OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 8 MARCH 1979 [1]

Mr President,
Members of the Court,

The two references for preliminary rulings upon which I am speaking today relate to the common organization of the market in cereals as laid down in Regulation No 120/67/EEC of the Council of 13 June 1967 (Official Journal, English Special Edition 1967, p. 33).

This organization of the market aims to guarantee a certain income for producers in the Community. For this purpose target prices are fixed and market prices are intended to stabilize at the level of those target prices. They are fixed for Duisburg "at the wholesale stage, goods delivered to warehouse, not unloaded". In order to protect the Community price level imports from third countries are increased to the Community level by means of levies. For this purpose what are known as threshold prices are derived from the target prices; the threshold prices are no other than target prices related to Rotterdam, the chief place of import. They are reached by deducting from the target prices the transhipment charges at Rotterdam, the transport costs from Rotterdam to Duisburg and a trading margin for the importer. The levy is then equal to the difference between the c.i.f. price calculated for Rotterdam and the threshold price (Article 13 of Regulation No 120/67/EEC). This applies to cereals produced in the Community.

Since no target prices are fixed for other products which are not widely or not produced at all in the Community and which, as for example sorghum, are in competition with Community products, the relevant threshold prices upon which the levy depends cannot be determined by the derivation described. On the contrary, Article 5 (2) of Regulation No 120/67/EEC provides that the threshold prices for such products are fixed in such a way that the prices for the cereals produced in the Community which are in competition with those products reach the target prices on the Duisburg market. In the case of sorghum this means that its threshold price must be fixed in such a way that the market in barley and maize in Duisburg is not disturbed.

The main actions concern the question whether the threshold price fixed for common wheat in Regulation (EEC) No 1173/75 of the Council of 28 April 1975 (Official Journal 1975 L 117 of 7 May 1975, p. 6) and the threshold price fixed for sorghum in Regulation (EEC) No 1427/74 of the Council of 4 June 1974 (Official Journal 1974 L 151 of 8 June 1974, p. 1) have been correctly calculated. This matter is of interest to the plaintiff in the main action because in August 1975 it obtained import licences for common wheat with advance fixing of the levy for the months of August, September and October 1975 (Case 131/78) and in July 1974 it obtained import licences for sorghum with advance fixing of the levy for the months of July, August and September 1974 (Case 150/78). It takes the view that in both cases the threshold prices were fixed at too high a level because insufficient account had been taken of

1 — Translated from the German

the preliminary costs (Vorkosten) mentioned in the recitals of the preambles to both the above-mentioned regulations (the most advantageous transport costs between Rotterdam and Duisburg, transhipment charges at Rotterdam and the trading margin for the importer). It therefore lodged objections against the notices of assessment to the levy and when these had been rejected brought proceedings before the Hessisches Finanzgericht. That court stayed the proceedings by orders of 3 May and 6 June 1978 and referred to the Court of Justice under Article 177 of the EEC Treaty the following questions for a preliminary ruling:

1. Case 131/78:

   "Is Regulation (EEC) No 1173/75 of the Council of 28 April 1975 fixing the threshold prices for cereals for the 1975/76 marketing year (Official Journal 1975, L 117, p. 6) invalid and therefore inapplicable in so far as it relates to common wheat because it infringes Article 5 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 (Official Journal, English Special Edition 1967, p. 33), as last amended by Regulation (EEC) No 85/75 (Official Journal 1975, L 11, p. 1)?"

2. Case 150/78:

   "Is Regulation (EEC) No 1427/74 of the Council of 4 June 1974 fixing the threshold prices for cereals for the 1974/75 marketing year (Official Journal 1974, L 151, p. 1) invalid and therefore inapplicable in so far as it relates to sorghum because it infringes Article 5 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 (Official Journal, English Special Edition 1967, p. 33), as last amended by Regulation (EEC) No 1125/74 (Official Journal 1974, L 128, p. 12)?"

I adopt the following viewpoint with regard to these questions:

I — As regards the validity of Regulation No 1173/75 in so far as it fixes the threshold price for common wheat

1. I shall preface the examination of this question with a short summary of the relevant case-law so that it is clear which principles may already be regarded as established.

