JUDGMENT OF THE COURT
OF 5 APRIL 1979 [1]

Dulciora S.p.A.
v Amministrazione delle finanze dello Stato
(preliminary ruling requested by the Pretura di Milano)

"Monetary compensatory amounts"

Case 95/78

1. *Agriculture — Processed products — Monetary compensatory amounts — Application — Condition — Incidence of compensatory amounts applicable to basic products on price of processed products*
   (Regulation No 974/71 of the Council, Art. 2 (2))

2. *Agriculture — Monetary compensatory amounts — Groups of products — Application — Commission — Discretion*

1. In order to justify the application of compensatory amounts to processed products, it is sufficient for the compensatory amounts applicable to the basic products to have a considerable incidence on the price of the processed products.

2. The Commission is not bound to fix compensatory amounts for all the products in a group, but may assess the need to apply compensatory amounts either by products or by groups of products.

3. According to the provisions of Article 26 of Regulation No 2727/75, it is only if the Commission adopts measures which are not in accordance with the opinion of the Management Committee that those measures must be communicated to the Council. In these circumstances the absence of an opinion by the Committee in no way affects the validity of the measures adopted by the Commission.

In Case 95/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretura di Milano for a preliminary ruling in the proceedings pending before that court between

1 — Language of the Case: Italian.

DULCIORA S.P.A.

with ASSOCIAZIONE INDUSTRIE DOLCIARIE ITALIANE (A.I.D.I.) as intervener

and

AMMINISTRAZIONE DELLE FINANZE DELLO STATO [State Finance Administration]

on the validity of Commission Regulation (EEC) No 800/77 of 20 April 1977 amending, as regards products which are subject to monetary compensatory amounts, Regulation (EEC) No 572/76 fixing the monetary compensatory amounts (Official Journal 1977, L 97, p. 18) and of Commission Regulation (EEC) No 2657/77 of 30 November 1977 on the application of monetary compensatory amounts to certain products not covered by Annex II to the Treaty (Official Journal 1977, L 308, p. 48),

THE COURT

composed of: J. Mertens de Wilmars, President of the First Chamber, acting as President, Lord Mackenzie Stuart (President of the Second Chamber), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

A — The framework of the regulations

Article 1 (1) of Regulation No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257) authorizes the Member States to charge and grant monetary compensatory amounts on imports and exports of the products described in Article 1 (2):

"... products covered by intervention arrangements under the common organization of agricultural markets;

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

Article 1 (3) of the regulation as amended by Regulation No 2746/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (28-30 December), p. 64) provides that paragraph 1

"... shall apply only where application of the monetary measures referred to ... would lead to disturbances in trade in agricultural products." [1]

Article 4 of Regulation No 974/71 provides that:

"No compensatory amount shall be fixed where, in any Member State, the percentage referred to in Article 2 (1) does not exceed 2.5 %" (this percentage represents the difference between the official conversion rate of the currency concerned and the so-called green rate).

By Regulation No 800/77, a number of goods were bought within the system of monetary compensatory amounts. They were different kinds of sugar confectionery, ice cream and other ices, chocolate and cocoa-based porducts, pastry, biscuits, cakes and other fine bakers' wares and various food preparations.

The second and third recitals in the preamble to that regulation read as follows:

"... the monetary compensatory amounts do not apply to all products not covered by Annex II to the Treaty obtained from agricultural products and governed by special rules adopted under Article 235; ... on the other hand, all the relevant basic agricultural products are subject to the said amounts;

... such a situation may lead to distortion of competition, having regard to the high level of the monetary compensatory amounts currently applicable; ... in the case of the processed products not subject to monetary compensatory amounts, the difference in prices of the basic products has become so marked as to have a considerable effect on the conditions of competition of the processed products, having regard to the characteristics of the market in certain sensitive products."

The sixth recital provides that the list of non-Annex II products should be reviewed by the end of the year in the light of their economic situation. Thus the second subparagraph of Article 2 (2) of the regulation provides that monetary compensatory amounts shall not apply beyond 31 December 1977 in respect of products falling within tariff subheadings 17.04 D (sugar confectionery not containing cocoa, other than liquorice extract, chewing gum and white chocolate), 18.06 B (ice cream (not including ice cream powder) and other ices containing cocoa), 18.06 C (chocolate and sugar confectionery containing cocoa), 19.08 B (pastry, biscuits, cakes and other fine bakers' wares other than gingerbread and the like) and 21.07 C (ice cream (not including ice cream powder) and other ices not containing cocoa).

By Regulation No 2657/77, the time-limit on the applicability of Regulation No 800/77 was abolished and the

1 — *Translator's note:* This is a corrected version of the text appearing in the Official Journal, which is defective; cf. Mr Advocate General Warner's comments in Case 29/77 Roquette [1977] ECR 1835, at p. 1847.

monetary compensatory amounts on the products eration were maintained for an indefinite period.

