OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 22 JUNE 1967[1]

Mr President,
Members of the Court,

On 25 and 27 October 1965 the undertaking W. Beus imported into the Federal Republic 34 257 kg of outdoor table grapes from Bulgaria. On that occasion, in addition to customs duties and the turnover equalization tax imposed on importation, the customs collected a countervailing charge of DM 8 per 100 kg laid down by Regulation No 144/65 of the Commission of 18 October 1965. Considering that the collection of this latter charge was unlawful, the undertaking made an appeal to the Finanzgericht, Munich, which, although the wording of Article 177(b) of the Treaty allows it to do so, did not consider that it could itself decide upon the validity of that regulation, but referred the question to you by a decision of 25 January last.

It is appropriate first of all to consider the disputed measure in the framework of the common organization of the market in fruit and vegetables established by Regulation No 23 of the Council. Contrary to what is found in the regulations of the same day concerning cereals, eggs and other products, protection against imports from third countries is given not by a levy but by the collection of *ad valorem* customs duties. Nevertheless, in order to avoid the collapse of prices on a market which is typified by a sudden offer of large quantities of fruit which are rapidly perishable, Article 11(2) of Regulation No 23 provides protective measures consisting either in the suspension of imports or in the institution of a countervailing charge by the Commission. These measures may only be taken where the Community markets experience or are threatened with serious disturbances resulting from imports from third countries made at prices lower than a reference price calculated annually 'on the basis' of the average prices recorded during a certain period on certain Community markets. The amount of the countervailing charge is equal to the difference between the reference price and the entry price of the imported product.

It appeared very quickly that, taking into account the particular characteristics of the market in fruit and vegetables, this system was not as effective as the system provided for in the other common organizations of the markets; in addition, after long and difficult discussions, Regulation No 65/65 of the Council replaced Article 11(2) of Regulation No 23 by provisions which were appreciably stricter.

According to its present wording, Article 11(2) no longer makes provision for the suspension of imports on a Community scale, but only the institution of a countervailing charge. The object of that charge is to avoid disturbances due to offers from third countries at abnormal prices, but it no longer presupposes the proof of the existence or the threat of serious disturbances on these markets; it is enforced when the entry price has fallen below the reference price and, as previously, is equal to the difference between these two prices and is of the same amount in all the Member States. Furthermore the new wording settles the method of caulculation both of the reference price and of the entry price in a more precise manner.

In its present form the system closely resembles that which exists, for example, for cereals in which the levy, which is equal to the difference between the entry price (cif price) and the threshold price, is compulsorily collected by the Member States. It is different, from the point of view of procedure, since the countervailing charge is fixed by a regulation of the Commission after consultation with the Management Committee.

Thus whilst the old rules led only once to the imposition of a duty on Bulgarian grapes this was done four times in application of the new wording in 1965 by Regulations Nos 122/65, 138/65, 144/65 and 155/65.

It is the validity of Regulation No 144/65— published in the Official Journal of 18

1 — Translated from the French.

October 1965—which is disputed. A countervailing charge of two u.a. per 100 kg net (that is, DM 8) was imposed on imports of outdoor table grapes from Bulgaria and Romania from the third day following publication in the Official Journal until 31 October. Nevertheless the Commission was to revise the regulation before that date if the measures which it brought into being no longer corresponded to the conditions of Article 11(2) of Regulation No 23.

In referring the case to you, the Finanzgericht confines itself to saying that 'the doubts of the plaintiff as to the legality of the regulation do not appear *a priori* to be unfounded'. The question is in fact delicate *in* respect of certain matters; this will be seen by recalling the arguments set out both in their written observations and at the Bar by the Beus company and by the Commission, and which go over all the complaints made concerning the regulation.

I

I — The first complaint concerns its lega basis, through Regulation No 144/65, that is to say, Article 11(2) of Regulation No 23 as worded at present, which is alleged to infringe Articles 39 and 110 of the Treaty. More precisely it is claimed that the system adopted prevents the harmonious development of world trade and the progressive abolition of restrictions on international trade which, according to Article 110, are among the basic reasons for the customs union established between the Member States. Likewise, and above all because of its automatic nature, it is claimed, it tends only to guarantee the standard of living of producers in accordance with Article 39(1)(b), but totally neglects the other objectives of the common agricultural policy, in particular those which deal with the availability of supplies and with reasonable prices from which consumers should benefit (Article 39(1)(d) and (e)). In support of its arguments the Beus company emphasizes the development which has taken place in the common organization of the market in fruit. Although it has mentioned the special position of this market from the beginning because of the perishable character of the products, the Commission, in its first proposals to the Council in 1961, saw sufficient protection in respect of imports from third countries in the customs duties of the common external tariff. The original wording of Regulation No 23, however, introduces a 'safeguard clause' in the form of a prohibition on imports or of a countervailing charge, and the present wording of Article 11(2) increases even further the protection from which the Community producer benefits. How could such different rules contribute equally to the attainment of the objectives laid down by the Treaty?

