OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 14 MARCH 1978 [1]

Mr President,
Members of the Court,

I — This case concerns an action for damages brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty by a German limited partnership against the Commission on the grounds that performance of a contract which it had entered into with the Romanian State undertaking "Prodexport" was made excessively onerous by the effect of *Council* Regulation No 425/77 of 14 February 1977, published in the Official Journal of the European Communities on 5 March 1977.

Concluded on 15 February 1977, the contract concerned the delivery not of "seasoned bovine meat preparations", which came before the Court in Case 68/77 *IFG* in which the Court gave judgment on 14 February 1978, but of 450 tonnes of marinated beef ("Sauerbraten") ready for cooking, or to put it more prosaically uncooked beef put up in sealed containers weighing not more than 1 kilogramme. The deliveries from the Romanian undertaking were to be spread over the period from April to December 1977 at the rate of approximately 50 tonnes per month.

In March 1975 the applicant firm had sought and obtained from the German authorities an official ruling as to tariff classification, indicating that the goods at issue came at the time within subheading 16.02 B III (b) 1 of the Common Customs Tariff; on importation into the Community the goods were liable to both autonomous and conventional *ad valorem* customs duty of 26%, that is DM 1.30 per kg. A first consignment of about 10 tonnes of that meat, sent to test the market and not counting towards the 450 tonnes contracted for, was cleared into free circulation in the Federal Republic of Germany without any difficulty on 25 050March 1977; no import licence had been obtained in respect of that consignment in accordance with Article 1 of Commission Regulation No 3117/76 of 21 December 1976 amending and repealing the linking systems introduced in the beef and veal sector, by way of protective measures, by Regulations (EEC) No 76/76 and (EEC) No 223/76; the right or duty to obtain such a licence was reintroduced only as from 1 April 1977 (Article 15 of Council Regulation No 425/77).

The aforesaid Regulation No 425/77 made substantial amendments to the rules for trade with third countries as derived from Regulation No 805/68 of 27 June 1968 on the common organization of the market in beef and veal. Among other things, it makes provision (Article 3, amending Article 12 of Regulation No 805/68) for the levy to exceed the difference between the guide price and the free-at-Community-frontier offer price plus the amount of the customs duty; the levy exceeds 100% when the Community market price is lower than 98% of the guide price, which in certain respects is the threshold price for beef and veal.

These amendments made the contract entered into by the applicant quite uneconomic. In order to "arrive at a better definition of" the products which may be imported free of levies, Regulation No 425/77 divided subheading 16.02 B III (b) 1 into two parts:

on the one hand

1 — Translated from the French.

— subheading 16.02 B III (b) 1 (aa), covering "other prepared or preserved meat or meat offal, containing bovine meat or offal, uncooked", which was liable to autonomous customs duty of 20% *and* in certain circumstances to a levy (no conventional duty being chargeable);

on the other hand

— subheading 16.02 B III (b) 1 (bb), covering "other prepared or preserved meat or meat offal ... containing bovine meat or offal ... other"; products coming within this subheading were liable to both autonomous and conventional customs duty of 26%.

The first of these two subheadings was further defined in an Additional Note inserted by Article 14 (2) of Commission Regulation No 586/77 of 18 March 1977.

Consequently as from 1 April 1977, owing to this amendment of the terms of the Common Customs Tariff, the "bovine meat" at issue became liable to a levy in addition to the 20% customs duty in the circumstances laid down in Commission Regulation No 586/77. In this instance the levy amounted to DM 7.10 per kilogramme, which exceeded even the purchase price and was thus prohibitive. The applicant claims that it did not become aware of this new development until 4 April 1977, even though the Council regulation had been published on 5 March 1977 and the Commission regulation on 23 March 1977, after it had been informed by the German authorities that the official ruling as to tariff classification issued in 1975 was no longer valid. In consequence it immediately stopped importing the meat, and the other party to the contract is claiming a sum of DM 495 000 from it for non-performance of the contract.