It was stated in the judgment in Case 76/70 *(Ludwig Wünsche & Co.* v *Hauptzollamt Ludwigshafen am Rhein,* judgment of 12 May 1971, [1971] ECR 393) that for the purpose of determining the threshold price it is necessary to take into consideration the marketing costs up to the place where the basic target price is to be applied. Because this is however a general system of levies, the marketing costs actually borne in a particular case are not relevant; on the contrary it is necessary to make a flat rate calculation of the costs which the importer must unavoidably bear.

This view was confirmed and made more precise in part in the judgment in Case 11/73, *Getreide-Import GmbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* judgment of 12 July 1973, [1973] ECR 919. According to that judgment the marketing costs which every importer must incur in the procedures and formalities of import are relevant. It was pointed out in particular as regards transport costs that the normal expense of transporting the products must be taken into account, which must be interpreted as meaning that the most advantageous means of transport may be taken as the basis of the calculation.

2. The plaintiff in the main action considers that in fixing the threshold price for common wheat in 1975 the marketing costs which must, according to case-law, be taken into consideration, were incorrectly determined as regards the cost of transport from Rotterdam to Duisburg, the transhipment charges at Rotterdam and the importer's trading margin which also includes a series of smaller items such as charges for customs formalities, costs of the security lodged and expenses with regard to the inspection on receipt. In this connexion it is necessary to state the following:

(a) As regards transport costs

(aa) If I have understood correctly the statements made by the plaintiff at the hearing, it had doubts as to the accuracy of the transport costs taken into consideration, arising in particular from a working document of which it had obtained knowledge and which was intended for a meeting held in May 1974 which concerned the fixing of the threshold prices. It was possible to deduce from this document intended for the German delegation that the Italian delegation hoped that higher freight rates than proposed by the Commission would be taken into consideration, in other words 3.10 units of account instead of 1.02 units of account, and that the Danish delegation also considered correct higher freight rates (1.80 units of account) than had been taken as the basis of the Council decision (1.25 units of account).

This cannot however be decisive with regard to the present case. First, it is impossible to deduce from the above-mentioned document that the higher values quoted by the Italian and Danish delegations originate in concrete investigations carried out on the transport market. On the contrary, it is possible that they arose under the influence of considerations of commercial policy because both above-mentioned Member States had an interest in the reduction of the price of imports which could be achieved by lowering the threshold price and lessening the margin between that price and the c.i.f. price. Secondly, it must be borne in mind that the values quoted related to the 1974/75 marketing year whereas the main action concerns the 1975/76 marketing year. The values which were relevant for that year were however, according to the assurances given by the Council and Commission, fixed unanimously; accordingly therefore no delegation took the view that the freight rates for which a slightly higher amount was laid down than in the previous year (1.30 units of account instead of 1.25 units of account) were calculated at too low a level.

(bb) The plaintiff then complains in general that in fixing the threshold prices insufficient account was taken of foreseeable inflationary developments.

However, this argument is certainly irrelevant too as regards the transport costs, as has been shown at the hearing. In this connexion reference may be made to Annex I to the Commission's observations in which are compiled the figures which have been taken into account since the 1969/70 marketing year. They show that the values did not remain unchanged but rose to a certain extent; in fact they also rose as it happens from the 1974/75 marketing year to the 1975/76

marketing year. Secondly, an important factor is the convincing observation made by the Commission that, mainly through the effect of dumping by Eastern European States, there is keen competition in navigation on the Rhine which has excess capacities; this keeps the freight rates constantly low. This explains why it is impossible to record any developments corresponding to the general inflationary development in costs and it is therefore not surprising that, as the Commission stated without contradiction, freight rates of between DM 4.75 and DM 5 per tonne still applied in 1978.

