OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 28 February 1985 *

Mr President,
Members of the Court,

The second reference for a preliminary ruling which I am to consider today also concerns monetary compensatory amounts; in this case it is a question of the amounts fixed by Regulation No 3013/80 (Official Journal 1980, L 312, p. 12) and transactions which took place in a country with a so-called 'hard' currency.

A. Between 24 November and 8 December 1980 the plaintiffs in the main action, processors of maize, exported glucose (dextrose) falling with tariff subheadings 17.02 B I (a) and 17.02 B II (b) and maize starch falling within tariff subheading 11.08 A I, or transferred maize to the processing arrangements giving rise to a right to a refund, in order to manufacture from it products falling within the same tariff subheadings. They consider that the monetary compensatory amounts paid to them in respect of those transactions on the basis of the abovementioned regulation were too low. Because Regulation No 974/71 requires monetary compensatory amounts to be the same for imports and exports of one and the same product, they assume that that should also apply to the relationship between the basic product and products processed from it. That is not the case, in their view, however, with maize and products processed from it; on the contrary, they claim that the sum of the compensatory amounts applicable to processed products is well below the level of the amount applicable to maize. (I shall touch upon the actual figures later in my Opinion). They claim that the position is further aggravated by the fact that, although monetary compensatory amounts are fixed for the secondary product of maize germ, there is virtually no market for it and no export trade in it. On the other hand, no monetary compensation is payable on exports of kibbled germ, germ oil or feeding-stuffs (which may be processed out of germs by means of a recently-developed manufacturing process). The plaintiffs allege that, in that respect, Regulation No 3013/80 does not comply with Regulation No 974/71, cited above, which is the basic regulation applicable to monetary compensatory amounts. Moreover, they claim that if it is remembered that there must be a corresponding advantage for processing undertakings in countries with so-called 'soft' currencies, it must also be accepted that Articles 3 (f), 9 *et seq.* and 43 of the EEC Treaty are infringed.

The plaintiffs lodged objections to the decisions dated 16 December 1980 and 5 January 1981 by which the compensatory amounts were awarded (cf. decision on the objection of 5 May 1981), but were unsuccessful. They therefore brought an action before the Finanzgericht [Finance Court] Hamburg.

The Finanzgericht stated that on the basis of a manufacturing sequence of maize/starch/gluten/germ (which was the basis adopted in earlier judgments of the Court of Justice, to which I shall be referring), the monetary compensatory amounts granted under Regulation No 3013/80 on exports of maize starch and glucose (including all secondary products) was DM 2.14 per tonne less than the amount payable on the importation of the quantity of maize needed to produce those products. In the light of the relevant case-law of the Court of Justice, the national court therefore doubted whether it was consistent with Regulation No 974/71 for higher charges of that kind — which could not be regarded as

* Translated from the German.

negligible — to be imposed on manufacturers in countries with hard currencies, and it also questioned whether that constituted discrimination against those manufacturers, as compared with manufacturers in countries with soft currencies, which made a net gain. By order of 6 January 1984 it therefore stayed the proceedings and referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty the following questions:

(1) Is Commission Regulation (EEC) No 3013/80 of 21 November 1980 invalid in so far as it fixes the monetary compensatory amounts for the following products, listed in the corresponding headings of the Common Customs Tariff, only at the levels set out hereunder?

11.08 A I at DM 50.69
17.02 B I (a) at DM 66.13
17.02 B II (b) at DM 50.69
23.03 A I at DM 67.14
11.02 G II at DM 11.33

(2) Should Question 1 be answered in the affirmative, what are the consequences of such invalidity?

B. My views on those questions are as follows:

1. The regulation whose validity is contested in this case was adopted in November 1980, that is to say, after the Court of Justice in judgments of 15 October 1980 had criticized the fixing of monetary compensatory amounts applicable *inter alia* to products processed from maize.

(a) In those judgments the Court of Justice made certain general observations. Thus it pointed out that the calculation of the incidence on the prices of dependent products of the monetary compensatory amounts fixed for a basic product caused difficult technical and economic problems with regard to a large number of products whose manufacturing process and composition might vary in the various regions of the Community. Therefore it had to be accepted that the Commission had a wide margin of discretion in that context, in particular with regard to:

the existence or the threat of disturbances in trade,

the number of dependent products to which a compensatory amount must be applied, and

the incidence on the price of the dependent product of the compensatory amount applied to the basic product.