Here again one comes across the question, which you have often encountered, of reconciliation and of the choice to be made between various objectives, both of which are equally privided for by the Treaty, and which, considered in isolation, are divergent if not contradictory. Your judgment in Case 9/65 (*Meroni*, Rec. 1958, p. 43) shows for example that, in pursuit of the objectives laid down in Article 3 of the ECSC Treaty, the High Authority must permanently reconcile any possible conflict which may be implied by these objectives when considered individually, and when such conflict arises must grant such priority to one or other of the general objectives as appears necessary having regard to the economic facts or circumstances in the light of which it adopts its decisions. The same judgment adds that this reconciliation implies for whoever is given it a 'real discretion', and I would say at least a wide area of discretion which must be used subject to review by the courts.

These principles also find their application in the Treaty of Rome, and it does not appear that the Council has neglected them in the present case. The Commission is right in recalling that the disputed provision must not be regarded in isolation but as a factor in the general scheme laid down by Regulation No 23 for imports from third countries. That regulation provides as a normal method of protection only for customs duties, and in that it is liberal and in the first instance favours supply to consumers; but *ad valorem* duties are ineffective in the case of a noticeable and rapid fall in prices which would endanger the standard of living of the agricultural population. The countervailing charge, on the other hand, by taking the prices of imported products up to a level close to that of internal prices,

allows the objective laid down in Article 39(1)(b) to be realized and further contributes to stabilizing the markets. Of course, it may lead to an increase in price for the consumer, but 'reasonable' prices cannot be identical with the lowest prices; you mentioned that in your judgment in Case 34/62 (*Federal Republic of Germany* v *Commission of the EEC* [1963] E.C.R. 131). No doubt the present system is in certain ways stricter than that which was introduced originally—the more so since it excludes the possibility of suspending imports, that is to say, the most radical measure causing the greatest injury to international trade—but that does not imply that it is contrary to the Treaty, and it is not possible to complain that the competent authority modified a regulation which showed itself to be inapplicable and insufficient to ensure the protection of the standard of living of producers.

I consider in consequence that Article 11(2) of Regulation No 23 in its present wording does not infringe either Article 39 or Article 110 of the Treaty and was able therefore to serve as the basis for Regulation No 144/65.

II — There is a second point which is the nub of the question. There is reason to impose a countervailing charge when the entry price of a product imported from third countries is lower than the reference price and Article 11(2) shows how these two prices are fixed, the prices which must be taken into account and the deductions which, where necessary, must be made. The regulation is only legal, therefore, if certain conditions *of fact* are fulfilled, and it is their presence which was above all disputed before the Court of first instance. But before you the argument extended to questions of law which govern the facts. What must be the method of calculating the entry price? It is around this point that the entire discussion turned and it is that which must first of all be decided in order to establish whether the regulation was properly introduced.

The sixth subparagraph of Article 11(2) reads as follows: 'The entry price... shall be fixed on the basis of the lowest price recorded on the representative import markets referred to in the immediately foregoing subparagraph, less customs duty arising from the application of Article 23 of the Treaty and less other taxes on imports as well as transport costs from those markets to the Community frontier crossing points'. Article 2 of Regulation No 99/65 of the Commission, adopted for the application of the above provision, states which markets are to be regarded as representative. There is one for Italy, France and the Netherlands, two (Brussels and Antwerp) for Belgium and the Grand Duchy and four for the Federal Republic, which are Hamburg, Munich, Frankfurt and Düsseldorf.

In its written observations the Commission has set out very fully how it interpreted these provisions.

It considers first of all that the prices which must be taken into account are neither the average of the four representative German markets during the days which preceded the introduction of the regulation, nor the lowest prices recorded during the same period on one of these markets.