(cc) In support of its argument that the freight charges were fixed at too low a level the plaintiff relies in addition on a calculation consisting of the freight for the domestic route between Emmerich and Duisburg deduced from the Frachten- und Tarifanzeiger der Binnenschiffahrt [Inland Navigation Freight and Carriage Rates Gazette] of 20 June 1975 and the freight rates for the section of the route lying outside the Federal Republic of Germany (Rotterdam to Emmerich), calculated on the basis of the rate per kilometre applicable under the Directives on aid to freight issued by the Federal Ministry for Food applicable for the year 1975/76. This results in freight charges of DM 8.86 per tonne; compared with these the DM 4.76 per tonne which forms the basis of the regulation on the threshold price is, the plaintiff claims, much too low.

As the plaintiff itself admits, the above-mentioned figures are a notional calculation prepared for a very definite purpose; the calculation has nothing to do with the actual freight charges, which alone are important in this case. In fact, on the Rhine there is, in the case of traffic crossing the frontier, no such split calculation but solely international freight rates which have been freely negotiated. For the purpose of appraising the validity of the regulation on threshold prices a notional calculation such as this cannot therefore be decisive but solely the freight rates actually calculated.

In this connexion I would refer to a calculation from the inland navigation undertaking Rhenus AG produced by the plaintiff itself. According to that calculation the ship's freight rate for consignments of 300 to 500 tonnes amounted to approximately DM 4.80 per tonne in the case of annual contracts for the transport of cereals from Rotterdam to Duisburg at the beginning of 1975.

On the other hand the Commission stated that the freight charges which it had suggested and which were taken into consideration in fixing the threshold price were the result of continual contacts with relevant business circles (the Nederlandse Particuliere Rijnvaart Centrale and Peterson's Havenbedrijf) and in particular with two undertakings which own a large number of boats on the Rhine. In this connexion it is certainly necessary to take into consideration the fact that the amount of DM 4.76 per tonne used as the basis refers to shipments of between 500 and 1 500 tonnes.

If these values of DM 4.76 per tonne and DM 4.80 per tonne are compared however, there is in fact only a minimal difference which is easily explained by the fact that the different amounts of freight charges refer to different sizes of vessel. The plaintiff has therefore shown by the calculation which it itself produced that the Community authorities took appropriate values as their starting point. For this reason it is in my opinion unimportant whether the Commission should have used as the

basis of its calculation the average of the two most advantageous months of the reference period or the yearly average; even the latter, as shown by the Commission by means of the freight rates compiled for the year 1974, were not appreciably different from the first of the above-mentioned values.

It is therefore very difficult to raise any objections to the factor of transport costs in the examination of the threshold price of interest in this case.

(b) As regards the transhipment charges at the port of Rotterdam

In this connexion the Community authorities took DM 1.83 per tonne as the starting-point whilst the plaintiff considers that DM 3.15 per tonne is correct. The plaintiff relies in this connexion on the scale of charges of the Vereniging van Nederlandse Graanfactors en Graanexpediteurs and claims that it is necessary to take into consideration the fact that according to the conditions of the Rotterdam corn exchange in the port of Rotterdam it is unavoidable and customary in the trade to use a shipping agent. In contrast the Commission referred to the transhipment tariffs of Grainwave BV according to which the actual transhipment charges for common wheat from 1 July 1974 amounted to Hfl 1.43 per tonne and from 1 May 1975 Hfl 1.64 per tonne.

I have the impression that the plaintiff's criticism is also unjustified in this respect.

The higher values quoted by it are in fact explained partially by the fact that prices are listed in the tables referred to "inclusive of weighing, inspection and evening, night and weekend work". They therefore cover special services which do not always arise and which cannot therefore be regarded as "inevitable". In addition they refer to procedures the costs of which the Commission has taken into consideration in the context of the trading margin, such as the cost of weighing and inspections. Should they be justified however as for the rest because of the need to use a shipping agent at the port of Rotterdam it is necessary to bear in mind that according to the assurances made by the Commission *Netherlands* importers in Rotterdam do not need any agent so that these costs are not inevitable either. Furthermore, the Commission was able to point out that the sharp increase in the margin as early as the 1974/75 marketing year should be sufficient to cover this cost factor too.

It is therefore impossible to state that insufficient account was taken of the transhipment charges.