(Judgment in Case 4/79, [1] paragraph 27). The Commission also had to be able to take account of differences between the conditions of production in the various Member States and could thus make general appraisals (paragraph 36) which might not be entirely appropriate for an individual undertaking or group of producers (paragraph 27). On the other hand, however, the Court stressed that the Commission's discretion was limited. Thus the method of calculation employed could not result in persistently applying to processed products compensatory amounts the burden or, as the case may be, the benefits of which continually exceeded the amount necessary to take account of the incidence of the compensatory amount applicable to the basic product (paragraph 28). Accordingly the Court stated — in relation to the issue raised in the main action — that the sum of the monetary compensatory amounts applicable to the processed product should not exceed the compensatory amount applicable to the basic product.

(b) Because the regulations at issue did not comply with that requirement, they were declared invalid on the ground that they

1 — Judgment of 15 October 1980 in Case 4/79, *Société cooperative providence agricole de la Champagne* v *Office nationale interprofessionel des céréales*, [1980] ECR 2823.

infringed Regulation No 974/71 and Article 43 (3) (b) of the EEC Treaty (in the judgments in Cases 4/79 [1] and 109/79 [2] which concerned groats and meal obtained from maize). The regulations challenged before the Court in Case 145/79, [3] which concerned *inter alia* maize starch were declared invalid in relation to products processed from maize not only on the ground stated but also — as I have already explained in my Opinion in Case 33/84 [4] — because the monetary compensatory amounts applicable to maize starch were fixed on a basis other than that of the intervention price of maize after deduction of the production refund on starch.

2. In drawing up Regulation No 3013/80, the Commission — as is clear from the recitals in the preamble to that regulation — sought to take those judgments into account. However, as I have already mentioned in my summary of the facts, the plaintiffs consider that the Commission has not proceeded correctly but has, as it were, overshot the mark.

(a) In support of their contention, the plaintiffs compared the monetary compensatory amounts applicable to imports of maize with the monetary compensatory amounts applicable to all the processed products obtained in the manufacture of maize starch (the same applying to glucose) and demonstrated that, if all the secondary products were taken into account, the former were DM 2.14 per tonne higher than the latter. They alleged that in reality there was an even greater difference — to the detriment of German manufacturers — because the monetary compensatory amounts for maize germ ought to be discounted as there was no market for it and no monetary compensatory amount was fixed for the products processed from it. Thus processors in countries with hard currencies were placed at a quite considerable disadvantage and a corresponding advantage was simultaneously conferred upon processors in countries with soft currencies (that advantage being even greater, since processors are not obliged to export the secondary products in question).

As I see it, the Commission has not disputed the plaintiffs' calculations revealing a difference of DM 2.14 per tonne of maize. However, it considers that it was right to fix monetary compensatory amounts for germ and gluten. In its view there is in fact a market for those products; moreover, it submits that account should be taken of the fact that it had been forced to reduce the processing coefficient for germ in connection with the manufacture of grits, which entailed a corresponding reduction with regard to the production of starch. On the difference referred to by the plaintiffs, the Commission points out that as a result of the judgments cited it was obliged to *reduce* the monetary compensatory amounts for processed products. A precise mathematical balance could not be achieved. Moreover, the difference referred to by the plaintiffs is only slight. Lastly, the Commission argues that it should be borne in mind that it sought to obtain a general balance of all the advantages and disadvantages. That has been achieved, as processors in States with hard currencies obtain

1 — Judgment of 15 October 1980 in Case 4/79, *Société cooperative providence agricole de la Champagne* v *Office nationale interprofessionel des céréales,* [1980] ECR 2823.

2 — Judgment of 15 October 1980 in Case 109/79 *Maïseries de Beauce Sàrl* v *Office nationale interprofessionnel des céréales,* [1980] ECR 2883.

3 — Judgment of 15 October 1980 in Case 145/79, *Roquette Frères SA* v *French State,* [1980] ECR 2917.

4 — Opinion in Case 33/84 *Fragd SpA* v *Amministrazione delle Finanze dello Stato,* [1985] ECR 1606.

a broadly equivalent advantage on exports to non-member countries, as a result of the fact that the production refunds have to be repaid on exportation to non-member countries and the reduced export refund has to be multiplied by the monetary efficient.

