In Case 151/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Hamburg for a preliminary ruling in the proceedings pending before that court between

PEISER & Co. KG, Norderstedt,

and

HAUPTZOLLAMT [Principal Customs Office] HAMBURG-ERICUS,

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),

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 brought within the system of monetary compensatory amounts. They were different kinds of sugar confectionery, ice cream and other ices, chocolate and cocoa-based products, 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 baker's wares other than gingerbread and the like) and 21.07 C (ice cream (not including ice cream powder) and other ices not containing cocoa).

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.

By 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) the time-limit on the applicability of Regulation No 800/77 was abolished and the monetary compensatory amounts on the products under consideration 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

On 28 July 1977 the German firm Peiser & Co. KG requested the customs clearance of several consignments of biscuits and chocolate which it had bought in the Netherlands for a price of DM 30 030.28, for the purpose of putting them into free circulation in the Federal Republic of Germany.

By a decision of 29 July 1977 the Hauptzollamt [Principal Customs Office] Hamburg-Ericus charged monetary compensation amounting to DM 282.53 in respect of that importation. Peiser lodged an administrative objection against the charging of that compensation. The objection was dismissed, and on 19 October 1977 Peiser instituted proceedings before the Finanzgericht (Finance Court] Hamburg.

C — The question referred for a preliminary ruling

Holding that a question of the validity of a Community provision arose, the Finanzgericht Hamburg by an order of 23 November 1977 decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"Is Commission Regulation (EEC) No 800/77 of 20 April 1977 invalid in so far as monetary compensatory amounts are charged or granted on imports or exports

of goods under tariff subheading 18.06 C II a 1 (code number 1806 650 20), tariff subheading 18.06 C II b 2 (code numbers 1806 650 50 and 1806 700 50), tariff subheading 18.06 C II b 3 (code number 1806 650 60) and tariff subheading 19.08 B II d 1 (code number 1908 912 32)?".

The order making the reference was lodged at the Court Registry on 15 December 1977.

Upon hearing 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 observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

A — Observations submitted by Peiser & Co. KG

Peiser concludes that the introduction of monetary compensatory amounts by Regulation No 800/77 in respect of the processed agricultural products in question is contrary to the powers conferred by Regulation No 974/71 and to Article 235 of the Treaty, the principle of proportionality and the principle of non-discrimination.

1. Illegality of Regulation No 800/77 in relation to the powers conferred by Regulation No 974/71 and to Article 235 of the Treaty.

According to the basic Regulation No 974/71, the monetary compensatory amounts system applies to products which, in the words of Article 1 (2), (b), "are the subject of a specific arrangement under Article 235 of the Treaty". By the expression "special rules adopted under Article 235" in Regulation No 800/77, the Community legislature meant to refer to Regulation No 1059/69 of the Council of 28 May 1969 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products (Official Journal, English Special Edition 1969 (I), p. 240). However that regulation was based on the authorization of Article 235 of the Treaty only in so far as concerns the special trade arrangements concerning intra-Community trade which the Council was empowered to adopt under Article 14 (3) and (4) of the said regulation. Under the terms of these provisions, the Council acting by a qualified majority may take appropriate measures to deal with possible effects on trade between Member States, and acting unanimously may take appropriate measures to deal with a special situation which may arise in respect of certain goods.

However, in order for Article 235 to be applicable,

— action by the Community must prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community,

— the Treaty must not have provided the necessary powers,

— and the Council must take the appropriate measures acting unanimously on a proposal from the Commission and after consulting the Assembly.

The provisions of Article 14 (3) and (4) of Regulation No 1059/69 do not fulfil these conditions (in particular, at the time of the adoption of the regulation in question it was not possible to say whether action by the Community proved "necessary") and also fail to

observe the procedure laid down in Article 235 (which constitutes an institutional guarantee against the risk of the Community's powers being wrongfully extended beyond the limits laid down by the Treaty). Therefore there is no specific arrangement under Article 235 of the Treaty in respect of the products in question. The monetary compensatory amounts system should not therefore have been extended to these processed agricultural products.