The adoption of Regulation No 800/77 had been preceded by the Commission Decision of 23 March 1977 authorizing Ireland to take protective measures in respect of certain processed agricultural products under Article 135 of the Act of Accession (Official Journal 1977, L 97, p. 29). That decision authorized Ireland until 31 December 1977 to levy a charge on imports from the United Kingdom and grant a payment on exports to the United Kingdom of processed agricultural products covered by tariff headings 17.04 D, 18.06 B, 18.06 C, 19.08 B and 21.07 C. The recitals in the preamble to that decision state that:

"... the compensatory amounts charged or granted ... [on] basic products would amount to 34.7% in the case of the United Kingdom and to 10.4% in the case of Ireland; ... this situation, entailing a relative disadvantage to the manufacturers ... in Ireland on the cost of the basic products of 24.3%, may lead to distortion in the terms of competition in trade in the processed agricultural products referred to in the Irish application between the Member States concerned; ... this situation, in its present acute form since November 1976, has given rise to serious difficulties for the sectors concerned in Ireland ..."

The monetary compensatory amounts thus introduced by this bilateral system between the United Kingdom and Ireland were replaced by fresh amounts annexed to the Commission Decision of 4 May 1977 amending that of 23 March 1977 (Official Journal 1977, L 123, p. 18). Under Article 3 thereof, this second decision as well as the decision of 23 March 1977 ceased to apply on the day on which Regulation No 800/77 took effect (that is 23 May 1977).

B — The facts

In the last months of 1977 and the first months of 1978 Dulciora S.p.A. exported sugar confectionery to the other Member States and non-member countries. In respect of these exports it had to pay the monetary compensatory amounts provided for by Regulations Nos 800/77 and 2657/77. Taking the view that the charging of this compensation was unlawful, Dulciora asked the Pretura di Milano to order the Amministrazione delle Finanze [Finance Administration] to reimburse the sums paid, pleading in support of its claim that Regulations Nos 800/77 and 2657/77 were illegal and inapplicable to exports carried out as from 1 January 1978 in performance of contracts concluded before 1 December 1977 (the date of adoption of Regulation No 2657/77).

The Amministrazione delle Finanze raised the objection that the Pretura before which Dulciora had brought the action had no jurisdiction *ratione loci* or *ratione materiae* and on the substance of the case contended that the plaintiff's claims should be dismissed, but it did not oppose a reference to the Court of Justice, pointing out that the Court had already been requested for a ruling on the validity of the Community provisions at issue in Cases 151/77 *Peiser* and 11/78 *Italy* v *Commission (sub judice).*

The Associazione Industrie Dolciarie Italiane (hereinafter referred to as the A.I.D.I.) intervened in the main action in support of the plaintiff's claim.

C — The questions referred for a preliminary ruling

By an order of 11 April 1978, the Pretura di Milano referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1. Must Regulation (EEC) No 974/71 of the Council (as successively amended) be interpreted as meaning that the Community institutions may apply monetary compensatory amounts to imports and exports between Member States and between Member States and non-member countries of products listed in Regulation No 800/77 even though no disturbances whatever have occurred on the market in the basic products from which the products listed in the said Regulation No 800/77 are derived?
2. Having regard to the provisions of Regulation No 974/71 and those of the first [1] subparagraph of Article 40 (3) of the Treaty of Rome (prohibition on discrimination) is the Commission authorized to apply by means of a regulation (in the present instance Regulation No 800/77) monetary compensatory amounts to the exportation and importation of the sugar confectionery indicated in the said Regulation No 800/77 without introducing similar compensatory amounts for all the other sugar confectionery having characteristics similar to those of the products affected and which are subject to the same conditions?
3. (a) If Question (1) or Question (2) above is answered in the negative must Commission Regulations (EEC) Nos 800/77 and 2657/77 be considered invalid?

   (b) Must Commission Regulation No 2657/77 also be considered invalid because:

   (i) it extends the application of Regulation (EEC) No 800/77 beyond 31 December 1977 without an opinion having been delivered by the Management Committee;

   (ii) because it was drawn up with an inconsistent statement of reasons in infringement of Article 190 of the Treaty?
4. If however Regulation (EEC) No 2657/77 must be considered to be valid (and therefore also Regulation (EEC) No 800/77) can it be considered applicable to the exportation of products listed in Regulation (EEC) No 800/77 from Italy to other Member States or to non-member countries after 1 January 1978 in performance of contracts concluded before 1 December 1977 (the date on which Regulation (EEC) No 2657/77 was adopted) that is at a time when, taking account of the provisions of Regulation (EEC) No 800/77, it was not possible to foresee that the monetary compensatory amounts for the products in question would be maintained after 31 December 1977?

The order of the Pretura was received at the Court on 20 April 1978.

Having heard the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations submitted by Dulciora S.p.A. and the A.I.D.I.

Dulciora and the A.I.D.I. infer from the statement of the reasons on which Regulation No 800/77 is based that the Commission does not attempt to verify the existence of disturbances in the market in the basic products from which the processed products subject to application of monetary compensatory

1 — *Translator's note:* The second subparagraph would appear to be meant.

amounts are derived and that it does not even occur to it to imagine the possibility that disturbance might arise in that market. According to the Commission Article 1 (3) of Regulation No 974/71, which expressly refers to disturbances in the market in agricultural products, can be clearly read and interpreted as if the reference were made to the market in the non-agricultural products derived from the basic products. Such an interpretation infringes Regulation No 974/71, and for this reason Regulation no 800/77 should be declared illegal for failure to comply with the Council regulation.

