2. Orders the applicant to pay the costs.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 8 June 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 18 MAY 1977 [1]

Mr President,
Members of the Court,

In February, March, April and May 1976 the Kommanditgesellschaft in Firma Merkur, Hamburg, concluded a certain number of contracts by which it undertook to sell to certain Danish companies and one United Kingdom company considerable quantities of 'pellets of tapioca containing added molasses', for which it obtained from the competent German authorities on 28 April 1976 a notice classifying the goods in question under tariff subheading 23.07 B I (c) 1 (sweetened forage containing more than 30 % by weight of starch and no milk products). That certificate did not in itself entitle the applicant to any right to an export refund.

Manioc, the product which is used in the manufacture of tapioca, falls within heading No 07.06 when it is in root form and heading No 11.06 when it is in the form of flour.

The products listed under the headings Nos 07.06 and 11.06 and subheading 23.07 B I (c) 1 are governed by the common organization of the market in cereals (processed cereal-based products).

As you are aware, on 12 May 1971 the Council adopted Regulation No 974/71 authorizing the Member States which, for the purposes of commercial transactions, allow the exchange rate of their currencies to fluctuate 'temporarily' by a margin wider than that permitted by the International Monetary Fund, to charge on imports from Member States and third countries and to grant on exports to Member States and third countries compensatory amounts on certain specific agricultural products under conditions fixed by that regulation. This is known as the system of 'monetary compensatory amounts'.

The detailed rules for the application of Regulation No 974/71 were fixed for the first time by Regulation No 1013/71 of

1 — Translated from the French.

the Commission of 17 May 1971. It is by that means that the Federal Republic of Germany was authorized to resort to the system of monetary compensatory amounts. The list of products to which the machinery for the monetary compensatory amounts could apply was adopted for the first time by the Commission in Regulation No 1014/71 of the same day. The products listed under subheading 23.07 B I (c) 1 were included in that list.

The system was extended throughout the whole of the Community by Regulation No 2888/71 of the Commission and, although optional to start with, it became compulsory in December 1972 following the adoption of Regulation No 2746/72 of the Council of 19 December 1972.

Secondly, the Act annexed to the Treaty relating to the accession of the new Member States provides, especially for the cereals sector, for a system intended to compensate the difference in level between the prices fixed for the new Member States and the 'common' prices in the old Member States. That is the so-called system of 'accession compensatory amounts'.

The general rules applying to the system of accession compensatory amounts in the cereals sector were adopted for the first time in Regulation No 2757/75 of the Council of 29 October 1975.

At the time when Merkur concluded the contracts in question the products which it was proposing to manufacture and export benefited from the following compensatory amounts:

— a monetary compensatory amount of DM 37·01 per metric ton for exports from the Federal Republic of Germany to the other Member States (especially to the United Kingdom and Denmark) (Commission Regulation No 572/76 of 15 March 1976 adopted in accordance with the opinion of the Management Committee for Cereals);

Regulation No 1312/76 of 3 June 1976, which was adopted by the Commission acting alone, provided for a monetary compensatory amount of £10·407 per metric ton to be granted on imports to the United Kingdom with effect from 7 June 1976;

— an accession compensatory amount of 17.51 units of account (u.a.), that is, DM 56·39 per metric ton for exports to the United Kingdom; no accession compensatory amount was fixed for exports to Denmark (Regulation No 2006/75 of the Commission of 31 July 1975 adopted in accordance with the opinion of the Management Committee for Cereals).

On 8 March, 1 April and 14 April 1976 the applicant exercised its right (under Regulations Nos 3280/73 and 1580/74 of the Commission) to fix in advance, subject to the lodging of security, the accession compensatory amounts applying to the export to the United Kingdom of 5 000, 750 and 2 100 metric tons of the product in question. The validity of the advance-fixing certificates expired on 31 July and 31 August 1976 respectiveley.

