF 1 : BFR 9.

The Royal Decree of November 1971 was the only measure implementing the regulation of July 1968 for the whole time during which that regulation was in force, namely until 31 December 1977. In spite of the devaluation of the French franc in relation to the Belgian franc during that relatively long period the tariffs applicable to the carriage of goods between France and Belgium were not amended by mutual agreement between the two Governments directly concerned. Nor, in the absence of any Commission decision, does it appear that the tariffs were the subject of a dispute.

1 — Article 4 (2) (b).

2 — Article 4 (2).

3 — "General provisions and conditions of application."

B — (1) Regulation No 1174/68 was replaced only as from 1 January 1978 by another Council regulation namely No 2831/77 of 12 December 1977.

That regulation "on the fixing of rates for the carriage of goods by road between Member States" basically differs from the previous inasmuch as in addition to the system of compulsory bracket tariffs which is maintained it establishes a system of reference tariffs. [1] The Member States concerned are free to choose by mutual agreement between one and the other for each of their bilateral relations. France and Belgium have retained the compulsory system already in force between them.

Regulation No 2831/77 adopts, as regards the bracket tariffs, the majority of the provisions of Regulation No 1174/68. Articles 9 and 10 of the second regulation in particular reproduce word for word Articles 2 and 3 of the first. Likewise Article 13 of the new regulation takes over, subject to amendments as to time-limits, the procedure for settling disputes established in Article 4 (2) (b) of the former regulation.

In the same way Article 11 of the 1977 regulation largely constitutes the counterpart of Article 4 of the 1968 regulation. In that respect it is nevertheless necessary to point out two innovations. Learning from the delay with which Member States drew up or amended tariffs, the Council authorized the Commission to "prescribe a period within which the Member States concerned must take a decision" and specified that "if no decision has been taken by the end of this period, the procedure provided for in Article 13 ... shall be applicable". [2] It also allowed, without prejudice to the other methods of fixing tariffs, a Member State, in order to offset the effects of monetary fluctuations, unilaterally to carry out an upward revision of price schedules expressed in its currency. "The Member State concerned shall inform the other Member States concerned and the Commission at least one month before this measure is brought into effect." [3]

Finally it is necessary to mention Article 20 (2) which avoids a legal vacuum for the period after the entry into force of the regulation and prior to the entry into force of the implementing provisions adopted by the Member States. This transitional provision stipulates that the compulsory tariffs in effect when the regulation enters into force shall remain so until they are replaced by other tariffs.

(2) At a general level Belgium took the implementing measures necessitated by the new regulation by adopting the Royal Decree of 17 October 1979.

As regards Franco-Belgian relations it successively adopted three royal decrees amending the Royal Decree of 1971. Only the first, dated 11 October 1978, ante-dates the facts to the cases. It raises all the tariffs in both currencies by 15 % to take account of the increase in costs.

The second, dated 3 October 1979, is the first to attempt to remedy the disparity between the conversion rate applied to transport tariffs and the real

1 — Articles 2 (2) and 3 to 7.

2 — Second subparagraph of Article 11 (1).

3 — Article 11 (3).

rate, namely that of the foreign exchange market. To that end it leaves the tariffs expressed in Belgian francs unaltered and increases only those expressed in French by some 10 %.

Since the rate in force on the foreign exchange market was however still not achieved a third revision was made on 7 July 1981. The tariff expressed in Belgian francs still remained unchanged while that expressed in French francs was increased a second time by 10%. That revision finally enabled the conversion rate of the tariff to correspond with that of the foreign exchange market.

In conclusion let me say that since the entry into force of Regulation No 2831/77 France has not made use of the power given it by Article 11 (3) unilaterally to increase its tariffs.

Discussion

I — After setting out the relevant rules which apply to the case submitted to the Court I must consider the relevance and admissibility of the questions.

During the proceedings their relevance was queried. It was maintained that the real problem was that of the compatibility of the national law with Community rules or more simply the interpretation given by the inspectors from the Ministry of Transport and the Politierechter to the Royal Decree of 17 November 1971. There may be some merit in that contention.

Nevertheless it should be noted that in the *Pigs Marketing Board* case it was held by this Court:

"As regards the division of jurisdiction between national courts and the Court of Justice under Article 177 of the Treaty the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, is in the best position to appreciate, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment. [1]

Those considerations appear to me very pertinent in the present case. Even taking account of the reasons given for them, the questions submitted by the court in Ghent cannot be understood otherwise than as calling in issue the validity of the rules of the Council.