The first system has textual arguments against it since Article 11(2) does not mention the 'arithmetical mean' as regards the entry price—as it does concerning the reference price; it is not compatible with the provision which lays down that it must be decided 'on the basis of the lowest prices', because on the representative markets there may be at the same time low prices and high prices. Further, it does not enable producers throughout the Community to be protected against imports from third countries at prices below the reference price. In fact the State-trading countries which limit their offers at low prices to certain markets could prevent the average falling below the reference price and thus prevent the imposition of a countervailing charge.

But it is not possible to confine oneself merely to taking note of '*the* lowest price recorded on *one* of the most representative markets', because that formula was expressly set aside by the Council in favour of the following '*on the basis of the lowest price recorded on the representative import markets*'. The expressions used presuppose in consequence that account shall be taken of several prices and clearly imply a certain area of discretion on the part of the Com-

mission which is also emphasized by the words 'on the basis of'. The lowest prices are thus the point of departure for fixing the entry price, the fixing of which may be affected by very different factors: the more or less representative nature of certain markets for certain products (as it is undisputed that Munich is the leading market for all imports from the State-trading countries of Eastern Europe and Hamburg for imports from the Mediterranean, the prices which are recorded in these two towns have special importance according to the circumstances) or the date on which those prices are recorded (as prices have a tendency to rise at the end of the harvest of a product, a low price may appear as a temporary anomaly which the later markets will correct and which there is no need to take into account for the purpose of introducing a countervailing charge).

In its written observations the Beus company maintained that it was only possible to obtain a representative figure on the basis of data recorded on the four German markets; it stated at the oral procedure what it meant by that. It is no longer a matter of an arithmetical mean, but of an average weighted price established by taking into account the different markets, the lowest prices recorded on those markets and the turnover actually effected. The system is ingenious but hardly appears to conform with the wording of Article 11(2) which does not mention weighting, and it is not possible to see how one could take into account all the markets when it is necessary to take into account only the lowest prices.

Two other points of disagreement exist in respect of the fixing of the entry price. According to Article 11(2) the lowest prices recorded on the representative markets must be reduced in particular 'by customs duties resulting from the application of Article 23 of the Treaty, *and by other taxes on imports*'. The Commission has included among these deductible duties, the turnover equalization tax payable on imports (a German duty) and the countervailing charge of 3 u.a. introduced by Regulation No 138/65 of 5 October 1965 on the import of table grapes from Bulgaria, Romania and Yugoslavia (a Community charge in force during the period preceding the introduction of the regulation whose validity is disputed).

The deduction of these two charges is also disputed, but in my view wrongly. Textual arguments have been relied upon; it has been pointed out that Article 11(2) refers expressly to the provisions of the Treaty in respect of customs duties ('customs duties arising from the application of Article 23 of the Treaty'); it says nothing similar in respect of the 'other taxes on imports', which would show that the latter cannot be Community charges, but only charges laid down by purely national provisions. Also an attempt has been made to advance the argument that the expression 'tax on imports' is not used in the Treaty.

That discussion on terminology appears to me to be quite barren in respect of the provision to be applied. It is just because one expects to see deducted all the taxes levied on the entry of the goods into the territory of a Member State that it is necessary to choose a neutral term, which might apply both to taxes of 'national' origin or of 'Community' origin, and there could not be any question of enumerating them, taking into account the various names which may be given them in national law. It is in any case clear that the turnover equalization tax and the countervailing charge are both taxes on imports.

But their deduction from the entry price is justified above all by basic, technical reasons. Since the countervailing charge to be introduced represents the difference between the import price and the reference price, these two factors must be made comparable and considered at the same stage of the economic process. The reference price, which is a producer price, does not include the turnover tax; it is proper therefore to deduct from the entry price the turnover equalization tax levied on importation. As to the countervailing charge which is already levied on an imported product, but temporarily, the Commission at the hearing set out the technical reasons which lay behind its deduction. If it were not deducted, one would find oneself at the time when it was discontinued with an import price which would immediately be below the reference price and would require a reintroduction of the charge.

