OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 16 May 1991 *

Mr President,
Members of the Court,

1. The questions referred to the Court by the Finanzgericht (Finance Court), Düsseldorf, will require the Court to determine the scope of several provisions of Commission Regulation (EEC) No 926/80 of 15 April 1980 on exemption from the application of monetary compensatory amounts in certain cases [1] (hereinafter referred to as 'the regulation'), as amended by Commission Regulation (EEC) No 2899/81 of 7 October 1981. [2] That legislation, since repealed, calls for a brief reminder of its context.

2. As the Court has stated,

'the sole objective of the introduction of compensatory amounts was to neutralize the effect of disturbances arising in agricultural trade provoked by the fluctuation of exchange rates for the currencies of certain Member States'. [3]

3. The monetary compensatory amount machinery has itself caused other difficulties, such as the situation of 'existing contracts' which were concluded before the adoption of a monetary measure introducing or increasing monetary compensatory amounts but are to be performed after that amendment. In some cases, the amendment is such as to give rise to an additional expense for the operator in question.

4. In order to ensure that the operator does not bear the risk of loss connected with monetary measures, the Commission, beginning in 1974, adopted a succession of 'equity regulations', the last of which, dated 15 April 1980, forms the subject-matter of this reference for a preliminary ruling. I shall first of all mention the provisions of that measure now at issue, which provides on certain conditions for exemption from the payment of the new monetary compensatory amounts.

5. According to the recitals in the preamble, the basic criterion warranting exemption must be to avoid a disadvantage. In that connection, Article 8(1) of the regulation provides that exemption may be granted only where the applicant is subject, by virtue of the new monetary compensatory amount, to an additional expense which he could not have avoided even by taking all the necessary and normal precautions. Paragraph (3) [4] states that if movements on the exchange markets yield an advantage to the operator, in particular where he buys or sells currency at forward rates, the advantage is to be deducted from the additional expense. However, after setting out the methods for calculating that

* Original language: French.

1 — OJ 1980 L 99, p. 15.

2 — OJ 1981 L 287, p. 3.

3 — Case 34/74 *Roquette Frères* v *French State* [1974] ECR 1217, paragraph 14.

4 — As amended by Regulation No 2899/81.

advantage, paragraph (3) states in its third subparagraph that in the case of an operation at forward rates concluded on the same day as the contract for goods, no exchange advantage may be taken into account in determining the additional expense.

6. Article 9(1) of the regulation defines the additional expense as the payment of a new monetary compensatory amount which is not necessary, in the circumstances of the case, to offset the effect of the monetary measure on the contractual price of the product. Paragraph (2) indicates several factors to be taken into consideration when assessing the circumstances of the case; it then provides that forward currency operations are not to be taken into account if they are undertaken before the conclusion of the contract or after the monetary measure, or if there is no direct or indirect economic connection with the contract relating to the product.

7. It should be noted that the Commission repealed that regulation in 1984 on establishing certain cases of abuse by economic operators; it took the view that there was a general awareness of the existence and functioning of monetary compensatory amounts and that the risks of changes in the monetary compensatory amounts following variations in forward currency rates had to be guarded against, in particular by means of appropriate contractual provisions.

8. The facts occurred at a time when the regulation was still in force. As set out in the judgment making the reference, they may be summarized as follows.

9. An Bord Bainne, an Irish company and the plaintiff in the main proceedings, on February 11 1983 entered into contracts with a Netherlands undertaking for the delivery of skimmed milk powder between April and September 1983 to an undertaking established in Germany. Payment of the price for the goods was to be made in Deutschmarks. An Bord Bainne undertook to bear the risk of the German monetary compensatory amounts. On the same day it concluded a forward currency operation for the purchase of United States dollars in two tranches, one for DM 3.65 million, the other for DM 7 million, for a total amount of German marks equivalent to the whole of the proceeds expected from the operation for the goods. By means of what are known as swap transactions, it sold the amount of US dollars against German marks and, on 15 February 1983, carried out other forward currency operations whereby German marks purchased under the swap arrangements were definitively changed into US dollars.