(b) In the light of that difference of opinion, I wish to make the following comments:

(aa) As regards the products falling within tariff subheading 17.02 B I (a), to which the national court refers — and to which, if I have understood Annex I to Regulation No 3013/80 together with footnote 7 correctly — a monetary compensatory amount of DM 66.13 per tonne applies, the comparative calculations have not shown that the monetary compensatory amounts fixed for the processed products as a whole did not equal the amount applicable to maize. Therefore that product cannot, in my view, be taken into account in assessing the validity of Regulation No 3013/80.

(bb) The plaintiffs consider that, in determining whether the monetary compensatory amounts fixed for the main processed products are adequate, the amounts fixed for germ and gluten should not be taken into account (so that the difference in the resulting amount applicable to those products is even greater). It is in my view difficult to follow that view.

In that regard the plaintiffs are clearly mistaken in referring to the Commission Directive of 7 June 1979 'fixing standard rates of yield for certain inward processing operations' (Official Journal 1979, L 170, p. 5) and to the fact that maize germ is not mentioned in the processing sequence for the manufacture of maize starch, which only lists germ oil, germ meal and residue as the products obtained from processing. Although the recitals in the preamble to the directive refer to a detailed examination of existing production operations, it should not be overlooked that the directive concerns customs charges which are designed to afford protection against imports from non-member countries, a consideration which must clearly be discounted with respect to monetary compensatory amounts. Also, it is important that the directive was adopted before the judgments of the Court to which I have already referred. However, since the Court in those judgments rejected the argument put forward at that time by the Commission to the effect that there was virtually no market for maize germ, the Commission was bound to take that into account when it carried out the necessary corrections to the monetary compensatory amounts and could not follow the different considerations on which the directive in question was based.

It is indeed correct that there is no sizeable market in germ and gluten in the *Community* (which is undoubtedly the relevant market, and not only the export trade in *Germany*, on which the plaintiffs have made representations). The Commission took account of that in correcting the monetary compensatory amounts, by reducing the relevant coefficients for germ. However it is clear that there is a certain amount of trade, which is even displaying a tendency to grow (as a result of an increase in processing capacities, as the plaintiffs acknowledge). In 1983, it covered about 70 000 tonnes (including 15 000 tonnes of intra-Community trade) out of a total gluten production of 215 000 tonnes, and about 65 000 tonnes out of a total germ production of 260 000 tonnes. On the basis of that order of magnitude, it cannot be described as erroneous to include the products referred to in the system of monetary compensatory amounts — and the

Commission has a discretion to decide whether or not to include products processed in a processing sequence in that system. In fact it is possible — and in that regard I would point out that, according to the judgments of the Court, it is for the Commission to assess whether disturbances in trade are likely to arise — that in the absence of monetary compensatory amounts there would be a sudden increase in exports of such products from countries with soft currencies, which might result in considerable disturbance in the common market.

Thus I cannot accept the plaintiffs' view that the difference between the monetary compensatory amount for maize and the sum of the amounts fixed for the products processed from it must be assumed to be greater than the difference to which I have referred, on the ground that the amounts fixed for germ and gluten must be left out of account.

(cc) On the other hand, I cannot accept the Commission's view that the difference to which the plaintiffs have referred, and which the Commission acknowledges, is so *slight* that no objection could be made to it.

In that connection it should be borne in mind that in its judgments the Court has stressed the requirement of the *strict neutrality* of monetary compensatory amounts (Case 4/79, [1] paragraph 24). If it follows from that that in countries with soft currencies the monetary compensatory amounts applicable to processed products should not exceed a certain limit, the same must apply to countries with hard currencies, that is to say, the Commission must try to make the sum of the compensatory amounts applicable to processed products as close as possible to the compensatory amount fixed for the basic product.

Nor can it be said in this case that the plaintiffs are placed at a disadvantage as a result of special production conditions which the Commission were not required to take into account in fixing the permissible rates. On the contrary, in making their calculations the plaintiffs have adopted the same production sequence as that used by the Commission. However, although according to the judgments of the Court to which I have referred the Commission was compelled to reduce the monetary compensatory amounts for processed products, it does not necessarily follow that those amounts had to be reduced to a level which clearly favours processors in countries with soft currencies. And when it asserts that in connection with the production of grits it had to fix a different processing coefficient for germ (which it had to extend to the production of maize starch because for reasons of control a distinction could not be made), it could certainly have taken that into account by adjusting the monetary compensatory amount for the main processed product accordingly and could thus have obtained a greater overall balance.