In a first letter sent to the Commission on 12 April 1977, the applicant asked the Commission to make special arrangements to enable it to fulfil its contract on acceptable terms. On 22 April it wrote again asking the Commission to adopt transitional measures on the basis of Article 7 of Regulation No 425/77 to allow it to import the quantities agreed upon with the Romanian undertaking free of the levy until 31 December 1977.

On 3 June 1977, a Head of Division at the Directorate General for Agriculture replied by a refusal.

The applicant claims primarily that the Court should declare that the Commission is required to guarantee performance of the contract concluded on 15 February 1977 (compensation in kind); in its reply, introducing a slight variation, it claims primarily that the Court should declare that the Commission is required to authorize the importation, free of the levy, of the quantity of meat stipulated in the contract of 15 February 1977 by adopting a decision ordering the Federal Republic of Germany to admit the quantity at issue free of the levy. In the alternative the applicant claims that the Court should order the Commission to make good the damage arising out of the failure to perform the contract, which it calculates at DM 787 500, with interest at 8% as from the date of the damage.

II — The Commission first of all contends that the primary claim is inadmissible: it states that it is required to apply the existing rules and that an action for compensation cannot be used to obtain the adoption of a legislative measure involving an exception to those rules. Such an aim may be pursued only by way of Article 175 of the Treaty, which has not been pleaded in this case.

Although personally I agree with the views expressed by Mr Advocate General Capotorti in his opinion in the *IFG* case, and although I think that the

applicant's primary claim is inadmissible in both of its forms, I propose on the authority of the Court's judgment of 14 February 1978 in the *IFG* case that the Court should examine the substance of the case before giving any ruling as to the admissibility of the primary claim. Both the primary claim and the claim in the alternative, (against which the Commission raises no objection of inadmissibility) have a common basis, in so far as they imply that the Commission has incurred liability through an *unlawful* measure or *unlawful* conduct on the part of the Community institutions.

However it seems to me that the case is misconceived from the outset in that the *Commission* is made the defendant to action for compensation for the damage allegedly caused by a measure in fact adopted by the Council. The applicant, which had brought its application against the Commission alone, attempted to bring the Council into the issue in its reply, but by an order of 10 November 1977 the Court refused its request. However it does not seem possible to me to order the *Community* to make good any damage caused principally by the *Council* in the exercise of its powers, when only the *Commission* has been called upon to answer the action brought for that purpose.

III — (1) I shall consider first, not whether Council Regulation No 425/77 is *illegal*, a ground of complaint which was not pleaded and on which it is not possible to give a ruling in the absence of the institution which adopted the regulation, but whether the *Commission* by omitting to use Article 7 of Regulation No 425/77 caused the applicant damage of such a kind as to incur non-contractual liability.

That article provides:

"Should *transitional measures* be necessary to facilitate the implementation of this regulation, in particular if such implementation on the date provided for were to give rise to *substantial difficulties* in respect of certain products, such measures *shall be* adopted in accordance with the procedure laid down in Article 27. They shall be applicable until 31 December 1977."

The reference is to Article 27 of the basic Regulation No 805/68, which concerns the well-known Management Committee procedure.

On this first point I should like to refer to what I said in my opinion in the *Bainne* case about that procedure and in the *Debayser* case about the "discretionary relief regulation", and express the view that this case does not supply an appropriate framework for examining whether the Commission had a *duty* to make use of the power conferred on it by Article 7 and that at all events the Commission's non-contractual *liability* cannot be brought into the issue in that context: the Commission did not act *illegally* by refusing to apply Article 7 in the way desired by the applicant.

The applicant does not go so far as to maintain that Article 7 is illegal to the extent to which it does not confer on the Commission a "compétence *liée*" (a power which must be used in a certain way as opposed to a power which may be used at its discretion). Even if that were the case, I could not examine such an objection of illegality in the context of this action, and moreover any such illegality would concern the *Council* and not the Commission.

Even the requirements of natural justice, which were considered in the judgment of 1 February 1978 in the *Lührs* case, would not be sufficient grounds for admitting the existence of such a duty on the part of the Commission.

In dealings between individuals and Community administrative authorities, such as those in this case, where, far from entailing non-performance of any

obligation on the part of individuals, the charging of the levy results only in less favourable treatment for the imports concerned than that prevailing before the introduction of the levy, no general principle of law — and still less of natural justice — having the scope alleged can be deduced from the domestic legal orders of the Member States.