10. An Bord Bainne explained in its observations that it was customary to carry out forward currency operations by means of a 'swap' transaction based on three parallel exchange operations. It also pointed out that the difference in dates between 11 and 15 February 1983 was due to the fact that the banks do not state the value date until two working days after the transaction has been concluded, and also that 11 February 1983 was a Friday and there were no exchange operations on the Saturday or

Sunday. However, the forward currency transactions were definitively concluded on 11 February 1983.

11. On 21 March 1983 the German mark was revalued and the Commission, by means of a regulation, increased the German monetary compensatory amounts. An Bord Bainne requested exemption from the application of the new amount, that is to say of the 'portion of the monetary compensatory amount corresponding to the increase resulting from a monetary measure', within the meaning of Article 2 of the regulation; that request was refused by the Hauptzollamt Gronau.

12. Before the Finanzgericht (Finance Court), Düsseldorf, the dispute concerned the interpretation of Articles 8 and 9 of the regulation. Thus, the Finanzgericht is requesting a ruling in order to determine the scope of those two provisions.

13. The first question essentially seeks to ascertain whether Article 8(3) of the regulation, as amended by Regulation No 2899/81, must be interpreted as meaning that the advantage referred to therein may be calculated on the basis of a non-Community currency.

14. I would first of all observe that the provision under consideration includes no restriction on operations concluded in a currency other than that of the Member State of the applicant, in particular a non-Community currency.

15. It should next be pointed out that only the specific advantage received by the person concerned must be taken into account in the implementation of Article 8 of the regulation. In fact, from the additional expense following the introduction of or increase in the monetary compensatory amounts must be deducted the advantage received by the person concerned owing to the change in the exchange market. The objective of the provision at issue thus dictates that the *actual* advantage received by the person concerned as a result of the forward exchange operation *actually carried out* by him must be taken into account, even if it should concern a non-Community currency, in this case the US dollar. The logic of the measure at issue is underpinned by two further considerations.

16. First, it is important, it seems to me, to allow economic operators a sufficient margin of freedom in order to enter into the most suitable operations from the point of view of the sector concerned and of the relationships between the currencies on the various exchange markets.

17. Secondly, if the advantage could not be calculated on the basis of non-Community currencies, that interpretation could have the consequence that advantages actually obtained by the operator in question following a forward currency operation having an economic connection with the import or export operation could not be deducted from the additional expense. [5]

18. Consequently, I consider that Article 8(3) of the regulation must be interpreted as meaning that the advantage referred to therein is the actual advantage obtained by

5 — Let it be understood that I am here referring to situations in which the forward currency operation and the contract for goods were not concluded on the same day; when the dates in respect of those operations are the same, in the express words of the third subparagraph of Article 8(3) of the regulation, the advantage may not be calculated; see, on that point, my observations on the second question referred by the national court, below.

the operator concerned and that it may be calculated even on the basis of a non-Community currency, for example the US dollar.

19. In view of my proposed reply, there is no need to answer the question submitted in the alternative.

20. The second question includes a main question and three subsidiary questions submitted in the event that the Court should answer the main question in the affirmative. That question seeks to ascertain whether under the terms of the second subparagraph of Article 9(2), it is, as a general rule, necessary to produce evidence in the case of each forward currency operation of the economic connection with the contract relating to the product.

21. As I have said, Article 9(1) of the regulation defines the concept of additional expense. In that respect, I would recall that the existence of such an expense constitutes the condition subject to which exemption from payment of the monetary compensatory amount may be granted under Article 8(1) of the regulation.

22. Article 9(2) sets out in its first subparagraph certain criteria to be taken into consideration for the 'assessment of the circumstances of the case', and in its second subparagraph, provides in particular that forward currency operations which 'have no direct or indirect economic connection with the contract relating to the product' are not to be taken into account.

23. Viewed in that light, the objective of the legislation is clear: no account is to be taken of speculative forward currency operations, or those relating to other contracts for goods.