The market in the basic products can never be influenced by trade in the derived confectionery products referred to in Regulation No 800/77. As regards sugar, in 1976 Italian confectionery undertakings exported confectionery products containing in all 187 000 quintals of that basic product: even if such a quantity were considerably increased, it would never succeed in disturbing the market in sugar in Italy, the total consumption of which over the same period amounted to more than 16 000 000 quintals (the percentage is 1.17%). The same reasoning can be applied, with even more striking results, to the sector of common wheat from which the flour used in confectionery products is derived, to the sector of maize in the form of glucose, and to milk and milk powder.

Even assuming that it were possible to take account of disturbances affecting a class of products not referred to in Regulation No 974/71, among the facts referred to in Regulation No 800/77 there were no such disturbances as regards confectionery products. According to the Commission, the increase in exports from countries with a weak currency to countries with a strong currency constitutes the "disturbance" which, according to Regulation No 974/71, has to justify the use of compensatory amounts even for derived products. The Commission's argument is arbitrary because a mere increase in exports of confectionery products should not necessarily be considered as a "disturbance" within the meaning of Regulation No 974/71, and even if it were, it could depend on reasons unconnected with the existence of monetary compensatory amounts on the basic products from which the confectionery products are derived. The existence of compensatory amounts has no influence on trade in confectionery products because, since they are luxury products, consumers are essentially influenced by quality. It emerges from the NIMEXE [1] statistics that, owing to the fact that on average the consumption of confectionery products increased in countries with a strong currency and decreased in countries with a weak currency following an imbalance between *per capita* income and the cost of living, the trend for exports from countries with a weak currency to countries with a strong currency to increase arose without being in any way connected with developments in the agricultural markets. It follows from the judgment of the Court in Case 131/77 *Milac* [1978] ECR 1041 that the application of compensatory amounts is subject to there being a close correlation between the price of the basic product and that of the derived product. This condition is not fulfilled in the main action here. In the statement of the reasons on which Regulation No 722/75 (Official Journal 1975, L 71, p. 24) is based, the Commission itself admits that the price of confectionery products "is

1 — *Translator's note:* Nomenclature of Goods for the External Trade Statistics of the Community and Statistics of Trade between Member States.

determined largely by their value as processed products and by the cost of processing and very little by the value of the basic agricultural products; ... furthermore, such products can be assimilated to a considerable extent to those of the industrial sector, for which there are no compensatory amounts".

Regulation No 800/77 is also void because it breaches the principle of non-discrimination laid down in the second subparagraph of Article 40 (3) of the Treaty. In fact if there were any products to which compensatory amounts should be applied on the grounds put forward by the Commission for Regulation No 800/77, they would be those referred to in tariff headings 19.02, 19.05 and 19.07 (preparations ... of a kind used as infant food or for dietetic or culinary purposes, corn flakes and other ordinary bakers' wares), that is to say mixtures made from agricultural products of first-stage processing and of practically no added value, in respect of which the incidence of monetary compensatory amounts on the basic products can therefore entail marked variation in the price of the finished product.

In the alternative, even if Regualtion No 800/77 were not to be annulled, Regulation No 2657/77 should none the less be declared void for contradiction with the preceding regulation in its statement of grounds. If the situation had not "greatly changed", as the Commission itself states, there was no reason to prolong the application of a regulation which was to cease to apply on 31 December 1977.

If the Court of Justice were to decide not to declare Regulation No 800/77 or at least Regulation No 2657/77 void, it should certainly declare the compensatory amounts laid down in Regulation No 800/77 inapplicable to contracts concluded prior to the entry into force of the prolonging Regulation No 2657/77 (that is to say contracts concluded before 1 December 1977). Traders who had concluded such contracts in the belief that the expression "not ... beyond" in Regulation No 800/77 imposed an obligation upon the Commission, quoted prices for deliveries after 1 January 1978 which did not allow for compensatory amounts, which were to expire on 31 December 1977. They thus placed reliance upon the immutability of the legal situation determined by Regulation No 800/77, knowing, particularly in the month of December 1977, that no valid reason could have prompted the Commission to provide for prolongation.

Dulciora next undertakes a long analysis of the case-law of the Court in the field of protection of acquired rights and legitimate expectations.

It should not be accepted that the measures adopted are of such overriding and ineluctable use that — in a certain context — they can justify the sacrifice of the rights and expectations of individuals. Here it was not a general interest of the Commission which was at issue but at most the interest of a few traders placed in difficulty by sectorial circumstances which the Commission could have remedied, for example by resorting to diversified application of monetary compensatory amounts by regions. Furthermore the application of compensatory amounts in the confectionery products sector was no longer foreseeable, at least after 31 December 1977, because a Community trader could only foresee lawful — and

not arbitrary — interventions by the institutions.

B — Observations submitted by the Irish Government

The Irish Government refers to its observations in Case 151/77, cited above.

It is not correct to say that prior to the adoption of Regulation No 800/77, there had been no disturbances (or threat thereof) on the market in the basic products.

In accordance with the judgment in Case 29/77 *Roquette* [1977] ECR 1835 at p. 1843, separate assessments were made by the Commission for the basic products and the derived products.

The expression "agricultural products" in Article 1 (3) of Regulation No 974/71 should be interpreted in a wider sense than that in which it is employed in the Treaty.

As to Question 3 (b), the validity of Regulation No 2657/77 cannot be challenged on the ground that the relevant Management Committees did not deliver opinions within the time-limits set by their respective chairmen. To construe the provisions governing the Management Committee procedure to the effect that, although the Commission would have been free to act even if the Committees had delivered opinions which were contrary to its proposals, it was powerless to act in the absence of such opinions within the stipulated time-limits, would not only render the time-limits, meaningless but would also tend to undermine the very purpose of the Management Committee procedure itself.

