2. Orders the Italian Republic to pay the costs.

Mertens de Wilmars Mackenzie Stuart Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 10 May 1979.

Registrar by order

K. Mortelmans
Legal Secretary

J. Mertens de Wilmars
President of the First Chamber
Acting as President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 31 JANUARY 1979

My Lords,

Monetary compensatory amounts ("m.c.a.'s") on durum wheat and on products derived therefrom were abolished as from 12 August 1974 by Commission Regulation (EEC) No 2119/74. The reason for their abolition as stated in the preamble to that Regulation was that "prices on the market in durum wheat are appreciably higher than the threshold price", so that the "monetary measures" referred to in Article 1 of Council Regulation (EEC) No 974/71 "are unlikely to disturb trade in durum wheat".

Such m.c.a.'s were reintroduced as from 2 January 1978 by Commission Regulation (EEC) No 2604/77 which was adopted on 25 November 1977 and published in the Official Journal on the following day (OJ L 302 of 26. 11. 1977). It is common ground that in the meantime world market prices for durum wheat had fallen below Community prices.

The reasons given in the preamble to Regulation No 2604/77 for the reintroduction of the m.c.a.'s were that:

"the absence of monetary compensatory amounts has in recent months caused difficulties as regards both durum wheat and the products derived therefrom; ... deflections of trade in the case of durum wheat and distortions of competition in the case of some of the products in question have been noted; ... this state of affairs is furthermore worsened by the sharp drop in supplies of home-grown durum wheat and the increased need for imports from non-member countries;

... it is necessary to remedy this state of affairs by introducing the amounts in question in respect of durum wheat and the products derived therefrom."

Your Lordships will observe two things about those recitals. The first is that, in the case of durum wheat itself, they mention "deflections of trade", whereas in the case of derived products they mention "distortions of competition". The second is that those deflections and distortions are not merely stated to be feared or likely, but to "have been noted". In other words the Commission avowedly based the reintroduction of the m.c.a.'s not on prediction or apprehension but on ascertained facts.

The reason given in the preamble to the Regulation for the delay from 26 November 1977 to 2 January 1978 before it applied was that:

"the introduction of the new compensatory amounts requires a transitional period enabling the trade to adjust to them, account being taken, however, of the importance of the measures provided for in this Regulation in ensuring the proper functioning of the markets and in preventing speculation."

The derived products to which the Regulation applies are first durum wheat meal of CCT Heading 11.02 A 1 (a) and secondly what the English text of CCT Heading 19.03 calls "Macaroni, spaghetti and similar products" and I shall call by their shorter and more common name of pasta.

Durum wheat meal is a product of first stage processing of durum wheat and is unquestionably an agricultural product as defined by Article 38 of the Treaty; it is among those listed in Annex II.

Pasta on the other hand are a product of further processing and are not an agricultural product as so defined. They are among the products affected by Council Regulation (EEC) No 1059/69 which was adopted under, *inter alia*, Article 235 of the Treaty and which lays down "the trade arrangements applicable to certain goods resulting from the processing of agricultural products". The effect of that Regulation, so far as material for present purposes, is that pasta are, on importation into the Community, subject to an *ad valorem* customs duty and, in addition, to a "variable component" intended to reflect the amount of import levy that would have been paid on the quantity of durum wheat "considered to have been used" in their manufacture (see Article 5). The Regulation also envisages the payment of refunds on agricultural products processed into goods exported to third countries (see Article 9). It appears that, on average, 167 kg of durum wheat yield 107 kg of durum wheat meal which, in their turn, yield 100 kg of pasta.

Your Lordships will have it in mind that, by virtue of Article 1 (2) of Regulation No 974/71 (OJ L 106 of 12. 5. 1971) m.c.a.'s may be applied:

"(a) to products covered by intervention arrangements under the common organization of agricultural markets;

(b) to products whose price depends on the price of the products referred to under (a) and which are governed by the common organization of a market or are the subject of a specific arrangement under Article 235 of the Treaty."

Durum wheat is of course covered by intervention arrangements, so that both durum wheat meal and pasta are within paragraph (b).