24. It thus follows from the provision under consideration that proof of the economic connection must, in principle, be produced for forward currency operations. Is that the case, however, for *all* forward currency operations, as the national court is asking? There remains the difficulty of dovetailing Article 9 with the third subparagraph of Article 8(3). Although the second subparagraph of Article 9(2) undeniably requires the economic connection to be established in order for forward currency operations to be taken into account, the third subparagraph of Article 8(3) of the regulation provides, for its part, that no exchange advantage — in the form, I would recall, of a deduction from the additional expense — may be taken into account *when the forward currency operation was concluded on the same day as the contract for goods.* Does it follow from that provision that the economic connection between the operations in question may none the less be checked?

25. Allow me first of all to recall the objectives of that provision. The recitals in the preamble to Regulation No 2899/81 state in that connection that 'in that situation, one may reasonably consider that the forward currency rate is reflected in the price of the goods and, accordingly, is the rate employed for concluding the contract, which implies that there is no difference between the conversion rates to be compared and that there is no exchange advantage to be taken into consideration when determining the additional expense'.

26. According to the plaintiff in the main proceedings, the third subparagraph of Article 8(3) should 'give rise to an irrebuttable presumption' that when the dates of the contracts are the same, 'the economic connection between the two contracts (must) be regarded as having been proved'.

27. The Commission, for its part, considers that Article 8(3) does not have the same objective as Article 9: the latter provision specifically concerns the need for there to be an economic connection in the case of forward currency operations, whilst the former deals in particular with the calculation of an advantage in a forward currency operation *already* considered under the terms of Article 9.

28. In other words, according to the Commission, it is always necessary to check whether the forward currency operation has an economic connection with the contract relating to the product. On that view, two possibilities then arise for calculating the advantage according to whether or not that connection is established where the dates of the forward currency operations and the contract relating to the goods are the same.

29. In the first situation, it will then be ascertained whether the forward currency operation has produced an advantage for the trader. However, when the dates of that operation and of the contract relating to the goods are the same, no advantage may be taken into account according to the express terms of the third subparagraph of Article 8(3).

30. In the second situation, where there is no economic connection, the operation is precluded from being taken into account, even for calculating any advantage under Article 8, by the application of the second subparagraph of Article 9(2).

31. To accept the Commission's argument would mean that in all cases whenever the forward currency operations and the contract relating to the goods have been concluded on the same day the checking of the economic connection would be without consequence owing to the third subparagraph of Article 8(3): in both cases, the advantage is not to be taken into account. That consequence, which the Commission accepts, calls into question the analysis which it suggests to the Court.

32. For my part, I am unable to support an interpretation which entails a requirement for proof of the economic connection in the case of forward currency operations concluded on the same day as the contract relating to the goods whereas, whatever the outcome of that verification, any advantage need not in the end be taken into account.

33. The wording of Article 8(3) is clear: where the dates of the two operations are the same, no advantage is to be taken into account. There is no doubt that a provision of this nature contains an automatous element. Nevertheless, it cannot be deemed not to have been enacted and it undoubtedly constituted the law in the matter at the material time.

34. Accordingly, I am of the opinion that the finding on its own that the date of the forward currency operation and that of the

contract for goods are the same constitutes the requisite and sufficient condition for precluding the calculation of any exchange advantage.

35. In view of the solution which I suggest to the Court on that point, there is no need to consider the questions submitted in the alternative by the Finanzgericht Düsseldorf.

36. I therefore propose that the Court should rule:

1. The advantage referred to in Article 8(3) of Regulation (EEC) No 926/80 is the actual advantage obtained by the operator concerned and, consequently, may be calculated, where appropriate, on the basis of a non-Community currency, for example the US dollar;

2. The second subparagraph of Article 9(2) of Regulation (EEC) No 926/80 must be interpreted as meaning that, apart from the cases set out in point (a) where the forward currency operations are not to be taken into account, it is, as a general rule, necessary to produce evidence of the economic connection between the forward currency operations and the contract for goods; however, when the forward currency operation and the contract for goods were concluded on the same day, the third subparagraph of Article 8(3) of the regulation in question precludes the calculation of any exchange advantage on determination of the additional expense, and the only condition to which the application of that provision is subject is that the dates of the operations must be the same.