As to the invalidity of Regulation No 2657/77, the allegation that it was drawn up with an inconsistent statement of reasons in infringement of Article 190 of the Treaty is not sustainable. In Case 5/67 *Beus* [1968] ECR 83 at p. 95, the Court has already held that the extent of the requirement to state the reasons on which measures are based depends on the nature of the measure in question. It cannot be considered that the Commission was inconsistent in its reasoning when in Regulation No 2657/77 it stated that the situation had not greatly changed since the entry into force of Regulation No 800/77.

As to Question 4, it should be answered in the affirmative. The very existence of Regulation No 800/77, even in its original form with a terminal date of 31 December 1977, should, having regard to its declared purpose and content, have served in itself as a warning that it might be necessary to prolong its period of application after that date, especially as the preamble to the regulation expressly stated that the situation "should be reviewed by the end of the year in the light of the economic situation" of the products in question. In its decisions in Joined Cases 95 to 98/74 and 100/75 *Union Nationale des Coopératives Agricoles de Céréales* [1975] ECR 1615, and Case 146/77 *British Beef* [1978] ECR 1347, the Court stated that the actual right to receive a monetary compensatory amount and the charge resulting from the levying of such an amount are only created by the performance of the import or export transaction as the case may be and only from the moment when that transaction takes place, and that in the absence of an express provision to the contrary (there being no such provision applicable to the present case) the amounts to be paid or levied are those fixed by the rules in force at the moment of the import or export whatever may be the date on which the contract relating to the transaction in question was concluded.

C — *Observations submitted by the Italian Government*

The Italian Government refers to its observations in Cases 151/77 and 11/78, cited above.

As regards Question 3 (b) (i), the Italian Government confines itself to observing that the fact that Regulation No 2657/77 was adopted without the Management Committee having delivered an opinion is a sure sign of a major disagreement as to whether it was appropriate to apply monetary compensatory amounts to confectionery products.

As regards Question 3 (b) (ii), since the economic situation which had prompted the Commission to appoint 31 December 1977 as the final time-limit had remained stable, it is impossible to understand how that time-limit was then quite simply abolished and the monetary compensatory amounts reintroduced for an indefinite period. It may doubtless be admitted that, even in spite of the final time-limit laid down in Regulation No 800/77, the Commission had the power to reintroduce monetary compensatory amounts as from 1 January 1978. However, the exercise of such a power would presuppose that the existence of a different economic and monetary situation had been assessed and established.

As to Question 4, it should be confirmed that before 1 December 1977 there was a secure situation upon which, on the basis of the final time-limit mentioned above, even the most prudent trader could place reliance. This is the conclusion which is to be drawn by reasoning *a contrario* from the Court's decision in Case 146/77 cited above, in which breach of the principle of the protection of legitimate expectations was excluded because of the uncertainty which characterized the situation in the main action.

D — *Observations submitted by the Commission*

1. The Commission's policy in the sector of the products at issue

In the beginning, the Commission adopted the principle of limiting application of compensatory amounts to products in respect of which their incidence amounted to at least 1.5% of the average value of the goods. In addition, no compensatory amount was to be fixed if it would amount to less than 0.25 units of account per 100 kg.

The number of products covered by monetary compensation was thus enlarged and then diminished according to the monetary situation. In 1975, a guiding principle was laid down according to which monetary compensation was to be fixed only for processed products in respect of which the average maximum incidence exceeded 5%.

When the situation deteriorated again in 1976 (on 1 January 1977 the difference between the actual rates and the so-called green rates for the pound sterling was — 38.5%, for the Italian lira — 19.2% and for the French franc — 17.5%), the Commission first of all considered it justifiable not to re-establish compensatory amounts automatically for the processed products referred to in Regulation No 1059/69. However, following repeated representations by the Irish Government, it was prompted to intervene rapidly in order to reduce the difference of 24.3% which had arisen owing to the fixing of different green rates for the pound sterling and the Irish pound in spite of the fact that these two currencies are a single unit from the monetary point of view.

2. Regulation No 800/77

More thorough analysis of the economic and legal situation revealed to the Commission that the problems posed could not be resolved adequately by the

decision adopted in respect of Ireland, which was replaced by Regulation No 800/77.

At the time when that regulation was adopted, the rates of difference of the various currencies taken into account for the fixing of the compensatory amounts were as follows: pound sterling, — 34.7%; Irish pound, — 10.4%; French franc, — 16.2%; Italian lira, — 21.1%; German mark, + 9.3%; Belgian and Luxembourg francs, + 1.4%; Netherlands guilder, + 1.4%; Danish kroner, 0. It emerged that the difference between the pound sterling and the Irish pound was much smaller than the difference between the pound sterling and all the strong currencies; likewise that difference was less than the difference between for example the mark and the Italian lira. Thus the actual incidence of the monetary compensation as regards the products concerned exceeded the 5% limit regarded in 1975 as a decisive factor for the abolition of the said compensation. In the light of this situation, the general application of monetary compensation was forthwith a logical and obvious solution, which moreover corresponded to the usual practice.