In December 1977 the Commission adopted two Regulations of a transitional nature restricting the operation of Regulation No 2604/77. First, Regulation (EEC) No 2792/77 added to Regulation No 2604/77 a provision exempting from m.c.a., on application in writing by the person concerned, an operation covered by a certificate fixing the export refund or import levy in advance if the application for the certificate had been made before 26 November 1977. Since there are no refunds or levies on trade between Member States, that provision could apply only to exports to or imports from third countries. Secondly, Regulation (EEC) No 2917/77 provided that, in the period 2 January to 28 February 1978, m.c.a.'s should not be granted on exports from Member States with appreciated currencies, or on imports from such a Member State into a Member State with a depreciated currency, of either durum wheat or durum wheat meal, unless certain conditions were satisfied.

Of the present two cases, one, Case 12/78, is an action brought by the Italian Republic against the Commission under Article 173 of the Treaty for a declaration that Regulation No 2604/77 is void, with the consequence that Regulations No 2792/77 and No 2917/77 are also void. The Italian Republic contends:

(1) that there had in fact been no deflections of trade in durum wheat, or at all events none of such significance as to warrant the imposition of m.c.a.'s;

(2) that by virtue of Article 1 (3) of Regulation No 974/71 (inserted by Council Regulation (EEC) No 2746/72) m.c.a.'s may be imposed only where application of the monetary measures referred to in Article 1 (1) of that Regulation would lead to "disturbances in trade in agricultural products", so that, insofar as Regulation No 2604/77 was based on the alleged existence of disturbances in trade in pasta, it was *ultra vires;* and

(3) that the true purpose of the imposition of m.c.a.'s by that Regulation was to counteract the competitiveness of the Italian pasta industry with the pasta industries in other Member States, which was not a proper purpose for the imposition of m.c.a.'s, so that the adoption of the Regulation constituted a misuse of powers.

The other case, Case 84/78, has come to the Court by way of a reference for a preliminary ruling by the Pretore of Trento. The Plaintiff in the proceedings

before the Pretore is an Italian pasta manufacturer, Angelo Tomadini S.n.c. (which I shall call "Tomadini"), who, under a contract dated 23 April 1977 for the delivery to a German customer over the period June 1977 to June 1978 of 10 000 tons of various pasta at prices fixed by the contract, exported from Italy to Germany on 21 January 1978 a consignment of pasta on which it was called upon to pay an m.c.a. at the rate of 85.20 lire per kg. The Defendant before the Pretore is the Amministrazione delle Finanze dello Stato, from which the Plaintiff claims repayment of that amount. The Unione Industriali Pastai Italiani (or "UNIPI"), an association of Italian pasta manufacturers, has intervened on the side of Tomadini.

The questions referred to the Court by the Pretore are these:

"1. Must Regulation (EEC) No 974/71 of the Council (as successively amended) be interpreted as meaning that the Community institutions may, following a period of three years — during which they refrained from applying compensatory amounts to a basic agricultural product (durum wheat) — introduce specific monetary compensatory amounts in relation to products derived from the said basic product (pasta products), even though within the said three years and certainly during the last year (1977), no disturbances whatever had occurred on the market in the basic agricultural product in question (durum wheat)?

2. In the event of a *negative* answer to Question 1 (above), must Commission Regulation No 2604/77 be considered invalid, at least in so far as it introduces monetary compensatory amounts on exports of pasta products?

3. In the event of an *affirmative* answer to Question 1 (above), may Regulation No 2604/77 in conjunction with Regulations (EEC) Nos 2792/77 and 2917/77 be considered to be applicable to exportations of pasta products from Italy to the other Member States and third countries after 2 January 1978, pursuant to contracts drawn up prior to 25 November 1977, the date of the adoption of Regulation No 2604/77, during a period in which it was not possible to foresee the introduction of any compensatory amount in the sector in question?"

There are thus, I think, three main questions before the Court:

(1) Was the imposition of m.c.a.'s on durum wheat and durum wheat meal valid? (Durum wheat meal was mentioned in the arguments of the parties only in passing and, having regard to the nature of those arguments, it can, I think, be taken to be common ground that, if the imposition of m.c.a.'s on durum wheat was valid, then so was their imposition on durum wheat meal.)

(2) Was the imposition of m.c.a.'s on pasta valid?

(3) If it was, should transitional provisions additional to those contained in Regulation No 2792/77 and Regulation No 2917/77 have been made applicable to transactions carried out pursuant to contracts entered into before 26 November 1977?