2. Illegality of Regulation No 800/77 in relation to the principle of proportionality

Pursuant to this principle — which is expressly referred to in the basic Regulation No 974/71 — in order for a monetary compensation system to be introduced in respect of a processed product in does not suffice for the monetary compensatory amounts applied to the basic products to have an incidence of any size whatever upon that processed product. The said amounts must also be "necessary" to compensate for the effect of the monetary measures on the prices of the basic products, and those measures must have led to disturbances in trade in the goods (cf. the judgment of 17 March 1976 in Joined Cases 76 to 85/75, [1976] ECR 391, and the judgment of 14 May 1975 in Case 74/74, [1975] ECR 539). Article 190 of the Treaty is infringed in that the statement of the reasons on which Regulation No 800/77 is based is insufficient. The Commission failed to show whether there was any disturbance in trade in agricultural products, whether application of the monetary compensatory amounts system was necessary and to what extent the said amounts applied to the basic products affected the conditions of competition of the processed products.

Disturbances in trade ought to have led to a sudden alteration in the trends of imports and exports from the time of the imposition of the compensatory amounts on the basic products in question or even from the time of the widening of the margins of fluctuation of the currencies. It appears in particular from the edition of the "Süßenwarentaschenbuch" [confectionery handbook] published by the "Bundesverband der deutschen Süßenwarenindustrie e. V." [Federal Union of German Confectionery Industries] that, as regards trade between the Federal Republic of Germany and the other Member States, imports of chocolate and cocoa-based products increased 2.5 times between 1966 and 1976, whereas over the same period exports increased 6 times (during the period immediately preceding the introduction of the compensatory amounts system, that is during 1976, imports increased by 12.3% and exports by 15.6%). Over the 10 year period from 1966 to 1976, imports and exports of sugar confectionery increased 3.5 times (in 1976 imports decreased by 3.4% and exports increased by 21%).

As regards trade between Member States with a strong currency and Member States with a weak currency over the three years preceding the introduction of compensatory amounts, it is noted that it followed a normal trend:

— With one exception, imports did not show any unexpected developments justifying an inference of disturbances in trade between Member States.

— Exports show either a tendency to increase (particularly for the most

important product: bars of soft-centred chocolate) or a very slight tendency to decrease.

Therefore the only disturbance in trade is that which affected commercial relations between the United Kingdom and Ireland. However a mere bilateral disturbance cannot justify the introduction of a multilateral system of compensatory amounts. This follows primarily from the principle of proportionality. But it also follows from an interpretation of Regulation No 974/71 according to which the authorization contained in Article 1 is addressed not to the Commission but to each Member State which allows its currency to depart from the official parity for commercial transactions.

It also seems that monetary compensation of DM 282.53 charged on goods worth DM 30 030.28 cannot be such as to affect the traditional trends of trade. Such a paltry percentage in itself makes quite improbable the idea that there is any disturbance in trade in the products in question. Furthermore, regard must be had to the particular nature of the products, in relation to which provenance from a certain country with its distinctive features of quality and taste is more important than a minimal increase or decrease in price due to differences in the parity of currencies.

3. Illegality of Regulation No 800/77 in relation to the principle of non-discrimination laid down in respect of the agricultural common market by Article 40 (3) of the Treaty

In the preamble to the said regulation, the fact that the compensatory amounts on the basic products led to differences in prices and distortions of competition at the level of the processed products is given as the justification for extending the monetary compensation system to confectionery products. The Commission did not 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, pasta, marmalade, jam and preserved fruits containing sugar.

In addition to this basic discrimination, Regulation No 800/77 also contains a number of particular forms of discrimination for which no rational foundation can be seen. Thus, for example, almost all kinds of chocolate and cocoa-based products are made subject to compensatory amounts whereas white chocolate under tariff heading 17.04 C, which contains the same amount of sugar as brown chocolate and has a similar taste owing to its cocoa butter content, is excluded from the monetary compensatory amounts system.