On 23 June 1976, in accordance with the opinion of the Management Committee for Cereals, the Commission adopted Regulation No 1497/76 on the application of accession compensatory amounts and monetary compensatory amounts for certain cereal-based compound feedingstuffs. The French version of Article 1 of that regulation reads as follows:

'Pour les produits relevant de la sous-position 23.07 B I (c) 1 ou 2 du tarif douanier commun, d'une teneur en poids supérieure a 50 % de produits relevant de la position 07.06 ou 11.06 du tarif douanier commun, les montants compensatoires adhésion ou montants compensatoires monétaires sont applicables aux produits relevant de la sous-position 07.06 A du tarif douanier

commun'. [The English version of Article 1 reads as follows: 'For products falling within subheading 23.07 B I (c) 1 or 2 of the Common Customs Tariff, containing more than 50 % by weight of products falling within heading No 07.06 or 11.06 thereof the accession compensatory amounts or monetary compensatory amounts shall be those applicable to products falling within subheading 07.06 A thereof'].

That regulation was published in the Official Journal of the European Communities of 26 June 1976. Under the terms of Article 191 of the Treaty, in the absence of any provision to the contrary, regulations shall enter into force on the twentieth day following their publication. Article 3 of the foregoing regulation provides that it shall enter into force on the fifteenth day following its publication, that is, on 11 July 1976.

The French version of Article 1 of that regulation is inaccurate and must be corrected in the following way:

'les montants compensatoires adhésion ou monétaires sont *ceux* applicables aux produits relevant de la sous-position 07.06 A du tarif douanier commun'.[1]

No correction was published in the Official Journal of the European Communities but the applicant, who was in possession of the correct German version of the regulation, was not misled: in plain language the regulation meant that for the products which it was proposing to dispatch to the United Kingdom and Denmark after 11 July 1976 the applicant would obtain no more than the monetary compensatory amounts applicable to products falling within subheading 07.06 A, which, since no monetary compensatory amount was paid on the importation of those products into the United Kingdom, meant in practice 0 u.a.

1 — Translator's note: the English text does not require correction.

The accession compensatory amounts applicable to the products listed under that subheading amounted to 0·93 u.a. per metric ton for Denmark and 4·51 u.a. per metric ton for the United Kingdom, which is only one-quarter of those applying to subheading 23.07 B I (c) 1.

As, when Regulation No 1497/76 entered into force, the applicant had not yet performed in full the contracts which it had concluded, it took steps to limit the losses, or rather the absence of profit, brought about by the introduction of the new rules by negotiating with its clients either the termination of the contracts or the alteration of their terms. The applicant claims, however, that despite all its efforts, it suffered a loss amounting to DM 168 185·20, which (without taking account of the interest) it asks you to order the Commission to pay as compensation, on the ground of its alleged liability for a legislative measure.

Before going into the legal question of the existence of extracontractual liability on the part of the Commission in the present case let me make it clear that the problem does not arise in relation to the accession compensatory amounts. The applicant could have exported the remaining quantities which it had undertaking to deliver without obtaining the monetary compensatory amounts applying to exports from the Federal Republic of Germany but receiving the accession compensatory amounts for which it had obtained, subject to giving security, advance-fixing certificates covering the deliveries which it intended to make to the United Kingdom and which, according to your judgment of 14 May 1975 in Case 74/74 *(Comptoir National Technique Agricole (CNTA) S.A.* v *Commission of the European Communities* [1975] ECR 533), covered traders against the risk of the abolition or modification of those amounts.

If the applicant decided not to make the deliveries in question and not to avail itself of the possibility of advance-fixing, it did so in full knowledge of the facts. It

considered that the loss which it risked incurring by renegotiating the terms of delivery was less than that which would have been brought about by the performance in full of the original contracts, even with payment of the accession compensatory amounts fixed in advance, and it cannot put forward a claim based on the loss of both the monetary compensatory amounts and the accession compensatory amounts.