Moreover as in the *Trinon* case, the representative of the Belgian Government objected to the admissibility of the reference to the Court on the ground that the questions related to Regulation No 1174/68 which at the material time had been replaced by Regulation No 2831/77. The Court cannot allow that objection.

It is true that in January 1979 the 1977 regulation was already in force as regards the fixing of the tariffs between Belgium

1 — 29 November 1978 Case 83/79 *Pigs Marketing Board* [1978] ECR 2347, paragraph 25 of decision at p. 2366; see also the judgment of 15 July 1982 in Case 270/81 *Felicitas* [1982] ECR 2771 paragraph 8 and 9 of the decision.

and France. That is shown by the version then applicable of the Royal Decree of 1971, namely that resulting from its amendment by the Royal Decree of 11 October 1978 which, in conformity with Article 10 (2) of Regulation No 2831/77, refers to that regulation.

However, there are several instances in the case-law of the Court where

"in the event of questions' having been improperly formulated or going beyond the scope of the powers conferred on the Court of Justice by Article 177",

the Court is free

"to extract from all the factors provided by the national court the elements of Community law requiring an interpretation — or, as the case may be, an assessment of validity — having regard to the subject-matter of the dispute." [1]

In the present case it suffices to replace the citation of the regulation by that of the regulation which succeeded it and which reproduced most of its terms.

To summarize, in the absence of rules enabling the effects of the disparity in currency between the Member States to be eliminated it seems to me that the questions submitted by the court making the reference must be understood as calling in issue the validity of Council Regulation No 2831/77 on the grounds of the provisions of Article 75 of the Treaty, the purpose of the regulation to the effect that the tariffs must be fixed so as to avoid damaging competition and finally the principle of non-discrimination recognized by Community law.

It is that principle which appears to me to constitute the root of the problem.

II — (1) It is not disputed that, at least beyond a certain degree, the failure of the real parity between the currencies of two Member States to match that fixed by the transport tariffs may lead to distortion in competition to the detriment of carriers established in countries with a strong currency. Accordingly Regulation No 2831/77 would be invalid if it were not capable of remedying such distortions.

(2) It is true that this regulation, which provides for the fixing of tariffs by mutual agreement between the Member States directly concerned, contains no specific provision requiring them to reestablish normal conditions of competition when they are distorted by the effect of currency fluctuations.

It is however readily apparent that the system of compulsory tariffs taken as a whole, which was established by Regulation No 1174/68 and adopted and improved by Regulation No 2831/77, not only allows the States to amend tariffs when circumstances so require but lays upon them an obligation to do so.

Thus Article 10 (1) of the present regulation, which adopts Article 3 (1) of the former regulation, provides that the base-rate is to be fixed "having regard to both the average cost of the transport operation concerned ... and [is to be] such as to provide a fair return for carriers". Since international transport is

1 — Judgment in Case 83/78 cited above, paragraph 6 of the decision; see also Case 203/80 *Casati* [1981] ECR 2595, paragraph 24 of the decision at p. 2617.

involved the average cost of transport operations and the profitability of undertakings are obviously likely to be affected by a change in monetary parities. Accordingly when such is the case, compliance with the obligation entails an amendment of bilateral tariffs.

In the same way it is stated that "compulsory tariffs shall be fixed ... by agreement between the Member States concerned". [1] Thus for each bilateral relationship there is but a single tariff expressed in two currencies. To use the analogy suggested by the Commission's representative, the tariff expressed in each of the two currencies is like each of the two sides of the same coin. Therefore when the parities used in establishing the tariff and those actually used in commercial relations come out of alignment the two sides of the coin no longer fit perfectly and the common character of the tariff is destroyed.

Finally Article 9 (2) of the present regulation (Article 2 (2) of the former regulation) provides that "the bracket spread shall be 23 % of the maximum rate". It is clear that fluctuations in the rates of exchange actually applied lead to a widening of the brackets beyond the 23%, which is incompatible with the compulsory nature of that percentage.

The Member States' obligation to amend the tariffs in order to neutralize currency fluctuations seems to me all the more imperative inasmuch as Regulation No 2831/77 must be applied in the light of the reasons on which Regulation No 1174/68 is based. [2] These include the need to avoid damaging competition and to establish a base-rate having regard to the criteria retained in Article 10 (1) of the present regulation.

(3) In addition Regulation No 2831/77 contains procedural provisions enabling each Member State to give effect to that obligation.

