OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 24 MARCH 1983 [1]

Mr President,
Members of the Court,

In this case two main and two subsidiary questions have been submitted to the Court by the Tribunal de Commerce [Commercial Court], Bourg-en-Bresse. For the purposes of a sound understanding of the facts of the case I shall devote the first section of my Opinion to the applicable legislative rules.

1. The applicable legislative rules

The Community organization of the market in wine was established by Regulation (EEC) No 816/80 of the Council (Official Journal, English Special Edition 1970 (I), p. 234). As regards the importation of wines from beyond the frontiers of the Community, the ruling principle is that the mere application of the relevant tariff headings in the Common Customs Tariff affords sufficient protection to the Community market in wine. This is apparent from the third recital in the preamble to the regulation. In order that disturbances should not arise as a result of abnormally low prices the so called free-at-frontier offer prices are determined on the basis of all available information (Article 9 (2)). Where that price, plus customs duties, is lower than the reference price, a countervailing charge is fixed (Article 9 (3)).

In 1976 the Community and the Democratic People's Republic of Algeria signed an Interim Agreement which preceded the subsequent Cooperation Agreement. The Interim Agreement, which covers preferences in respect of the trade in goods, was approved and introduced by Council Regulation (EEC) No 1287/76 of 28 May 1976 (Official Journal, L 141, p. 1). Article 13 of the Agreement provides for an 80% reduction if customs duties relating to the heading "Wine of fresh grapes" (heading 22.05) provided that the import price plus the customs duties actually levied is not less than the Community reference price.

By virtue of this type of preference the danger to the Community of market disturbances caused by the import of wines naturally becomes greater. For that reason Council Regulation (EEC) No 2506/75 of 29 September 1975 (Official Journal, L 256, p. 2) introduced an information scheme. Member States must inform the Commission of all cases of imports of wine at a price lower than the Community reference price less customs duties (the free-at-frontier reference price). In such cases the preference does not apply (Article 3 (1)). As evidence that the reference price is observed the exporting country must present a certificate.

Thus what the system of market protection I have outlined entails is that the free-at-frontier reference price must be compared with the free-at-frontier offer price. How the latter price must be calculated is laid down in Article 1 of Commission Regulation (EEC) No 1393/76 of 17 June 1976 (Official Journal, L 157, p. 20). Both prices must be stated on the customs forms (Article 2) so that it is possible to compare them.

1 — Translated from the Dutch.

The free-at-frontier offer price consists of the fob price plus transportation and insurance costs (Article 1 (1)).

Here, too, the existence of monetary compensatory amounts creates complications. If the currency of the importing State has depreciated the free-at-frontier offer price must then be reduced by the relevant monetary compensatory amount, as provided for in Article 1 of Commission Regulation (EEC) No 1577/76 of 30 June 1976 (Official Journal, L 172, p. 57).

2. The facts

The defendant in the main action, the Société des Fils d'Henri Ramel, imports from Algeria into France wine which it obtains from the plaintiff in the main action, the Algerian public undertaking Office National de Commercialisation des Produits Viti-vinicoles (hereinafter referred to as the "Office National"). The contracts concluded between the two parties contained a clause which reads as follows: "It is agreed that any sum arising from a monetary compensatory amount granted by ONIVIT shall be paid by the buyer directly into the account of the seller on the basis of a supplementary invoice made out for that purpose." Until 1978 Ramel always paid over, in pursuance of that clause, the monetary compensatory amounts which it received. However, in May of that year Ramel refused to pay the invoices for the payment over of monetary compensatory amounts in the sums of FF 623 698.91 and 72 670.35 respectively sent to it by the Office National. The argument advanced by Ramel was that this manner of doing business was in conflict with the relevant provisions of Community law and that the contractual clause I have cited was illegal and therefore void. The Office National sued Ramel before the Tribunal de Commerce [Commercial Court], Bourg-en-Bresse, for the payment of the above-mentioned sums. Ramel thereupon submitted a counterclaim for a sum of FF 1 877 509.16. The origin of that counterclaim is to be traced to the nationalization of the wine trade by Algeria as a result of which Ramel lost its subsidiary undertaking in that country. Although this counterclaim may perhaps shed more light on Ramel's refusal to pay over the monetary compensatory amounts to the Office National, this matter has no relevance to the preliminary questions referred to this Court by the Tribunal de Commerce. Those questions read as follows:

(1) Is a sales organization in a Maghreb non-member country entitled to export wines to a Member State of the Community at import prices lower than the reference price, without any customs duties, at full or reduced rate, being levied on those wines?

If not, may it, in order to avoid the application of that rule, stipulate in its contract with an importer in a country which belongs to the EEC that the monetary compensatory amounts received upon importation are to be paid over to it, in order to enable it subsequently to prove to the Community that its invoice price accords with the reference price?

(2) May the monetary compensatory amounts received by the importer in an EEC country be included in that reference price?

If not, what value should be attributed to an agreement between a sales organization in a Maghreb non-member country and a French importer obliging the latter to transfer the compensatory amounts to the former in order to prove compliance with the reference price?

As I shall explain in greater detail, it seems sensible to combine on the one hand the two main questions (on the import system) and on the other hand the two supplementary questions (on the contractual system).

3. The answers to the questions

The questions submitted by the Tribunal de Commerce must be viewed against the background of a possible breach of the Community rules governing the importation of wine inasmuch as the free-at-frontier reference prices for the imported wine are said not always to have been complied with. The breach is said to be the result of manipulations of the monetary compensatory amount which is due to the importer upon the importation of wine. This background clearly emerges from the judgment of the court making the reference, whilst Ramel, in its written observations and also at the hearing, has done its utmost to justify the non-payment of the monetary compensatory amounts to the Office National by asserting that in this way a breach of the Community rules by the Office National is being brought to an end. This commendable attempt to contribute to the upholding of Community law did not however appear to be maintained in the face of the questions put by this Court in the course of the hearing.