I — The applicant does not contest the fundamental right of the Commission to adopt a measure such as Regulation No 1497/76, that is, to alter, or even to abolish, the monetary compensatory amounts. It rather criticizes the absence of appropriate transitional provisions, at least as regards contracts which have been shown to be binding, and the consequent damage to the 'legitimate expectation' of traders which was caused by the Commission despite the absence of any overriding matter of public interest forcing it to act as it did. The defendant was aware from its correspondence and telephone conversations with Merkur that its regulation only concerned that company and it had been warned by the applicant that as a result of the allegedly very complex method of manufacture of the product in question there was no risk that the applicant would profit from the transitional period, which it was urging the Commission to fix, to conclude and perform new contracts. The applicant considers, therefore, that it would have been fair to fix a transitional period for the entry into force of the regulation, such period expiring on 15 August or, at the earliest, on 31 July 1976. By refusing to allow that period the defendant committed a flagrant violation of a superior rule of law for the protection of the individual which, according to your case-law, is the condition which must be satisfied before a claim for compensation is justified.

In this case, in contrast to Case 43/72 *(Merkur-Außenhandels-GmbH* v *Commission of the European Communities* [1973] II ECR 1055), in which the applicant attacked the Commission on the ground of its failure to include certain products within the system of monetary compensatory amounts, the applicant does not consider that, in principle, the abolition of the monetary compensatory amounts granted until then on the products listed under subheading 23.07 B I (c) 1 was illegal. In fact, it maintains that the effect of the measure adopted by the Commission is to create a distinction within that subheading in respect of feedingstuffs containing mor than 50 % by weight of products falling within headings Nos 07.06 or 11.06 of the Common Customs Tariff. However, if, following the adoption of Regulation No 1497/76, the grant of a monetary compensatory amount depends in practice upon the percentage by weight of products incorporated in the goods in question, the result is not an alteration in the tariff classification of the goods but rather in the way in which the goods are treated from the point of view of the application of monetary compensatory amounts.

The applicant is in fact complaining that the Commission made a sudden and untimely alteration in the method of treatment of the goods from the point of view of the grant of monetary compensatory amounts. It considers that the very principles laid down by basic Regulation No 974/71 of the Council have thereby been violated. It is therefore necessary to consider whether, when it adopted that regulation, the Council granted the Commission a wide discretion, not as to the choice of the products whose export may give rise to the grant of compensatory amounts, but rather as to the timing of the abolition or modification of the grant of those amounts.

II — The idea behind the system of monetary compensatory amounts, as established by Regulation No 974/71 and subsequent enactments, is that the

'temporary' widening of the margins of fluctuation for the currencies may entail a disruption of the intervention system laid down by Community rules in the Member State concerned and abnormal movements of prices jeopardizing a normal trend of business in agriculture. As regards *derived* products, such as those in question in this instance, for which no intervention is provided, monetary compensatory amounts must only be applied where the incidence of the monetary measures would lead to difficulties. Their amount is limited to what is strictly necessary to compensate the incidence of the monetary measures on the prices of *the basic products* (Article 1 (2) and (3), Article 2 (2)).

With effect from 1 January 1973, for the purposes of the financing of the common agricultural policy, the compensatory amounts charged or granted in trade with Member States shall be treated as part of the expenditure on intervention intended to stabilize the agricultural markets (Article 2 (2) of Regulation (EEC) No 2746/72 of the Council of 19 December 1972, OJ, English Special Edition 1972 (28-30 December) p. 64).

Article 6 of Regulation No 974/71, which is referred to especially by Regulation No 1497/76 here in question, not only gives the Commission the power to fix the monetary compensatory amounts in accordance with the Management Committee procedure but also to adopt detailed rules for the application of the regulation 'which may include other derogations from the regulations on the common agricultural policy', without prejudice to its obligation to modify such amounts, without implementing the Management Committee procedure, on the basis of the difference between the parity of the currencies of the Member States and the arithmetic mean of the rates of exchange during a specific period.