Its most specific provision in that respect is Article 11 (3) which authorizes a Member State whose currency has depreciated to carry out unilaterally an upward revision of price schedules expressed in its currency to offset the effects of monetary fluctuations. That provision however is of an optional nature and certain States may, generally or in particular cases, consider it expedient not to have recourse to it if they consider for example that equality must be reestablished partly by an increase in the tariffs expressed in their currency and partly by a reduction in the tariffs expressed in the currency which has increased in value.

In such a case the procedure for agreement laid down in Article 11 (1) must apply. If a Member State considers that the carriers established in its territory are the victims of monetary disparities the State is free to enter into negotiations with the other State directly concerned with the object of adapting the tariffs to the situation so created. It may be thought that the Commission's participation in such negotiations in an advisory capacity, for which provision is made, must help such agreements to be reached since "the Commission may

1 — Article 11 (1) of the 1977 regulation; Article 4 (1) of the 1968 regulation.

2 — Seventh recital in the preamble to the 1977 regulation.

prescribe a period within which the Member States concerned must take a decision pursuant to paragraph (1)". [1]

If nevertheless no agreement is possible the procedure laid down in Article 13 for settling disputes may lead to a settlement ensuring or restoring compliance with the provisions of the regulation by recourse to the arbitration of the institutions.

From all those rules both substantive and procedural it seems to me that in the event of monetary disparities Regulation No 2831/77 requires the Member States to adopt the measures necessary to maintain the common nature of the rules "applicable to international transport to or from the territory of a Member State" as required by Article 75 (1) (a) of the Treaty. At the same time those measures are of such a nature as to avoid competition of a damaging nature and discrimination between the carriers of the various Member States.

(4) Whilst the obligation is thus clear, so far as its principle is concerned, the procedures for giving effect to it raise problems of some delicacy. Although consideration of those procedures goes beyond the scope of the questions submitted by the court in Ghent it does not seem to me possible to avoid it entirely in the context of this Opinion; there is no purpose in imposing an obligation which cannot in practice be fulfilled.

Two kinds of questions, not equally important in practice, arise.

Subject to the unilateral procedure under Article 11 (3) it is for the State which is a victim of distortion of competition to initiate negotiations and once that procedure is under way the regulation contains all the appropriate instruments for enabling legality at the Community level to be restored. A State may however for reasons of its own refrain from initiating such negotiations where compliance with the mandatory provisions of the regulation would require it to do so. In such a case, no doubt rare, the regulation in itself provides no way out of the impasse. In my opinion recourse must be then had to the first indent of Article 155 of the Treaty. The Commission, which is responsible for ensuring the application of the measures taken by the institutions pursuant to the Treaty, should thereupon adopt on its own initiative the decisions which the second subparagraph of Article 11 (1) of the regulation enables it to take when negotiations have been initiated.

But at what stage should the procedure be set in motion? In strict law the unconditional compliance with the provisions of the regulation and in the first place with the mandatory nature of the bracket of 23 % requires that it should be begun when the parities of the tariff are exceeded.

In the present monetary situation such a solution unfortunately cannot be applied. Automatic variation of the bilateral transport tariffs on the basis of the rate of exchange of the relevant currencies would involve continuous amendments. This would give rise to insurmountable administrative difficulties.

In the same way continuous fluctuations in the rates of exchange prevent the choice of a certain fixed and predetermined percentage in the disparity

1 — First sentence of Article 11 (2).

between the tariff rates and the actual rates in order to bring into operation the requirement to make amendments. It seems to me that in each mutual relationship a "case-by-case" approach must be adopted, taking into account in particular of all the circumstances other than monetary fluctuations which actually influence the conditions of competition. A wide discretion must therefore be left to the Member States concerned.

The requirement that the rules, which I have mentioned, laid down by the regulation, and the other rules and principles of Community law, in particular the principle of non-discrimination, must be complied with leads me however to place a limit on that power. There can be no question of permitting a manifest infringement of those rules and principles. As I have said, it is primarily for the Member States directly concerned and in default thereof the Commission on the basis of Article 155 of the Treaty to judge whether the infringement is a manifest one which would obviously entail an obligation to revise the tariffs.

It is true this solution is not fully satisfactory but it seems to me inevitable in the present state of development of the common transport policy and the relations between the currencies of the Member States.

In conclusion I propose that the Court's answer to the Rechtbank van Eerste Aanleg, Ghent, should be that consideration of the questions submitted has disclosed no factor of such a kind as to affect the validity of Council Regulation No 2831/77 of 12 December 1977 on the fixing of rates for the carriage of goods by road between Member States.