(c) As regards the trading margin and other costs arising

The figure of DM 4.55 mentioned by the plaintiff in this connexion differs only very slightly from the amount of DM 4.40 used by the Community authorities. Such a difference may of course be readily disregarded in the legal appraisal, chiefly in view of the considerable variations in the c.i.f. prices of which the Commission spoke at the hearing. Moreover, I do not have the impression that the difference is caused by the fact that some items mentioned by the plaintiff were not taken into consideration by the Community authorities. In any case the plaintiff did not go into this further at the hearing and did not in addition oppose the

Commission's view that the difference may basically be attributed to different conceptions as to the size of the profit margin. In this respect however the Community authorities certainly have a certain margin of discretion. In addition, a misuse of discretion can hardly be based upon DM 0.15.

3. As a whole it is therefore necessary to state that no reasons have become apparent in the procedure which might enable doubts to be raised as to the validity of Regulation No 1173/75.

II — As regards the validity of Regulation No 1427/74 in so far as it fixes the threshold price of sorghum

The plaintiff has put forward fundamentally the same arguments in the context of Case 150/78 on this question as those which it put forward on the regulation on the fixing of the threshold price for common wheat. I therefore consider that the plaintiff's criticism regarding the fixing of the threshold price for sorghum is likewise unfounded, as regards both its general reference to the need to take into consideration the foreseeable inflationary developments and as regards the calculation of the transport costs between Rotterdam and Duisburg by dividing up the route and calling in aid the German directive on aid to freight as well as the transhipment charges at Rotterdam and the trading margin.

Moreover it is also impossible to consider — Case 150/78 concerns an earlier marketing year — that it has been shown that higher freight rates applied in the 1974/75 marketing year than in the subsequent marketing year. In this connexion the preparatory document for the meeting of May 1974 which has already been mentioned containing references to Italian and Danish conceptions of the freight rates is just as inadequate as the certificate from Rhenus AG produced by the plaintiff according to which in the case of annual contracts for the transport of cereals from Rotterdam to Duisburg the ship's freight rates for consignments of 300 to 500 tonnes were approximately DM 6 per tonne at the beginning of 1974.

In the final analysis however this question can remain undecided for reasons connected with the principles used for the calculation of the threshold price for a cereal such as sorghum (Article 1 (a) of Regulation No 120/67/EEC), which is not produced in the Community.

As I have already stated at the outset no target prices are fixed for such cereals because no income guarantee is necessary; nor for this reason does a so to speak mathematical derivation from the target prices apply in the case of the threshold prices as for example in the case of common wheat. On the contrary, the threshold price is in this instance fixed according to Article 5 (2) of Regulation No 120/67/EEC in such a way that, in the case of fodder cereals produced in the Community such as maize and barley, which are, because of their similar nutritive value, in competition, the target price is reached in Duisburg so that the price of those cereals is not brought down and their sales markets are not jeopardized. There is therefore clearly room for discretion regarding economic policy in this case.

It is however in my opinion impossible to perceive any indications that this discretion was not exercised correctly. In this connexion the Commission stated before this Court at the hearing that when it made the proposals adopted by the Council it guided itself by the

competitive relationships between sorghum on the one hand and barley and maize on the the other as reflected in the prices on the world market and the c.i.f. prices determined for Rotterdam. In the case of sorghum some of these prices were below and some above the prices of barley and maize; they varied between 83 % and 107 % of those prices. Accordingly it was absolutely justified to fix the threshold price for sorghum above the level applicable to barley and maize. In fact however in the 1974/75 marketing year the threshold price of maize was 106.60 units of account and that of barley was 107.55 units of account whilst only the more advantageous value of 105.55 units of account applied to sorghum.

In these circumstances it is in fact impossible to state that the threshold price for sorghum in Regulation No 1427/74 was not fixed in accordance with the principles laid down in Article 5 (2) of Regulation No 120/67/EEC.

III — I can therefore only propose that the questions referred to the Court for a preliminary ruling by the Hessisches Finanzgericht should be answered to the effect that in the procedure no reasons have become apparent which might give rise to doubts as to the validity of Regulations (EEC) Nos 1173/75 and 1427/74.