At the same time, in considering whether the difference can be described as slight, account should also be taken, at least in relation to Article 43 (3) (b) of the EEC Treaty, of the fact that the aforesaid disadvantage facing undertakings in countries with hard currencies is accompanied by *an advantage for undertakings in countries with soft currencies*, which is, moreover,

1 — Judgment of 15 October 1980 in Case 4/79, *Société cooperative providence agricole de la Champagne* v *Office nationale interprofessionel des céréales*, [1980] ECR 2823.

magnified by the fact that there is no compulsion to export all the secondary products to which monetary compensatory amounts apply. Although the figure stated cannot simply be doubled (because monetary compensatory amounts depend upon the different monetary conditions), that none the less leads to such a widening of the disparity that the disadvantage suffered by the plaintiffs (which the Commission itself estimates at 5.9% of the monetary compensatory amount applicable to maize) cannot be regarded as slight.

(dd) The next matter which falls to be considered is the Commission's contention — which in fact constitutes its principal argument — that the disadvantage referred to must be viewed in the light of its endeavour to ensure a general balance in organizing monetary compensatory amounts.

As the Court will recall, the Commission pointed out that, because the production refund must be deducted from the export refund and the monetary coefficient must then be applied, the calculation of monetary compensatory amounts for exports to non-member countries results in an advantage being conferred upon undertakings in countries with hard currencies because the monetary coefficient is actually intended to apply to the export refund in its entirety. If monetary compensatory amounts for residues are included, this results in an advantage which broadly corresponds to the disadvantage arising in intra-Community trade, and if the position is viewed in its entirety it may be said that monetary compensatory amounts have a neutral effect on competition.

However, that line of argument invites the following criticisms.

I consider it open to doubt whether Regulation No 974/71 of the Council can provide a legal foundation for that view. Its aim is to avoid 'difficulties . . . as regards the proper functioning of the *common market*', [5] which could arise 'following the temporary widening of the margin of fluctuation for the currencies of certain Member States' (see Regulation No 974/71, title and third recital in the preamble). The best way of achieving that aim would seem to be to fix monetary compensatory amounts in accordance with conditions obtaining within the common market. Accordingly, the Court stressed in its judgment in Case 4/79 [1] *inter alia* that monetary compensatory amounts were intended to maintain the system of single prices as the foundation of the free movement of agricultural products *within* the Community (paragraph 20). The aim pursued was that of 'ensuring conditions for trade within the Community similar to those existing in a *national market*' (paragraph 25). The Court even stated that the fundamental objective of the system was to ensure the maximum possible neutrality of monetary compensatory amounts in *intra-Community trade* and that was not to be eschewed in favour of the objective of protection which it was sought to ascribe to the same monetary compensatory amounts in certain trading relations with non-member countries (paragraph 40). In fact it may be questioned whether that can be reconciled with the Commission's argument that undertakings in countries with hard currencies must be prepared to accept disadvantages as regards monetary compensation in intra-Community trade, because they can be compensated for them in trade with non-member countries or whether — as the plaintiffs maintain — those considerations are irrelevant.

I was also surprised by the fact that the Commission referred in this connection to Regulation No 1372/81 of *19 May 1981*,

1 — Judgment of 15 October 1980 in Case 4/79, *Société cooperative providence agricole de la Champagne* v *Office nationale interprofessionel des céréales*, [1980] ECR 2823.

5 — Our italics.

because this case concerns exports effected in November and December 1980. In the context of a similar argument in Case 46/84 [6] (which also concerned exports effected in 1980), however, it was simply pointed out that in exports to non-member countries advantages arose from the fact that monetary compensatory amounts for processed goods were calculated on the basis of the intervention price for maize without deduction of the production refund. I cannot see how that can be reduced to a common denominator.

In addition I must say that from the Commission's explanations (at the hearing it also explained, in answer to questions put by the Court, that export refunds were fixed in advance whereas the monetary coefficient was determined by the date of exportation) it was difficult to see that there is automatically an advantage in the case of exports to non-member countries or that it was impossible to deal with it in any way other than by accepting the existence of a disadvantage in the case of trade within the common market.