In short, the objections made on the legal plane against the method of calculation of the entry price do not appear to me to be acceptable. It remains that the disputed regulation could only take effect if that price, calculated on the bases which we have seen, had *in fact* fallen below the reference price. The Beus company maintained during the proceedings before the Finanzgericht that this condition had been fulfilled at the most for several days before the adoption of the regulation only on the Munich market, which did not justify the introduction of the charge, but that assertion is incorrect if one applies to the price the deductions which we have seen should have been made. The figures contained in the written observations of the Commission—which are indisputable—show that from 11 to 15 October inclusive, the date on which the Management Committee met, the Munich prices were always noticeably less than the reference price as they were also, but to a lesser extent, during the four days when there was a quotation at Düsseldorf. They even justified the quantification of the entry price at 12 u.a. at most and thus a countervailing charge of 4 u.a., since the reference price was 15.9 u.a. That the figure of 2 u.a. was taken was because between 15 October and the entry into force of the regulation, some days after its publication, the approach of the end of the grape harvest of Bulgarian table grapes led to an increase in import prices. There appears no doubt therefore that at the time when the regulation was adopted the conditions laid down in Article 11(2) of Regulation No 23 were fulfilled.

III — Then we meet another criticism which is linked to that which we have just seen and which is as follows. Supposing that the regulation was valid at the moment when it was adopted, it would no longer have been so in any case on the dates when it was applied to the imports made by the Beus company, that is, on 25 and 27 October. The regulation was applicable until 31 October, but according to Article 2(2) the Commission undertook to revise it before the latter date if the measures included in it no longer corresponded to the conditions of Article 11(2) of Regulation No 23, that is to say, if the import prices after all deductions equalled the reference price.

Here again it is necessary to reconsider the figures as they were given by the Commission in its written observations for the period 21 to 31 October—the duration of the application of the regulation—and amplified at the hearing in respect of the period from 18 to 20 October inclusive which ran between the publication of the document and its entry into force.

The first fact which appear from it is that the prices after deductions were not continually less than the reference price. More exactly, it is noticeable that on 18 October the prices at Düsseldorf and Munich were 11.6 u.a. and 12.3 u.a. respectively; thus they refer in an unequal but general manner to all the markets where there are quotations and they clearly exceed the reference price of Friday 22 October. But, on Monday 25 and the two following days (that is to say, at the moment when the Beus company made its imports), the prices at Munich, the most important market for imports from Bulgaria, were slightly less than 13.9 u.a. which had been used by the disputed regulation as the entry price.

What conclusions must be drawn from that development? It will be recalled that the procedure for fixing the countervailing charge presupposes first of all recourse to the Management Committee, then its introduction by the Commission, its publication and finally its entry into force which cannot be immediate; it is the same thing, or more or less so, when it is necessary to alter the rate of the charge or to abolish it. All that implies delays, which do not make it possible to follow the day-by-day fluctuations of prices, but no doubt it is undesirable to follow them blindly. It is necessary to consider whether what one finds is a passing fluctuation due to chance, or on the contrary a real market tendency with a more lasting effect; and it is only on the last supposition that it is proper to revoke the countervailing charge. As for the area of discretion which the Commission must have in order to introduce the charge, taking into account the opinion which it may form of the probable evolution of prices, it is logically necessary for the Commission to keep it when it is a matter of ending its applica-

tion. The zig-zag course pursued by the price curve between 18 and 25 October does not allow it to be said that the Commission should have revoked the disputed regulation before it was applied to the imports made by the Beus company.

IV — There remains one final complaint made against Regulation No 144/65, namely that it is vitiated by the inadequacy of the statement of reasons on which it is based.

The statement of reasons deals first of all with the Treaty and Regulation No 23 and reproduces the wording of Article 11(2) of that regulation. Then after stating that Regulation No 104/65 fixed the reference price for outdoor table grapes at 15.9 u.a. for the month of October, it states that the import prices on the representative markets 'have been for several days on certain markets at a level lower than the reference price in respect of products from Bulgaria'. It ends by saying that for the supplying countries in question the entry price was 13.9 u.a.

This reasoning was certainly succinct and was criticized before the Finanzgericht, but it hardly convinced that court because its order referring the matter states that the complaint of an insufficient statement of reasons appears unlikely to be accepted, having regard to the arguments which you set out in Case 16/65 (*Firma C. Schwarze* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] E.C.R. 887). The Beus company also keeps to its previous argument and emphasizes that, as it is a question of an exceptional decision 'of an individual nature', the reasons which led you to give a restrictive interpretation of Article 190 of the Treaty in the *Schwarze* case are not present here. The recitals mentioned above do not show the facts which played a decisive part in the fixing of the entry price, and the progress of the case showed that those concerned could not themselves establish whether the Commission had settled this price in a proper manner.