When answering the preliminary questions it will be necessary to draw a distinction between the possible disturbance of the Community rules on imports as a result of fraudulent conduct and a possible disturbance as a result of contractual conditions relating to the monetary compensatory amount. In its written observations Ramel has dealt comprehensively with the first aspect and with the possible consequences thereof in conjunction with an offence against the French customs legislation. The questions of the Tribunal de Commerce relate only to the last-mentioned aspect.

As regards the answer to the first of the main questions it is helpful to recall to mind the system of legislation which I explained earlier. The object of the Community rules on imports is to prevent any import of wine at prices lower than the free-at-frontier reference price. In the event of such an import, however, the preference in regard to customs duties no longer applies and countervailing charges may even be imposed. The import system is thus so conceived that any possibility of importing at prices lower than the free-at-frontier reference price is countered.

At the same time it should be added, for a sound understanding of the situation, that the system, considered on its own, cannot be disturbed by the existence of monetary compensatory amounts. As I have stated, the essential element in that system is that the free-at-frontier offer price may not be lower than the free-at-frontier reference price. The customs authority must verify that this is so upon importation on the basis of documents submitted to it. The method of calculation prescribed for the free-at-frontier offer price is such that where a monetary compensatory amount is granted it must be deducted from that price. Thus a positive monetary compensatory amount cannot disturb the import system by producing an effect which may encourage imports. This must also be regarded as being in conformity with the monetary aspect of the system of Regulation No 974/71. Accordingly, as regards the second main question the answer must be that the monetary compensatory amounts are included in the free-at-frontier offer price and not in the reference price (free-at-frontier). In the nature of things the latter possibility is also excluded since the reference prices

are expressed in European units of account.

The answer both to the first main question and the first subsidiary question follows from the two preceding paragraphs. The answer to the first main question is: "The export of wine by the sales organization of a Maghreb country at import prices which, inclusive of the reduced customs duties, are lower than the free-at-frontier reference prices is contrary to Community law." Since upon a correct application of the import system the effect of a monetary compensatory amount is neutral, the answer to the first subsidiary question is in the affirmative. That answer is fully confirmed by the judgment in Case 74/79 (*O.C.E.* v *Samavins* [1980] ECR 239). That case involved similar problems relating to the importation of wine from Morocco. As the Commission rightly stressed in that case, it does not matter who receives the monetary compensatory amount *so long as the reference prices are observed* (emphasis added, as this requirement is of particular importance precisely in the present case). There is not a single provision on this subject in the legal provisions of the system of monetary compensatory amounts. He who completes the import or export formalities receives or pays the amount. I would add that in various judgments, and in particular in the judgment in Case 74/79 (*CNTA* v *Commission* [1974] ECR 533), this Court has held that a monetary compensatory amount does not have the function of a guarantee for the individual trader but serves to protect the relevant market organization against disturbances of a monetary nature. It may also be concluded from this objective of the monetary compensatory amounts that requirements of private law in regard to the destination of the monetary compensatory amounts are, as such, of no relevance from the point of view of Community law. What matters in the final analysis is the fixing of the offer price and not the manner in which it is made up.

These considerations also supply the answer to the second subsidiary question, in the sense that an agreement concerning the destination of monetary compensatory amounts must be judged in accordance with national law on contracts and not with Community law. That is expressed in unequivocal terms by the Court in paragraph 7 of its judgment in Case 74/79, cited above.

The answers proposed above to the preliminary questions remain unchanged in the case of non-observance of the free-at-frontier reference prices as a result of fraudulent conduct. If the exporter is content with a price which, including the monetary compensatory amounts, is equal to the free-at-frontier reference price, the importer is in a position to import wine at a price lower than the latter price if he does not (as the Commission, too, pointed out in answer to a question of mine) pay over the compensatory amount to be received by him to the exporter. In such a case the Community import system is indeed disturbed, not by the effect of the monetary compensatory amount or by the destination of that amount under the contract but by the fraudulent acts of the parties concerned. In the case in point — contrary to what Ramel suggests — it is precisely the non-compliance with the contractual provision in regard to the monetary compensatory amount paid out which may imply the existence of such fraudulent conduct.

It is clear from my argument that the answers to the questions put to the Court are simplified if, on the one hand, the two main questions (on the Community import system) and, on the other hand, the two supplementary questions (on the contractual destination of the monetary compensatory amounts) are combined. After all, it does seem that the monetary compensatory amount to be paid out by the French authorities may also have a role to play in the fixing of the offer price which has to be compared to the reference price. It is therefore difficult to answer the first main question separately from the second. Furthermore the second main question did not appear to be framed in the most felicitous of terms. Finally, the two supplementary questions in fact have a common object which makes it possible to answer them jointly. That object is to determine the relevance under Community law of contractual provisions relating to the destination of monetary compensatory amounts received.

I therefore propose that the Court should answer the questions put by the Tribunal de Commerce, as joined in the manner I have indicated, as follows:

1. Where wine is imported from a Maghreb country the free-at-frontier offer price of that product as corrected by the applicable monetary compensatory amount must not be lower than the free-at-frontier reference price.

2. Without prejudice to the appraisal of the offer price resulting from the requirement stated in paragraph (1) above, the question of the validity of a provision of a contract between an importer and an exporter in regard to the receipt of a monetary compensatory amount does not as such come within the field of Community law but within that of the law of contract.