4. Limits of the Commission's discretionary power of assessment

According to its settled case-law the Court confines itself to considering whether the assessment of measures of an economic nature is vitiated by manifest error or misuse of powers, but this principle does not entirely exclude the Court's ability also to assess economic factors, to the extent to which this may be necessary for the purpose of reviewing the legality of the act in question. This is the case *inter alia* where observance of the principle of proportionality has to be verified: here the question is whether the introduction of a monetary compensatory system was necessary for the products at issue. The Commission's discretionary power of assessment must not be too broad, as the compensatory amounts system

constitutes "partitioning of the markets" contrary to the principles of the Common Market. Thus the Court has always held that account had to be taken of the market conditions as well as of the monetary situation. In Joined Cases 67 to 85/75 cited above it even held that the Commission was obliged "to abolish the system of compensatory amounts for the products in question, as soon as its application proved to be no longer necessary in order to prevent disturbances in trade."

In the present case, unlike Case 5/73 *Balkan* [1973] 1091, the mistakes of assessment which the Commission made do not concern disturbances in trade in a certain product in relation to a single country: here it is a matter of extending "partitioning of the markets" to a large group of products when there were no disturbances in trade between the Member States except between the United Kingdom and Ireland.

The Commission itself has emphasized several times, most recently on 10 February 1978 in a communication to the Council on the economic effects of the agri-monetary system (COM (78) 20 final), that the sole function of the compensatory amounts should be to compensate for the sudden incidence of monetary instability in exchange rates. The existence of such a questionable system necessitates particularly strict observance of the limits of lawfulness resulting from the principles of proportionality and non-discrimination.

B — Observations submitted by the Irish Government

The Irish Government shows that Peiser's criticisms are based, at least in part, on the erroneous view that disturbances in trade must actually have commenced before action is taken under Regulation No 974/71.

Ireland had initially requested the Commission to adopt a measure under Regulation No 974/71. The protective measure concerning Ireland did not remove the competitive disadvantage to which Irish manufacturers were subject in trade with any other Member State or non-member country. Furthermore, it did not take account of the possibility of deflections of trade through other Member States.

If the Court concludes that the conditions which Regulation No 974/71 lays down for the application of monetary compensatory amounts to the products in question were not fulfilled with regard to trade between certain Member States, Regulation No 800/77 should not be held to be invalid in its entirety but only to the extent to which its provisions were not justified under Regulation No 974/71. The conditions which gave rise to the disturbances in trade between Ireland and the United Kingdom would recur if the provisions of Regulation No 800/77 were to cease to be applied in their entirety.

In the exercise of the power under Regulation No 974/71 to apply monetary compensatory amounts to products such as those in question in the present case, the requirements of Article 235 are satisfied if the condition concerning the threat of disturbances in trade is satisfied.

There were objective reasons for the Commission's decision not to include certain processed products within the ambit of Regulation No 800/77. In particular, the products to which the

monetary compensatory amounts system was extended by that regulation are traded in significant volume between Member States and with non-member countries, unlike other products mentioned by Peiser. At all events, it would be open to the Court to declare that such discrimination as may exist should be removed, thus in effect obliging the Community institutions to take the necessary steps for this purpose.

C — *Observations submitted by the Italian Government*

The Italian Government points out that in Case 1/78 *(sub judice)* it challenges both Regulation No 2657/77 and Regulation No 800/77 in so far as the latter makes provision, through Regulation No 2657/77, for the continued application, even after 31 December 1977, of the monetary compensatory amounts to the products under consideration.

However, since certain of the grounds put forward in Case 11/78 in support of the illegality of Regulation No 800/77 are relevant for the purpose of answering the question asked by the Finanzgericht, the Italian Government repeats them as observations.

1. Infringement of Article 1 (3) of Regulation No 974/71

As emerges from this provision, the Commission's discretionary power in assessing the risk of disturbances in trade can be exercised only at the level of agricultural products. Therefore monetary compensatory amounts can be applied to products which "are the subject of a specific arrangement under Article 235 of the Treaty" only if there is a risk of disturbances in trade in the agricultural products upon which the price of the products which are the subject of an arrangement under Article 235 depends. As emerges from the third recital in the preamble to Regulation No 800/77, the assessment of the risk of disturbances in trade was carried out at the level of processed (non-agricultural) products.

The Italian Government is aware that all the basic agricultural products were already subject to monetary compensatory amounts. Because of this it assumes that the risk of disturbances in trade in those products had already been eliminated. Doubtless an aggravation of the risk can make it necessary to apply the compensatory amounts even to derived products; but the condition, which the Commission has failed to observe in this case (cf. the third recital aforesaid), is still the risk of disturbances in trade in basic agricultural products.