There is no need to recall that your case-law adapts the extent of the requirement to give reasons to the nature of the various measures of the institution; for example, you accept that general decisions of a legislative nature may be less reasoned than individual decisions (Case 18/62, *Emilia Leone (née Barge)* v *High Authority of the ECSC* [1963] E.C.R. 259). On the contrary according to the Beus company we are faced here not with an individual decision but with a regulation, the object of which is to introduce a charge and to fix its amount. The amount is governed by two factors: one—the reference price—is already known and follows from a previous regulation; the other is the entry price appearing in the statement of reasons which refers to prices recorded 'for several days on certain markets'. Certainly that includes a reference to legal and, to a certain extent, factual requirements which explain the operative part of the regulation but not the concrete factors upon which the entry price was based. What are those prices; on what days were they recorded and on which markets? That is what the statement of reasons does not say.

Must it say so? Your judgment in the *Schwarze* case makes one inclined to reply in the negative. As it is a matter of fixing a free-at-frontier price, you agreed that the decision to act could refer to criteria of a permanent and general nature laid down in a previous decision, but need not necessarily include the specific reasons mentioning the prices, the markets, the quality and the quantities which were taken into account by the Commission. You supported that decision by the technical necessities in the particular case, but also because of the fact that the comparison of price laid down and of the general criteria published was sufficient to inform those concerned of the nature and trend of the data which served as a basis for the decision of the Commission. You recalled finally that the Commission had to place the technical facts on which it based its decision at the disposal of the parties when its decision was disputed before the courts, which refers thus not to the administrative measure but to preparations for the proceedings.

Although the fixing of the rate of countervailing charge is in a certain respect simpler than that of the free-at-frontier price, the decision in the *Schwarze* case may perhaps be followed; in particular the daily publication of prices in the various countries allows

those concerned to know and to discuss from the beginning the *factual* data which led the Commission to calculate the entry price at a certain figure and not at another.

It appears to me that the last complaint made against the validity of Regulation No 144/65 should be rejected.

However, I would say in ending, that this does not imply that the system as it has been set up and as it functions is entirely satisfactory. As has been seen, the machinery created follows the development of the markets with difficulty but the reason is no doubt that the market in fruit and vegetables is particularly volatile, being liable to sharp changes and therefore more difficult to 'organize'. Would another system be more effective? That is a question both political and technical into which it is not for me to enter. It is sufficient for me to state, and this is the gist of my opinion, that the examination which I have conducted shows no factor capable of affecting the validity of Regulation No 144/65 of the Commission.

I am of the opinion, further, that it is for the Finanzgericht to decide upon the costs of the present proceedings.

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 30 NOVEMBER 1967[1]

Mr President,
Members of the Court,

It is my task today to present some further observations on the request made to you by the Finanzgericht, Munich, for a preliminary ruling on the validity of Regulation No 144/65 of the Commission of the EEC. Your order of 6 July 1967 did more than reopen the oral procedure. It asked the Commission to explain in writing the exact machinery for the calculation of reference and entry prices, as laid down in Regulation No 99/65 of 7 July 1965. In so doing, the Court in fact set in motion an inquiry as provided for by Article 45 et seq. of the Rules of Procedure, which had not at first seemed necessary. The detailed reply given by the Commission caused the Beus company to submit further observations.
Carrying the analysis further, you asked the Commission by telex of 24 October to give certain information on the tonnage by year and variety of the harvest ot table grapes within the Community. You asked them, in addition, to explain the criteria which it used in applying Article 11(2) of Regulation No 23, by which the only products to be taken into account in order to calculate the reference price are the 'products or varieties which represent a considerable part of the marketed output throughout the year'. It was no doubt a slip of the pen which led you to quote a phrase which makes reference to 'the marketed output throughout the year *or during a part thereof*'. However that may be, it was on the basis of that complete version of the wording as I have just quoted it that the Commission provided the information requested, which it enlarged at the hearing.

I

1. One preliminary matter arises. Because of the preparatory inquiries set in motion by the Court and the statements of case exchanged, the issues of the present case were enlarged. The countervailing charge introduced by Regulation No 144/65 is equal to the difference between the reference price and the entry price. The legality of that regulation was disputed both before the

1 — Translated from the French.