In brief, therefore, the Member States are under an obligation to grant or levy the monetary compensatory amounts. The expenses of doing so are borne by the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as 'EAGGF'), and the income which they produce is also paid to the EAGGF, that is, in effect, to the general public of the Community. Unlike the accession compensatory amounts, monetary compensatory amounts cannot be fixed in advance and that fact is in itself a warning to traders. As you have already acknowledged in your judgments in *Merkur* (Case 43/72 *Merkur-Außenhandels-GmbH* v *Commission of the European Communities* [1973] II ECR 1055 at p. 1073) and, in particular, in *Balkan* (Case 5/73, *Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* ([1973] II ECR p. 1091 at p. 1112) of 24 October 1973, although the machinery for those amounts was also set up in the interests of those traders, it is intended essentially to satisfy a public interest.

III — The practice of the Commission with regard to the time-limits attached to the revocation or reduction of the financial benefits or burdens which the monetary compensatory amounts constitute are an illustration of the dual character.

The Commission generally provides for fairly liberal transitional measures where the *importation* of a product gives rise to the *levy* of a monetary compensatory amount which is *borne by the trader,* provided that the additional burden was unforeseeable and the trader proves that he was bound by contract. On the other hand, as it is the prospect of profit which is affected, transitional measures either do not exist or are, at least, much more limited in scope in the case of *exports* which give rise to the *grant* of a monetary compensatory amount which benefits the trader. The nature of the compensatory amounts as 'fixable in advance' is of decisive importance.

Thus, in order to take account of the possible repercussions on import

contracts of the measures to implement the provisions governing the application of compensatory amounts adopted by Regulation No 974/71 with effect from 12 May 1971, the Commission ruled out the *levy* of compensatory amounts on *imports* as regards those contracts which could validly be shown to have been concluded before 10 May 1971 (Regulation No 1013/71 of the Commission which was adopted on 17 May 1971 and entered into force on 18 May 1971, the day of its publication in the Official Journal of the European Communities, with effect from 12 May 1971).

Similarly, Regulation No 2887/71 of the Commission of 30 December 1971, which extended the system of compensatory amounts to France and Italy and entered into force on 31 December 1971, excluded import transactions concluded before 28 December 1971.

As regards *export* contracts, Regulation No 842/73 of the Commission of 27 March 1973, which entered into force three days after its publication in the Offical Journal on 30 March 1973, increased the *refunds fixed in advance* and relating to exports not yet affected by 13 February 1973, the date of the announcement of the devaluation of the dollar by the Government of the United States of America 'as an exceptional measure' in order 'to prevent repercussions of the world monetary situation jeopardizing forward transactions planned' before that date.

In the light of the entry into force on 4 June 1973 of the new system of monetary compensatory amounts — under which operators had to cover themselves against the risk of exchange fluctuations in relation to the dollar, while under the former system the risk of changes in that rate of exchange was covered by the monetary compensatory amount — the Commission considered it fair to provide by means of Regulation No 2042/73 of 27 July 1973, published on 28 July 1973 and applying from 4 June 1973, that for all import or export transactions in respect of which the *advance fixing of the levy or refund* had been requested before 4 June 1973 the monetary compensatory amount applicable should be that applicable on 3 June. Here again, the regulation only applies to *amounts fixed in advance* in dollars for export refunds or import levies on goods going to or coming from third countries.