3. Answers to the questions referred for a preliminary ruling

As to Question 1, it is to be noted that the introduction of monetary compensatory amounts is subject to there being a risk of disturbances. This is a matter of *ex ante* anticipation in respect of which the Commission has discretionary power. In reviewing the legality of acts adopted by virtue of that discretionary power, the Court must confine itself to considering whether there has been manifest error, misuse of powers or manifest excess of the limits of the discretionary power.

As regards the products at issue, it should be noted that at the time when Regulation No 800/77 was adopted the differences between the exchange rates of the currencies taken into consideration for the fixing of the monetary compensatory amounts were particularly large. As regards the risks of disturbance, a considerable increase was observed in Italian exports between 1974 and 1976.

As to Question 2, for the application of monetary compensatory amounts the Commission can carry out an examination product by product but, in certain cases when it is faced with a multitude of products, it must also adopt an abstract, general method. In the present case, the criterion adopted was in principle that of the degree of incidence of the monetary compensatory amounts, applied when that incidence rose to approximately 5% of the value of the goods.

As regards pasta, the monetary compensatory amounts were reintroduced by Regulation No 2604/77 of 25 November 1977 (cf. Cases 12/78 *Italy* v *Commission* and 84/78 *Tomadini, sub judice*).

Gingerbread and similar products coming under tariff subheading 19.08 A were included in the monetary compensation system, but only for a short time. Complete examination of the statistics relating to recent years showed that there had been no appreciable variations in trade and, in these circumstances, it was considered that it was not necessary to apply monetary compensatory amounts to those products.

For white chocolate, no request has so far been submitted for monetary compensatory amounts to be applied; neither has there been any complaint.

Before 1975, monetary compensation was applied to cocoa powder and similar

products within subheading 18.06 A, but the statistics available in spring 1977 disclosed no trend giving reason to think that there was a risk of disturbance.

The answers to the first two questions make Question 3 (a) purposeless.

As to Question 3 (b), it suffices to state that the Management Committees were consulted but did not express any opinion. Moreover, on the date when the regulation at issue was adopted, the prolongation was fully justified if what is stated in the preamble corresponds to the truth, namely that the differences between the currencies were particularly large on that date and that there was a risk of disturbance in trade in the products at issue.

The Commission considers that the reference to the date of 31 December 1977 had a precise meaning, in relation to which the prolongation laid down in Regulation No 2657/77 involves no contradiction. Member States and traders thus krew that in order to prolong the application of the compensatory amounts beyond that date, the Commission had to adopt a new regulation.

As to Question 4, in the field of monetary compensatory amounts it is not possible to rely upon a legitimate expectation of being exempted from paying them when the monetary situation makes it necessary to maintain or introduce them (cf. the settled case-law of the Court).

Regulation No 2657/77 allowed a period of one month, so that traders should know in advance what arrangements would apply as from 1 January 1978. It may even be presumed (cf. the letter of 24 October 1977 from Italy's Permanent Representation, relating to the proposed prolongation of Regulation No 800/77) that traders were aware well before 30 November 1977 of the Commission's intention to prolong the period laid down in Regulation No 800/77.

Dulciora and the A.I.D.I., represented by G. M. Ubertazzi and F. Capelli, Advocates of the Milan Bar, the Irish Government, represented by J. Murray, Barrister-at-Law, the Italian Government, represented by I. M. Braguglia, Avvocato dello Stato, and the Commission of the European Communities, represented by its Legal Adviser, C. Maestripieri, acting as Agent, presented oral argument at the hearing on 12 December 1978.

The Advocate General delivered his opinion at the hearing on 1 February 1979.

Decision

1 By an order of 11 April 1978, which was received at the Court on 20 April 1978, the Pretura di Milano referred a number of questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty on the

validity of Commission Regulation No 800/77 of 20 April 1977 amending, as regards products which are subject to monetary compensatory amounts, Regulation No 572/76 fixing the monetary compensatory amounts (Official Journal 1977, L 97, p. 18) and of Commission Regulation No 2657/77 of 30 November 1977 on the application of monetary compensatory amounts to certain products not covered by Annex II to the Treaty (Official Journal 1977, L 308, p. 48).

2 These questions were raised in the context of a dispute over the charging of compensatory amounts on exports of sugar confectionery by Dulciora S.p.A., the plaintiff in the main action, from Italy to the Federal Republic of Germany, Belgium and non-member countries during the last months of 1977 and the first months of 1978.

3 The plaintiff asked the Pretura di Milano to declare illegal the charging of a compensatory amount on those goods under Regulation Nos 800/77 and 2657/77 by the Amministrazione delle Finanze, the defendant.

4 The Associazione Industrie Dolciarie Italiane intervened in the main action in support of the plaintiff's claim.

5 The dispute concerns the application of the monetary compensatory amounts system to certain products which are not covered by Annex II to the Treaty and are the subject of a specific arrangement under Article 235 of the Treaty according to the terms of Article 1 (2) (b) of Regulation No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257).

6 The said products, to which Regulation No 800/77 relates, come under tariff headings 17.04 D (sugar confectionery not containing cocoa, other than liquorice extract, chewing gum and white chocolate), 18.06 B (ice cream (not including ice cream powder) and other ices containing cocoa), 18.06 C (chocolate and sugar confectionery containing cocoa), 19.08 B (pastry, biscuits, cakes and other fine bakers' wares other than gingerbread and the like) and 21.07 C (ice cream (not including ice cream powder) and other ices not containing cocoa).