(2) The same is true of the circumstances in which the European Parliament was — or rather was not — consulted on the last *oral* proposal of the Commission which underlies *Council* Regulation No 425/77. Any irregularity in that connexion cannot result in the applicant's receiving satisfaction as regards compensation.

(3) Next, the applicant pleads the well-known general principle of legal certainty and the protection of the legitimate expectation of those concerned.

I would point out first of all that, assuming that the applicant could have cherished legitimate hopes as to the maintenance in force of the rules existing when its contract was entered into, that is a mere *expectancy:* a *vested right* to such maintenance would suppose at least the existence of a document embodying rights; however no import licence was required in order to carry out the transaction contemplated. The import rules in question did not require the person concerned to obtain prior authorization from or give an undertaking guaranteed by a deposit to the authorities responsible for the organization of the markets in question.

If the administrative authorities of the Federal Republic of Germany gave the applicant reason to believe that the previous rules would be retained in their entirety until old contracts had been performed, notwithstanding changes in market conditions, any liability for failure to protect legitimate expectation would lie with that Member State.

From the point of view of "failure to protect legitimate expectation", I would observe that at least two of the conditions for this Court to find the institutions of the Community liable on those grounds have not been fulfilled.

First, the introduction of the levy at issue was not unforeseeable, as the Commission explains in detail. Products falling within subheading 16.02 B III (b) 1 of the Common Customs Tariff have always been a sensitive area. In the past, the Community had frequently had to adopt protective measures in respect of certain of those products by providing for the issue of import licences upon presentation of contracts of purchase under the system of linking imports of beef and veal products to sales of fresh or preserved beef and veal held by the intervention agencies. I would also cite Regulation No 610/75 of the Commission of 7 March 1975 on protective measures for certain products falling within that subheading, and Regulation No 2033/75 of the Commission of 5 August 1975 which was at issue in the *IFG* case. The announcements in Commission Regulation No 3117/76 of 21 December 1976 that the measures introduced by that regulation in view of the market situation "constitute a step towards the restoration of the normal import system" and that "the end of the system of protective measures" was contemplated was not such as to assure traders that in the event of a radical change in the situation certain products within that sensitive area could continue to be imported without a system of protection being reintroduced in one form or another.

The obtaining of an official ruling as to tariff classification from the German authorities is merely a guide. It was for the applicant to take precautions, as is not unusual in the field of international

contracts, by inserting a clause to guarantee it against the occurrence of an event making performance of its contract excessively onerous: the applicant must seek the appropriate remedy if need be by pleading *force majeure*, in its legal relations with its contracting partner or with the German Federal authorities.

On the other hand, the amount of the levy replacing the earlier linking system could only be a matter for conjecture. One of the main problems of trade in beef and veal is the uncertainty between the time of placing the order and the time of delivery as to the amount of the levy which will be charged on imports into the Community. In a period of world shortage, a levy system discourages Community importers; a single, fixed *ad valorem* charge on all goods submitted contributes to reducing such uncertainty. The levy introduced by Council Regulation No 425/77 and Commission Regulation No 586/77 varies according to the prices charged within the Community; the Council's intention in deciding on that new variation of the levy was to ensure that in future the market would be managed in a way better adapted to changes in Community prices in relation to the guide price, in order to avoid a return to situations as extreme as the application of the shortage system in 1972 and the application of the protective measures system from 1974. Thus by their nature those rules involve an element of uncertainty; but that uncertainty was not confined to the applicant, and the applicant's importations are not taking place in a period of shortage but on the contrary in a period of surpluses.

Secondly, it seems to me that a theme of the new rules is an overriding public interest, or what for my part I should prefer to call reasons of general interest, in their implementation, which, it should be noted, took place not *immediately* but almost four weeks after the alteration announced by the publication of Council Regulation No 425/77 and almost a week after the publication of the rules of application laid down in Commission Regulation No 586/77.