Lastly, I also regret that there was no corresponding demonstration in relation to countries with soft currencies, as is required if a general balance is to be achieved. The Commission ought to have shown that, corresponding to the advantage in trade within the common market resulting from the arrangement of monetary compensatory amounts, there is a disadvantage in the case of exports to non-member countries and in addition that such disadvantage is actually incurred. On the latter point, however, there is real doubt, since, according to the statistics submitted to the Court (Annex 1 to the Commission's observations), the ratio of the trade of maize starch in 1979 and 1980 within the common market to trade with non-member countries was three to two. The ratio of three to two thus shows that, on balance, trade within the common market is favoured and trade with non-member countries is placed at a disadvantage. In particular, it should be recognized that exports of maize starch to non-member countries from France, a State with a soft currency, amounted to only half of the trade within the Community in 1979 and 1980.

I therefore consider that the Commission's attempt to justify the present system by claiming that general balance is achieved has failed. The only possible conclusion must then be that Regulation No 3013/80 did not correctly fix the monetary compensatory amounts applicable to products in tariff subheadings 11.08 A I, 17.02 B II (b), 23.03 A 1 and 11.02 G II and must to this extent be regarded as invalid in accordance with the judgments of the Court on basic Regulation No 974/71 and Article 43 of the EEC Treaty. If the Court were not prepared to take such a decision, it might be possible to continue the oral procedure in order to obtain further clarification of that problem.

3. If the Court should declare the regulation invalid, the Finanzgericht further asked *what were the consequences of such invalidity.*

On that question, in the light of my Opinion in Case 33/84, [4] can set out my view fairly briefly.

(a) In principle the position should still, in my view, be governed by the decided cases of the Court, such as the judgment in Case 4/79. [1]

In other words I consider that Article 174 of the EEC Treaty should be applied by

6 — Case 46/84, *Firma Nordgetreide GmbH & Co. KG* v *Hauptzollamt Hamburg-Jonas,* [1985] ECR 1985-8.

1 — Judgment of 15 October 1980 in Case 4/79, *Société cooperative providence agricole de la Champagne* v *Office nationale interprofessionel des céréales,* [1980] ECR 2823.

4 — Opinion in Case 33/84 *Fragd SpA* v *Amministrazione delle Finanze dello Stato,* [1985] ECR 1606.

analogy in proceedings for a preliminary ruling where a regulation is declared invalid and circumstances require that the effects of that declaration should be limited in time.

I also in principle consider that the declaration that Regulation No 3013/80 is invalid is effective only from the date of the judgment. It may indeed be right that after that declaration it is not difficult for undertakings which have received monetary compensatory amounts on export retrospectively to undertake a fresh calculation, if it is only a matter of increases in such amounts. However, that, together with the elimination of distortions of competition which placed undertakings with countries with hard currencies at a disadvantage, are clearly not the only relevant aspects of this question. It is also important that if the invalidity of the regulation has retroactive effect undertakings in countries with soft currencies will sometimes be liable to pay additional monetary compensatory amounts, and Regulation No 1697/79 (which is declared applicable to monetary compensatory amounts to be levied on intra-Community trade by Regulation No 1371/81) may not provide adequate protection. It is equally important that one of the main considerations which prompted the Court of Justice to rule out the retroactive effect of invalidity in the cases mentioned was the knowledge that, owing to the lack of uniformity of the relevant national provisions on the obligation to make restitution and the right to obtain refunds, new and undesirable distortions of competition might arise. That, however, would be difficult to accept in this case, which after all concerns a regulation adopted in 1980.

(b) In any event it may, as I have already explained in Case 33/84, [4] be possible to make an exception to the general rule — in the interests of providing effective protection and justice in an individual case — to the effect that anyone who lodged an application in due time before the judgment was given, and thus prevented the notices of assessment from taking effect, could benefit from the declaration of invalidity claimed. That would cover the plaintiffs in this action, as was clear from the description of the facts.

C. Accordingly, I propose that the answers to the questions submitted to the Court by the Finanzgericht Hamburg should be as follows:

(a) Regulation No 3013/80 is invalid in so far as it fixes monetary compensatory amounts for products falling within tariff subheadings 11.08 A I, 17.02 B II (b), 23.03 A I and 11.02 G II of the Common Customs Tariff.

(b) Such invalidity does not permit the challenging of monetary compensatory amounts charged or paid by the national authorities on the basis of the regulation in question before judgment is given in this case, except in so far as legal proceedings challenging notices of assessment were brought in due time before the date of judgment.

4 — Opinion in Case 33/84, *Fragd SpA* v *Amministrazione delle Finanze dello Stato*, [1985] ECR 1606.