In approaching the first and second questions I think it necessary to bear in

mind certain principles that have been laid down by the Court.

First, the Treaty does not authorize the Council to provide for the levying in intra-Community trade of any charge having an effect equivalent to a customs duty; see Cases 80 & 81/77 *Commissionaires Réunis* v *Receveur des Douanes [1978]* ECR 927, where (in paragraph 37 of the Judgment) the Court held that the application of m.c.a.'s in trade between Member States was justified only by the need to prevent disturbances in trade in agricultural products caused by the impact of variations in exchange rates on organizations of markets in those products based on common prices. This of course echoes numerous earlier decisions of the Court to the effect that the purpose of m.c.a.'s is to prevent fluctuations in exchange rates from affecting agricultural prices in such a way as to disturb the functioning of the common organizations of markets. In some of those earlier decisions (which I mentioned in my Opinion in Case 29/77 the third *Roquette* case [1977] ECR at p. 1850) two ways in which fluctuations in exchange rates might cause such disturbances were identified. One consists in the direct disturbance of intervention arrangements, such as by the sale to the intervention agency of a Member State with an appreciated currency of products obtained in a Member State with a depreciated currency. The other consists in the disturbance of trade between the Community and third countries, in particular by the diversion of imports through Member States with depreciated currencies in search of lower levies and the diversion of exports through Member States with appreciated currencies in search of higher refunds.

Secondly, in deciding whether m.c.a.'s are needed to prevent disturbances in a particular sector the Commission and the Management Committee have a wide discretion. Since the exercise of that discretion involves the evaluation of a complex economic situation, the Court, in reviewing its legality "must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion" (see paragraph 4 of the Judgment in Case 136/77 *Racke* v *HZA Mainz* [1978] ECR 1245 and paragraph 5 of the very recent Judgment in Case 98/78 also *Racke* v *HZA Mainz*, which follow earlier authority).

In the light of those principles it cannot in my opinion be held that the imposition of m.c.a.'s on durum wheat and durum wheat meal in the winter of 1977/78 was invalid. There was evidence before the Commission of both kinds of disturbance of trade that I have mentioned as characteristically calling for the imposition of m.c.a.'s. There was evidence of sales of Italian durum wheat to the Belgian intervention agency; and there was evidence of consignments of durum wheat from North America, destined for Belgium, Germany and the Netherlands, being unloaded in England, cleared through customs so as to be in free circulation there, and then reloaded for onward shipment to their true destinations.

It was said on behalf of the Italian Government that the sales to the Belgian intervention agency were of only 3 500 tonnes, which contrasted with much larger sales in the same period to the French and Italian intervention agencies, and that they might have been due to circumstances other than a desire to obtain the higher Belgian intervention price. That may be so, but the Commission was, in my opinion, entitled to treat them as being at least a straw in the wind.

It was sought on behalf of the Italian Government to belittle also the significance of the diversions of North American wheat through England. But the evidence placed before the Court as to them shows that they were substantial and likely to increase. So serious were they, indeed, that they aroused the concern both of the Control Sub-Committee of the Budget Committee of the European Parliament (see Annex IV to the Rejoinder in Case 12/78) and of the Court of Auditors (see its Annual Report for 1977 pp. 2.35 to 2.37, where the profit made by the operators concerned at the expense of Community funds is estimated to have amounted to over £ 1 million sterling). The Italian Government suggested that the situation could have been remedied, rather than by the imposition of m.c.a.'s, by a tightening up of customs requirements. In what the Italian Government said on this point, however, it seemed to me to overlook that once goods have been put into free circulation in any Member State they are in free circulation throughout the Community.

The Commission, in its pleadings in Case 12/78 and in its observations in Case 84/78, suggested a third reason why the application of m.c.a.'s to durum wheat was called for, viz. that the divergence between the representative (or "green") rate of the lira and its true value had become such that the world price of durum wheat had become greater than its threshold price expressed in lire, with the result that Italian imports of durum wheat were hindered. I confess that I found this difficult to understand in view of what was happening at the same time in England. Moreover I doubt if m.c.a.'s may legitimately be used to counteract an excessive divergence between a currency's representative rate and its true value. It seems to me that the remedy for that is for the Council to alter the representative rate. Since, however, there were in my opinion ample other reasons for the application of m.c.a.'s to durum wheat, I need not pursue the point.