The Council regulation rests on the footing that products such as those which the applicant intended to import "were created *for the sole purpose* of avoiding application of the levies", the introduction of which is justified precisely by the risk of serious disturbances due to imports, and that those products *"can be substituted* for meat falling within heading No 02.01 of the Common Customs Tariff ... which may be imported free of levies".

Resulting as they do from the assessment of a complex economic situation, these operations cannot be questioned in the context of this action and *prima facie* completely justify the introduction of a system of levies.

It has always been particularly difficult to deal with the instability of the market in beef and veal and to control the cycles of production, which give rise to considerable fluctuations. Such a system is an improvement on using protective measures. As I have already said, the use of a single basic levy and rules for its application necessarily gives a precarious and uncertain character to the management of the market with cases being dealt with as they arise, which necessarily leads to discontinuity. The fixing of the levy is influenced by short-term economic considerations and by changes in Community prices in relation to the guide price, and the management of the market has to take account of the "political" aspect of the improvement in the income of Community producers of beef and veal.

IV — It remains to be considered whether the introduction of a system of levies in respect of the products at issue is contrary to the combined provisions

of Articles 39 and 110 of the Treaty, and especially to the rules as to binding in the General Agreement on Tariffs and Trade (GATT). It should be noted once again that this complaint is directed at *Council* Regulation No 425/77. Subject to any observations which the Council may make, I would make the following remarks:

According to the applicant, the placing of the prepared meat at issue under subheading 16.02 B III (b) 1 (aa) of the Common Customs Tariff is contrary to the binding of the rate of duty pertaining to subheading 16.02 B III (b) 1 under GATT. The binding expressly refers to the whole of that subheading. Moreover the new version of Article 17 of Regulation No 805/68 introduced by Regulation No 425/77 exactly corresponds to Article 16 of Regulation No 805/68, according to which "The provisions of this regulation *shall be* applied with due regard to the obligations under international agreements by which the Community is bound". It is argued that the introduction of a levy in respect of certain products falling within that tariff subheading clearly breaches that provision.

In answer to the question which the Court put to it about this "unbinding", the Commission states that the concession granted did not relate to the products at issue in this case and that the relevant point is rather the total economic and financial measure of the trade affected by the tariff negotiations.

I shall proceed no further with this discussion, because even assuming that it were proved that a unanimously adopted *Council* regulation had infringed the GATT rules and even if an individual can found an action on such an infringement, which I doubt, I consider that such infringement is not apt to give rise to liability on the part *of the Commission.*

However I would add that in the context of the common agricultural policy the Community must respect the various objectives set out in Article 39 of the Treaty, in particular: to stabilize markets (Article 39 (1) (c)), to assure the availability of supplies (Article 39 (1) (d)), to ensure that supplies reach consumers at reasonable prices (Article 39 (1) (e)). These objectives are 9themselves of differing degrees of importance and are not easy to reconcile. To ensure reasonable prices for consumers, it is necessary to simplify the agreements governing importation of beef and veal; this conflicts with the objective of stabilizing markets; similarly, to ensure better quality, it is necessary to encourage Community production of red meat, and this is also hardly compatible with the development of international trade. However, if the objectives set out in Article 39 are not easy to reconcile with one another, they are even more difficult to reconcile with the harmonious development of international trade sought by Article 110. Thus the Community must be able to put certain of these objectives before others, having regard to the economic and political situation. As Mr Advocate General Capotorti pointed out in his opinion in the *IFG* case, this involves arguments which are rather of a political nature.

Finally I would observe that the linking systems, introduced as protective measures, have been abolished as from 1 April 1977, and that unlike Yugoslavia for example, Romania is not bound to the Community by any commercial agreement; that country has not entered into any undertaking designed to limit its exports of beef and veal to the Community or to prevent abnormally low prices for such exports.

The date of 31 December 1977 and Article 7 were laid down essentially in order to deal with difficulties which might have arisen with the ACP countries and in order to allow the

continuation until 31 December 1977 of measures reducing the non-tariff charges on imports by 90% in exchange for the levying of a charge of an equivalent amount on exports by the ACP countries concerned.

I am of the opinion that the application should be dismissed and the applicant ordered to bear the costs.