7 It emerges from the second and third recitals in the preamble to Regulation No 800/77 that, since all the basic agricultural products from which those goods are derived were subject to monetary compensatory amounts of a high level, the difference in prices of the baisc products had become so marked as to have a considerable effect on the conditions of competition of the processed products, having regard to the characteristics of the market in certain sensitive products.

8 The second subparagraph of Article 2 (2) of Regulation No 800/77 provided that in respect of the said processed products "monetary compensatory amounts shall not apply beyond 31 December 1977".

9 The adoption of that regulation, which applied with effect from 23 May 1977, had been preceded by the Commission Decision of 23 March 1977 authorizing Ireland to take protective measures in respect of certain processed agricultural products under Article 135 of the Act of Accession and allowing that Member State until 31 December 1977 to levy a charge on imports from the United Kingdom and grant a payment on exports to the United Kingdom of the processed agricultural products coming under the above-mentioned tariff headings (Official Journal 1977, L 97, p. 29).

10 The recitals in the preamble to this decision stated that:

"... the compensatory amounts charged or granted ... [on the] basic products, would amount to 34.7% in the case of the United Kingdom and to 10.4% in the case of Ireland; ... this situation, entailing a relative disadvantage to the manufacturers ... in Ireland on the cost of the basic products of 24.3%, may lead to distortion in the terms of competition in trade in the processed agricultural products referred to in the Irish application between the Member States concerned; ... this situation, in its present acute form since November 1976, has given rise to serious difficulties for the sectors concerned in Ireland ...".

11 The monetary compensatory amounts thus introduced by these bilateral arrangements between the United Kingdom and Ireland were altered by the Commission Decision of 4 May 1977 (Official Journal 1977, L 123, p. 18), according to which this second decision as well as the preceding one ceased to apply on the day on which Regulation No 800/77 took effect.

12 Prolongation of Regulation No 800/77, for an indefinite period, was decided by Regulation No 2657/77 of 30 November 1977.

13 The questions asked by the Pretura di Milano are the following:

1. Must Regulation (EEC) No 974/71 of the Council (as successively amended) be interpreted as meaning that the Community institutions may apply monetary compensatory amounts to imports and exports between Member States and between Member States and non-member countries of products listed in Regulation No 800/77 even though no disturbances whatever have occurred on the market in the basic products from which the products listed in the said Regulation No 800/77 are derived?

2. Having regard to the provisions of Regulation No 974/71 and those of the first [1] subparagraph of Article 40 (3) of the Treaty of Rome (prohibition on discrimination) is the Commission authorized to apply by means of a regulation (in the present instance Regulation No 800/77) monetary compensatory amounts to the exportation and importation of the sugar confectionery indicated in the said Regulation No 800/77 without introducing similar compensatory amounts for all the other sugar confectionery having characteristics similar to those of the products affected and which are subject to the same conditions?

3. (a) If Question (1) or Question (2) above is answered in the negative must Commission Regulations (EEC) Nos 800/77 and 2657/77 be considered invalid?

   (b) Must Commission Regulation No 2657/77 also be considered invalid because:

      (i) it extends the application of Regulation (EEC) No 800/77 beyond 31 December 1977 without an opinion having been delivered by the Management Committee;

      (ii) because it was drawn up with an inconsistent statement of reasons in infringement of Article 190 of the Treaty?

4. If however Regulation (EEC) No 2657/77 must be considered to be valid (and therefore also Regulation (EEC) No 800/77) and it be considered applicable to the exportation of products listed in Regulation (EEC) No 800/77 from Italy to other Member States or to non-member countries after 1 January 1978 in performance of contracts concluded before 1 December 1977 (the date on which Regulation (EEC) No 2657/77 was adopted) that is at a time when, taking account of the provisions of Regu-

1 — *Translator's note:* The second subparagraph would appear to be meant.

lation (EEC) No 800/77, it was not possible to foresee that the monetary compensatory amounts for the products in question would be maintained after 31 December 1977?

The first two questions

14 The plaintiff and the Italian Government submit that by adopting Regulation No 800/77 the Commission infringed the provisions of Article 1 (3) of Regulation No 974/71, according to which, "Paragraph 1 shall apply only where application of the monetary measures referred to in that paragraph would lead to disturbances in trade in agricultural products".

15 They submit that by virtue of that provision compensatory amounts on products not covered by Annex II to the Treaty and forming the subject of a specific arrangement under Article 235 of the Treaty could not have been introduced except in order to avoid the risk of disturbances in trade in the basic agricultural products (sugar, cereals and so on) on which the processed products, namely ice cream, chocolate, biscuits and so on, depend.

16 They submit that, according to the recitals in the preamble to Regulation No 800/77, the Commission assessed not the risk of disturbances in trade in agricultural products but the risk of distortions in competition in the products at issue.

17 They also submit that the statement of the reasons on which Regulation No 800/77 was based is defective inasmuch as it fails to take account of the risk of disturbances in trade in agricultural products and in that it confines itself to establishing the risk of disturbances in the conditions of competition in trade in the processed products.

18 It is true that in order to justify Regulation No 800/77 the Commission stated that "in the case of the processed products not subject to monetary compensatory amounts, the difference in prices of the basic products has become so marked as to have a considerable effect on the conditions of competition of the processed products . . . ".