After Regulation No 2497/74 of the Council of 2 October 1974 suspended with effect from 21 October 1974 the application of Article 4a (2) of Regulation No 974/71 of the Council (in the version contained in Regulation No 3450/73), which provides that in trade between the Member States and with third countries the compensatory amounts granted on imports and levied on exports as a result of the decrease in value of the currency concerned may not be higher than the charge on products imported from third countries, the Commission, which considered that for traders who before the adoption of that regulation had entered into contracts containing set conditions, the suspension of that provision had sometimes resulted in the levy on exports of charges which could not have been taken into account when the contracts were entered into, decided to adopt Regulation No 2966/74 of 25 November 1974 (OJ No L 316 of 26 November 1974) which authorized Member States not to charge either the monetary compensatory amount or the proportion of that amount which corresponds to the increase in the monetary compensatory amount applying to exports to Member States to be effected in performance of binding contracts entered into before 20 September 1974 and carried out within a period of three months from that date. It must be noted, however, that, here again, the compensatory amounts in question are *levied on exports* rather than granted and therefore represent an increased

burden rather than a failure to make a profit.

Regulation No 1026/75 (OJ No L 101, p. 1) was adopted by the Commission on 18 April 1975 in a similar context to the present one.

In the light of the fact that 'recent experience has shown that the method used heretofore for the calculation of monetary compensatory amounts for certain processed products has led to amounts the level of which is higher than the aforementioned incidence' (that is, the incidence on the price of the processed product of the application of the compensatory amount to the prices of the relevant basic product), that 'this results or could result in trade flows such that competition is distorted and the smooth functioning of the common organization of the market endangered' and that 'there should be fixed for the products concerned a compensatory amount based on data corresponding more closely to the actual situation' Regulation No 751/75 of the Commission of 21 March 1975 (OJ No L 74, p. 37) lowered the monetary compensatory amounts applying to those products. That regulation, which was adopted on 21 March and published on 22 March, entered into force on 24 March 1975 with effect from 21 April 1975. It referred in particular to products falling within subheading 23.07 B I (c) 1, for which the *amounts to be granted on exports* were DM 4·14 per 100 kg. However, the monetary compensatory amount to be granted on the export of those products was not modified in relation to the level at which it was previously fixed by Regulation No 539/75 of 28 February 1975. It must be noted that the Management Committee for Cereals had not delivered an opinion within the time-limits set by its Chairman. In order to take into account the situation of dealers who had entered into undertakings on the basis of the compensatory amounts published, the Commission provided by Regulation No 1026/75 of 18 April 1975 (OJ No L 101, p. 1), that as regards certain products falling within subheading 11.02 E II (a) (rolled grains and flaked grains) for which the compensatory amounts had been lowered by Regulation No 751/75, the amounts formerly fixed by Regulation No 539/75 should be maintained for a limited period. To take account of undertakings existing in respect of those products before the entry into force of Regulation No 751/75, Regulation No 1026/75, which was also adopted in the absence of any opinion from the Management Committee for Cereals, extended the time-limit of 21 April 1975 until 19 May 1975.

Thus, in that particular case the Commission allowed traders who had entered into undertakings on the basis of the compensatory amounts published the benefit of a transitional period of almost two months. It must be noted, however, that the regulation concerned only the products of the milling industry, which have gone through some form of processing, are intended for human consumption and require substantial investments and plant for their production. They are, furthermore, subject to a relatively high levy (rolled grains and wheat flakes).

In short, I find that the Commission has only adopted transitional measures in the case of amounts *levied* on imports or exports, whether or not fixed in advance. However, in at least one case the Commission has to my knowledge adopted such measures in relation to compensatory amounts *granted on exports.*

IV — I therefore consider that, as the Commission appears to admit in its last statement, no overriding matter of public interest justified the abolition, with immediate effect, of the compensatory amounts granted until then, or prevented the interests of traders who acted in good faith from being taken into account.

Furthermore, instead of formally exempting transactions under binding contracts concluded before a certain date, while providing at the same time for the immediate or even retroactive abolition of those amounts as regards future transactions or other earlier contracts, the Commission provided a period of grace for the traders concerned. Its regulation was adopted on 23 June 1976; it was published on 26 June 1976 and only entered into force fifteen days later.