The question whether the imposition of m.c.a.'s on pasta was valid is, in my opinion, more difficult.

There are undoubtedly in many Judgments of the Court dicta that lend support to the view contended for by the Italian Government that, by virtue of Article 1 (3) of Regulation No 974/71, m.c.a.'s may not be imposed on any product unless it is apprehended that in their absence there would be disturbances in trade in agricultural products. On the other hand that view would render virtually nugatory the reference in Article 1 (2) (b) of the Regulation to

products that are the subject of a specific arrangement under Article 235, for it is difficult to imagine circumstances in which the application of m.c.a.'s to trade in such a product could be necessary to prevent disturbances in trade in the agricultural products from which it was derived, much less disturbances in trade in other agricultural products.

Article 1 (3), read literally, means no more than that only where the monetary measures referred to in Article 1 (1) of the Regulation would lead to disturbances in trade in agricultural products may m.c.a.'s be imposed on the products specified in Article 1 (2), including products that are the subject of a specific arrangement under Article 235. Thus, so read, it leaves open the possibility of m.c.a.'s being imposed on what I shall henceforth call for short an "Article 235 product", not for the purpose of preventing disturbances in trade in agricultural products, but for the purpose of preventing disturbances in trade in that product itself in circumstances in which m.c.a.'s have been imposed on agricultural products related to it. I use in this context the wide phrase "related to it" because I am conscious of the fact that there are circumstances in which the imposition of m.c.a.'s on a derived product may be attributable not to the imposition of them on the products from which it is derived but on products competing with them.

I can find no convincing reason for departing from a literal interpretation of Article 1 (3). On the contrary, the logic and coherence of the system is preserved if, for instance, in a situation where the levies and refunds applicable in trade with third countries in particular agricultural products are affected by m.c.a.'s, the variable component payable on imports from third countries of a product processed from them, and the refund payable on exports to third countries of that product, may be similarly affected. That is not to say, of course, that every time m.c.a.'s are imposed on an agricultural product they may automatically be imposed on derived products related to it.

So the question is: when may m.c.a.'s be made applicable to an Article 235 product? More exactly, it is whether the reasons for which the Commission made them applicable to pasta in the winter of 1977/78 were valid.

From an analysis of the Commission's pleadings in Case 12/78 and of its written observations in Case 84/78, as supplemented by the oral submissions put forward on its behalf at the hearing of the two cases, it appears to me that those reasons were as follows:

(1) The constant depreciation of the lira gave Italian pasta manufacturers an advantage over their competitors in other Member States about which the Governments of some of those other Member States and associations of pasta manufacturers in them had complained;

(2) Sales by the Italian intervention agency, the "AIMA", of durum

wheat imported from third countries at prices below the Community target price had increased that advantage;

(3) Certain Governments of Member States other than Italy and associations of pasta manufacturers in those Member States had complained of the fact that m.c.a.'s were applied to common wheat but not to pasta made from it.

I think it right to observe at the outset that each of those reasons was concerned with trade inside the Community. None of them was concerned with the pattern of the Community's trade with third countries, except perhaps in so far as the AIMA's sales may have affected imports of durum wheat. Nor did any of those reasons concern intervention arrangements or any of the other mechanisms of the common organization of any market.

Reason (1) has at first sight an aura of being consistent with Regulation No 974/71 in that it is connected with the depreciation of a Member State's currency. But, if it were a valid reason for imposing m.c.a.'s, it could be invoked also, subject only to the Council enacting the necessary enabling legislation, as regards industrial products not derived from agricultural raw materials. To recognize it as a valid reason for the imposition of m.c.a.'s would mean holding that the Treaty authorized their imposition on any products of a Member State simply on the ground that that Member State's currency had declined in value and thereby made its products more competitive. Plainly, however, the fact that a Member State's currency has declined in value is not a ground upon which any Community Institution may authorize or provide for the imposition, as between that Member State and others, of charges having an effect equivalent to customs duties, or any other barrier to trade. M.c.a.'s, as I have pointed out, may only be made applicable if and insofar as they may be necessary for the protection of the functioning of the common organization of markets in agricultural products and for reasons connected therewith.