19 The wording of Article 1 (3) of Regulation No 974/71 as amended by Regulation No 2746/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (28-30 December), p. 64) requires that for the application of compensatory amounts to basic agricultural products, the monetary measures referred to in paragraph 1 (namely the fluctuation of the exchange rate of a Member State's currency) should lead to disturbances in trade in agricultural products.

20 As regards the processed product, it emerges from the provisions of Article 2 (2) of Regulation No 974/71 that the compensatory amounts applicable shall be equal to the incidence, on the price of the product concerned, of the application of the compensatory amount to the price of the basic product on which it depends.

21 It follows that in order to justify the application of compensatory amounts to processed products, it is sufficient for the compensatory amounts applicable to the basic products to have a considerable incidence on the price of the processed products.

22 As regards the basic agricultural products from which the processed products referred to in Regulation No 800/77 are derived, the risk of disturbances had been established at the time when the monetary compensatory amounts were applied to those basic products.

23 Hence the Commission was right in confining itself to establishing that the incidence on the prices of the processed products of the monetary compensatory amounts applicable to the basic products had become so marked as for the difference in prices of the basic products to have a considerable effect on the conditions of competition of the processed products.

24 The statement of the reasons on which Regulation No 800/77 is based is sufficient.

25 The Italian Government submits that the Commission applied monetary compensatory amounts to the products at issue not in order to deal with the difficulties to which monetary instability might give rise for the proper functioning of the common organization of the market, but in order to deal

with the difficulties complained of by Irish processing industries in trade with the United Kingdom.

26 It submits that application of monetary compensatory amounts to the products at issue in respect of trade between Member States and with non-member countries is not justified by the small incidence which the monetary differences might have on the prices of the processed products.

27 It submits that under Article 14 of Regulation No 1059/69, the Council could have taken appropriate measures either to deal with the possible effect on trade between Member States and with non-member countries of special measures adopted under the common organizations as regards the prices of certain basic products, or to deal with a special situation which may arise in respect of certain goods.

28 It submits that, in the part concerning the products to which this action refers, Regulation No 800/77 breaches the principle of proportionality because a measure taken under the said Article 14 would have been adequate and sufficient to deal with the difficulties encountered by the Irish processing industries in the limited sector of trade with the United Kingdom, whereas the application of compensatory amounts was neither necessary nor in proportion to the aim pursued.

29 The Commission states that in 1975 it adopted a practice whereby monetary compensation was to be fixed only in respect of processed products on which the maximum average incidence of the compensation exceeded 5%.

30 On 1 January 1977 the difference between the so-called green rates for the pound sterling and the Irish pound was 24.3%, which gave rise to repeated representations by the Irish Government and, following those representations, to the decision of 23 March 1977 authorizing Ireland to take protective measures.

31 The Commission states that more thorough analysis of the legal and economic situation revealed that the problems posed could not be adequately dealt with by the decision adopted in respect of Ireland.

32 It states that at the time when Regulation No 800/77 was adopted, the rates of difference of the various currencies taken into account for the fixing of the compensatory amounts were as follows: pound sterling, — 34.7%; Irish pound, — 10.4%; French franc, — 16.2%; Italian lira, — 21.1%; German mark, + 9.3%; Belgian and Luxembourg frances, + 1.4%; Netherlands guilder, + 1.4%; Danish kroner, 0.

33 It emerged from this that the difference between the pound sterling and the Irish pound was much smaller than the difference between the pound sterling and all the strong currencies and between the German mark and the Italian lira.

34 Furthermore the actual incidence of the monetary compensation on the products at issue exceeded the 5% limit which was regarded in 1975 as a decisive factor for the abolition of the said compensation.

35 Article 14 of Regulation No 1059/69 refers to the Council's adopting "appropriate measures" only "to deal with the possible effect on trade between Member States and with third countries of special measures which may be adopted under the common organization of agricultural markets as regards the prices of certain basic products".

36 The Commission submits that consequently this provision is not appropriate to deal with the risk of disturbances in trade in processed products caused by the monetary situation of the Member States.

37 The plaintiff and the Italian Government have not called in question the statistical data supplied by the Commission.

38 The plaintiff submits that the extension of the monetary compensation system to confectionery products is not justified by the fact that the compensatory amounts applied to the basic products also led to price differences and distortions at the stage of the processed products, because the Commission failed to state why it extended the compensatory amounts system to certain processed agricultural products but not to other important groups of products — such as, in particular, preparations of a kind used as

infant food or for dietetic or culinary purposes, corn-flakes and other ordinary bakers' wares.

39 It submits that the absence of compensatory amounts on the latter products entailed discrimination between exporters of those products and exporters of products caught by the contested regulation.

40 However, the Commission is not bound to fix compensatory amounts for all the products in a group, but may assess the need to apply compensatory amounts either by products or by groups of products.

41 Moreover, the plaintiff has not shown that it is a question of similar products which are in competition with the products covered by the regulation.

42 Therefore it must be found that it was open to the Commission to adopt Regulation No 800/77 and to fix monetary compensatory amounts for the products in question.

43 Accordingly, the answer to the first two questions must be that consideration of the provisions in question has disclosed no factor of such a kind as to affect the validity of Regulation No 800/77.

44 In the light of the answer to these questions, Question 3 (a) does not require an answer.

Question 3 (b) (i)

45 Question 3 (b) (i) asks whether Commission Regulation No 2657/77 must be considered invalid because it extends the application of Regulation No 800/77 beyond 31 December 1977 without an opinion having been delivered by the Management Committee.