The real question raised by the action is whether the period of grace thus granted is fair in the light of the nature of the product in question, the precarious nature of the compensatory amounts applying to that product, the nature of the undertakings to which the applicant refers and, finally, the manner in which it became aware of the projected measure and the efforts made to limit its loss.

We must not forget that the action involved in this instance concerns forage which is almost exclusively manufactured from basic products and which is intended to be used for the same purpose as those basic products.

In a case of that nature it is scarcely possible to consider the existence of liability in the abstract. The acknowledgement of liability is closely linked to the real nature of the loss and its extent, as well as to the existence of a causal link between the onset of the loss arising and the contested measure.

Those are questions of fact which the Management Committee, in accordance with whose opinion the regulation was adopted, must cdrtainly have considered before giving its approval, especially since the adoption of the regulation in dispute resulted from action by the German authorities, and since the applicant referred directly to those national authorities and to the Commission before it was adopted.

In my view it must be accepted that the Commission, assisted by the opinion of the Management Committee, has a largely discretionary power to decide whether the feedingstuffs in question are intended to be used for the same purpose as the basic products of which they are composed and whether or not they can be distinguished from the latter sufficiently to justify the application of compensatory amounts considerably higher than those applying to such basic products.

In addition, I would make the following observations:

It is true that by extending the benefit of the system governing the advance-fixing of the *accession* compensatory amounts to the products and compound feedingstuffs based on cereals, the Commission acknowledged that it was right to promote the development of trade in those products between the Member States as originally constituted and between the new Member States and the latter (Regulation No 1580/74 of 24 June 1974). Nevertheless, as the Commission observes, the tonnages produced in Germany and exported from that country towards the new Member States rapidly increased and reached a considerable figure (more than 60 000 metric tons between March and 10 July 1976, 20 000 metric tons of which were exported by the applicant, including 7 000 metric tons despatched during the early days of July 1976). Furthermore, the manufacturers working on behalf of the applicant succeeded in converting their production machinery in a relatively short period.

Then again, the applicant became aware of the forthcoming adoption of the contested measure from a professional publication on 19 June 1976. It had therefore more than fifteen days in which to take the appropriate measures and it was not taken entirely by surprise by the abolition of the monetary compensatory amounts. Finally, as the Commission rightly observes, the applicant perhaps had a premonition of the abolition of the compensatory

amount applying to the products in question, since in a contract for the delivery of 2 000 metric tons concluded with one of its Danish customers on 20 May it took the precaution of including a clause under which it reserved itself the right, in the case of modification of the monetary compensatory amount, to deliver pure tapioca. Finally, at a relatively early stage it readjusted its contracts with one of its Danish customers.

According to your judgment of 14 May 1975 in *CNTA* v *Commission of the European Communities* (Case 74/74 [1975] ECR 533 at pp. 549-50) 'the application of the compensatory amounts in practice avoids the exchange risk, so that a trader, even a prudent one, might be induced to omit to cover himself against such risk. In these circumstances, a trader may legitimately expect that for transactions irrevocably undertaken by him because he has obtained, subject to a deposit, export licences fixing the amount of the refund in advance, no unforeseeable alteration will occur which could have the effect of causing him inevitable loss, by re-exposing him to the exchange risk'. However, that case concerned the confidence which a trader could have in the advance-fixing of an aid to exports or of Community export refunds which had led him justifiably to omit to cover himself against the exchange risk. In this instance, on the other hand, it is not the abolition of the accession compensatory amounts, which alone could be fixed in advance and in respect of which the applicant could therefore omit to cover himself against the exchange risk, which caused the applicant to suffer loss.

I consider, therefore, that the Commission made a correct assessment of both the interest of the Community and the interests of the private traders and that the compensatory amounts were not abolished in such a way as to incur its liability.

I am therefore of the opinion that the application should be dismissed and that the applicant should be ordered to pay the costs.