As to reason (2) this Court is of course not unfamiliar with the topic of the AIMA's alleged sales of imported durum wheat and common wheat; see for instance Case 60/75 *Russo* v *AIMA* [1976] ECR 45 and Case 52/76 *Benedetti* v *Munari* [1977] ECR 163, where it was held that " the action of a Member State in purchasing wheat on the world market and subsequently reselling it on the Community market at a lower price than the target price is incompatible with the common organization of the market". Assuming in favour of the Commission that the Italian Republic is, in that respect, guilty of a breach of Community law, it cannot in my opinion, by any stretch of that law, be permissible for the Commission to retaliate by the imposition of m.c.a.'s on pasta. Its proper remedy lies in Article 169 of the Treaty.

Reason (3) was only sketchily canvassed by the Commission, which did not go so far as to say that it would be unfair to apply m.c.a.'s to common wheat and durum wheat without applying them also to pasta.

One can of course imagine circumstances in which it could by considered unfair to

grant to processors m.c.a.'s on imports of their raw materials without imposing them on exports of their products. The Court sought further information from the Commission, from which it transpired that, on the basis of the figures for 1977, imported durum wheat (on which m.c.a.'s would be granted) entered into the manufacture of Italian pasta to the extent of only about 20 %. We have even less information about the extent to which imported common wheat enters into the manufacture of Italian pasta, though it appears from figures placed before us by the Commission that, in 1977, Italy produced some 4 245 000 tonnes of common wheat and imported (net) some 1 483 000 tonnes, mostly from France.

I come now to a submission that was put forward on behalf to the Commission based on paragraphs 13 and 14 of the judgment of the Court in the third *Roquette* case ([1977] ECR at p. 1842). The Court there said this:

"The possibilities of disturbances in trade in agricultural products are so numerous and so diverse that it would be difficult, if not impossible, for the Commission to list all those possibilities in a regulation.

Consequently, the Commission may find that there is a risk of disturbances merely on the basis of an appreciable fall in the rate of exchange of a currency."

It must not be forgotten, however, that, in that case, as in many a previous case, the Court was dealing with the situation where, following the occurrence of a "monetary event" (in the third *Roquette* case it was the departure of the FF from the "snake" in March 1976) the Commission has quickly to decide as to the application of m.c.a.'s to the whole range of products to which they may be applied. In such a situation, the speed with which the Commission has to act and the enormous number of products that it has to consider necessitate an overall and largely theoretical approach on its part. Here in contrast the Commission was considering, independently of any particular monetary event, and at comparative leisure, whether to impose m.c.a.'s on a small range of specific products on the basis of ascertained facts concerning them. In such a situation the Commission must in my opinion make sure (and, if called upon to do so, satisfy the Court) that those facts are of a kind such as to warrant the application of m.c.a.'s to each of those products.

In the result I have come to the conclusion that none of the reasons for which, on its own showing, the Commission purported to impose m.c.a.'s on pasta were reasons of a kind consistent with the purpose for which the imposition of m.c.a.'s is authorized. So the Commission's action in that respect was in my opinion *ultra vires.* In the language used by the Court in its Judgments in the *Racke* cases and in earlier cases, it was either a misuse of powers or an instance where the Commission clearly exceeded the bounds of its discretion — depending on how one prefers precisely to define each of those concepts. My own preference is for the view that it was an instance where the Commission clearly exceeded the bounds of its discretion.

If I am right in thus thinking that Regulation No 2604/77, whilst valid in so far

as it made m.c.a.'s applicable to durum wheat and to durum wheat meal, was void in so far as it extended them to pasta, the third question before the Court, as to whether the Commission should have enacted additional transitional provisions, does not call for an answer, since it is raised only in Case 84/78 and only in relation to pasta. That being so I do not think it right to take up Your Lordships' time in discussing it, even though it was argued very fully. It is not, to my mind, a question that could be dealt with briefly.

If Your Lordships share my opinion, the consequence should, I think, be that, in each of these cases Your Lordships should declare that Regulation No 2604/77 is void in so far as it purports to make m.c.a.'s applicable in respect of products of CCT Heading 19.03 but that, otherwise, consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of that Regulation or of Regulations No 2792/77 and No 2917/77.

As regards the costs in Case 12/78, since the Italian Republic will have succeeded on part of the case and the Commission on the rest of it, I suggest that each party be left to bear its own (see Article 69 (3) of the Rules of Procedure). The costs in Case 84/78 will of course be a matter for the Pretore.