46 Article 6 of Regulation No 974/71 provides that detailed rules for the application of that regulation shall be adopted in accordance with the procedure laid down in Article 26 of Council Regulation No 120/67 on the common organization of the market in cereals, as last amended by Regulation No 2434/70, or, if appropriate, the corresponding article of the other regulations on the common organization of agricultural markets.

47 Regulation No 120/67 was repealed and replaced by Regulation No 2727/75, Article 26 of which corresponds to Article 26 of Regulation No 120/67 and provides as follows:

"1. Where the procedure laid down in this article is to be followed, the Chairman shall refer the matter to the Commmittee, either on his own initiative or at the request of the representative of a Member State.

2. The representative of the Commission shall submit a draft of the measures to be adopted. The Committee shall deliver its Opinion on the draft within a time-limit set by the Chairman according to the urgency of the matter. An Opinion shall be delivered by a majority of 41 votes.

3. The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the Opinion of the Committee, they shall forthwith be communicated by the Commission to the Council. In that event the Commission may defer application of the measures which it has adopted for not more than one month from the date of such communication.

The Council, acting by a qualified majority, may take a different decision within one month."

48 It appears from the last recital in the preamble to Regulation No 2657/77 that the Management Committee did not deliver an opinion within the time-limit set by its chairman.

49 According to the provisions of Article 26 of Regulation No 2727/75, it is only if the Commission adopts measures which are not in accordance with the opinion of the Committee that those measures must be communicated to the Council.

50 In these circumstances the absence of an opinion by the Committee in no way affects the validity of the measures adopted by the Commission.

Question 3 (b) (ii)

51 The plaintiff and the Italian Government submit that by the second subparagraph of Article 2 (2) of Regulation No 800/77 the Commission intended to limit its own discretionary power itself, that is to say limit the exercise of that power to the period ending on 31 December 1977 without the possibility of any prolongation.

52 They argue that consequently, when the situation has not greatly changed and the Commission decides that the compensatory amounts are to be applied for an indefinite period, it is guilty of misuse of powers.

53 According to the plaintiff, the statement of the reasons on which Regulation No 2657/77 is based is inconsistent, because the application of a regulation which was to apply "not . . . beyond" 31 December 1977 was prolonged even though the situation had not "greatly changed", as is stated by the Commission itself.

54 Even if Article 2 (2) of Regulation No 800/77 had the meaning which the Italian Government and the plaintiff attribute to it, it could not relieve the Commission from its obligation to review the situation by the end of the year.

55 The sixth recital in the preamble to Regulation No 800/77 had provided that "the list of . . . products subject to monetary compensatory amounts should be reviewed by the end of the year in the light of the economic situation of those products".

56 In the light of that recital it could not be inferred that, if the situation remained unchanged, the application of the compensatory amounts would necessarily be brought to an end; on the contrary it could be inferred that if their application were to continue after 31 December 1977 a new regulation would be necessary.

57 Therefore the statement of the reasons on which Regulation No 2657/77 is based is sufficient, and the answer to Question 3 (b) (ii) must be in the negative.

Question 4

58 Question 4 asks whether Regulation No 2657/77 can be considered applicable to the exportation of products listed in Regulation No 800/77 from Italy to other Member States or to non-member countries after 1 January 1978 in performance of contracts concluded before 1 December 1977, the date on which Regulation No 2657/77 was adopted.

59 The Italian Government and the plaintiff submit that there is also a breach of the principle of legitimate expectations inasmuch as the fixing of the period laid down in Regulation No 800/77 was so imperative that it was to be expected that the compensatory amounts would not apply beyond 31 December 1977.

60 They submit that the fact that Regulation No 2657/77 entered into force a month before that period expired is not sufficient to protect legitimate expectations since it had been declared that the period could not be prolonged, the terms of the second subparagraph of Article 2 (2) of Regulation No 800/77 providing that "monetary compensatory amounts shall not apply beyond 31 December 1977".

61 They submit that consequently, even if Regulation No 2657/77 were not to be declared invalid, the monetary compensatory amounts should not be applied to contracts concluded before the entry into force of that regulation, that is to say before 1 December 1977.

62 However, in the light of the terms of the sixth recital in the preamble to Regulation No 800/77 which is cited above, a prudent trader could not infer from the wording of the second subparagraph of Article 2 (2) of that regulation that the Commission would abolish compensatory amounts on the products in question if the situation at the end of the year remained unchanged.

63 There were therefore no grounds for exempting from the application of compensatory amounts contracts concluded before the date of Regulation No 2657/77.

Costs

64 The costs incurred by the Irish Government, the Italian Government and the Commission of the European Communities, which submitted observations to the Court, are not recoverable.

65 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Pretura di Milano, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Pretura di Milano by an order of 11 April 1978, hereby rules:

1. **Consideration of the provisions in question has disclosed no factor of such a kind as to affect the validity of Regulation No 800/77.**

2. **Consideration of Question 3 (b) has disclosed no factor of such a kind as to affect the validity of Regulation No 2657/77.**

3. **There were therefore no grounds for exempting from the application of compensatory amounts contracts concluded before the date of Regulation No 2657/77.**

Mertens de Wilmars Mackenzie Stuart Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 5 April 1979.

A. Van Houtte
Registrar

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