2. Misuse of powers

Assuming that the Commission had the power to apply monetary compensatory amounts to the products concerned, that power was used for a purpose other than that which Regulation No 974/71 attributed to it. In Regulation No 800/77, it was not the Commission's intention to resolve a common agricultural policy problem (which is the basic purpose of the system of compensatory amounts) but to deal with difficulties complained of by Irish processing industries in their trade with the United Kingdom. This conclusion is justified by the facts that:

— on the one hand, the decision concerning Ireland ceased to apply

on the day on which Regulation No 800/77 took effect (23 May 1977);

— on the other hand, the compensatory amounts were not applied for example to white chocolate and gingerbread, which, as regards the effect which the basic agricultural product has on them, are no different from the other products to which the monetary compensatory amounts were applied.

3. Breach of the principle of proportionality

The products at issue involve a high degree of processing, and trade in them, which is limited, is independent of the markets in the basic agricultural products, over which they do not exert any influence even of an indirect kind. In order to resolve the difficulties encountered in Ireland, a provision adopted under Article 14 of Regulation No 1059/69 would have been proportionate and adequate, whereas this is not the case of the application of monetary compensatory amounts.

To these observations based on the grounds put forward in Case 11/78, the Italian Government adds certain considerations flowing from Peiser's line of argument.

The main reason for the illegality of Regulation No 800/77 on grounds of infringement of Regulation No 974/71 is not that there was no risk of disturbances in trade in the products covered by it. The illegality lies above all in the absence of any risk of disturbances in trade in the basic agricultural products, because such risk had already been eliminated by the introduction of compensatory amounts on those products.

Regulation No 800/77 was adopted in breach of Article 2 (2) of Regulation No 974/71 for want of the strict relationship of dependence required by that provision, which provides the only grounds for the applicability of the compensatory amounts to non-agricultural derived products (cf. judgment of 12 November 1974 in Case 34/74 *Roquette* [1974] ECR 1217).

D — Observations submitted by the Commission

1. Disturbances in trade

(a) Matters of principle

Regulation No 974/71 should not be interpreted as requiring that the monetary measures should have led to difficulties or that disturbances should have occurred: in fact the question is whether the monetary situation entails a risk of disturbances or whether there is reason to fear disturbances in trade if monetary compensation is not applied (cf. judgment of 20 October 1977 in Case 29/77 *Roquette* [1977] ECR 1835).

In matters of economic policy, the Commission and the competent Management Committees have wide discretionary power to assess this risk of disturbances. The aforesaid judgment points this out, in a case which also concerns agricultural processed products, a sector in which a number of factors are instrumental in creating an economic situation which is particularly complex and difficult to assess.

Finally, the factual conditions which led to the adoption of Regulation No 800/77 should not be confused with those of the protective measure adopted in favour of Ireland. In order for the

latter measure to be able to be adopted, the existence of particular difficulties in Ireland had to be proved; it is not possible to justify a requirement that the existence of such difficulties in dealings between the Federal Republic of Germany and its neighbours must also be established.

(b) The Commission's policy in the sector of processed products

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%.

Although 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 despite the fact that from the monetary point of view these two currencies are a single unit.

(c) 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.

As regards the principle of proportionality, the Commission points out that the monetary compensation machinery was conceived from the outset as a general system in which the compensatory amounts, determined by the monetary situation of a particular Member State, were closely geared to one another. This is proved by Article 4 (1) of Regulation No 974/71, which lays it down as a condition for the fixing of compensatory amounts in all the Member States that the difference should exceed 2.5% in at least one Member State.

In most cases regional application of monetary compensation would lead to distortions and deflections of trade to the advantage or to the detriment of other commercial trends. Thus, in such a case, British producers would have turned increasingly towards countries with a strong currency, in relation to which the advantage which they enjoyed would have had a particularly pronounced effect.

The limitation of monetary compensation to the pound sterling would have resulted, for example, in exports to the United Kingdom from countries with a weak currency being given an advantage over exports from countries with a strong currency, because the corrective effect of charges on exports levied by some and aid granted by others would have been lacking.

Moreover regionalization of the compensatory amounts would have infringed the principle of equality of treatment.

Examination of the available statistics (established by the Statistical Office of the European Communities) reveals a trend towards deflections of trade. As regards the Federal Republic of Germany in particular, the data produced by Peiser are largely irrelevant. No certain conclusion can be drawn from separate examination of trade in each of the Member States between 1974 and 1976 because of the diversity of the occasionally contradictory trends observed. However, examination of the trends of trade between countries with a strong currency and countries with a weak currency lead to the finding that in practically all cases exports from the latter to the former increased considerably, whereas exports from the former to the latter decreased. Moreover in 1976 certain signs — in particular the growth in the number of bankruptcy proceedings in the economic sector under consideration — indicated that German producers were in a particularly difficult competitive position which could be expected within a short time to have certain repercussions on production as a whole and on trade.

As to the question whether monetary compensation is apt to eliminate disturbances in trade (the amount charged in this case on goods worth some DM 30 000 being only some DM 282), the Commission argues that if the products at issue had been imported from the United Kingdom into the Federal Republic of Germany, on 29 July 1977 they would have been subject to an additional compensatory amount of some DM 1 000 upon exportation from the United Kingdom. Together with the German compensatory amount, the charge would thus have amounted to approximately 4.5% of the value of the goods, an incidence which cannot be regarded as negligible.

2. Compatibility of the legislation in question with Article 235 of the EEC Treaty

The wording of Article 235 is more flexible than Peiser believes, and only

concerns the question whether action by the Community proves necessary. In Article 1 (2) of Regulation No 974/71, the Council laid down the basic decision on the extension of the monetary compensation system to processed products which are not covered by Annex II to the Treaty but are the subject of the specific arrangement of Regulation No 1059/69. Such products thus become entitled to treatment indentical to that of products which are covered as such by the common organization of the markets because they appear in Annex II. Moreover, a processed product's appearing or not appearing in Annex II is often due to chance or a decision taken for reasons of political expediency. For this reason it was necessary to fill the gap resulting from such a state of affairs by means of the "specific arrangement" of Regulation No 1059/69. In practice this arrangement, which Peiser certainly does not go so far as to challenge, hardly differs from a normal market organization.

3. The question of discrimination

(a) General complaint of discrimination

The Commission refers to the statement of its policy in the sector of processed products. It also submits that the method of selection on the basis of objective assessment (according to which it should have considered whether and established that difficulties and disturbances had arisen in trade in certain processed products between certain countries) is impracticable because of the constraints inherent in the system (cf. Case 29/77). This means not that the Commission is confined to using only the abstract, flat-rate method of determination, taking into consideration only the arithmetical incidence of the monetary compensation, but that it may use a combination of both methods. It used the criterion of whether the 5% limit was exceeded in considering, in particular in the light of complaints or requests from Member States or trade circles, whether a disturbance in trade had occurred or was to be feared.

The situation was different as regards pasta, since the main basic product, namely durum wheat, had been exempted from monetary compensation since 1974. As regards jam and marmalade, the incidence did not reach the 5% threshold, and furthermore those products do not come within the category of processed products for the purposes of Regulation No 1059/69 (which is also the case of preserved fruit containing sugar) but are governed by the system of organization of the markets (Regulation No 516/77).

(b) Complaint concerning specific forms of discrimination

Competition between white chocolate and other cocoa-based products can only be very restricted, having regard to the very pronounced differences between the taste of these products. Moreover no complaint has yet been registered. White chocolate is manufactured mainly in the United Kingdom, but exports from that country to countries with a strong currency practically stagnated, whereas exports from the latter countries increased. As to cocoa powder, it is not in direct competition with chocolate-based products.

(c) General remark on the question of discrimination in the field of monetary compensation

The risk of objective inequality of treatment can be eliminated only by exclusively using the flat-rate, abstract method, which would necessarily have the effect of extending the monetary compensation system when this was not required by overriding economic needs. If the Court were to accept Peiser's argument to the effect that there is no reason why certain products should not be subject to the monetary compensation system, the Commission would act upon it. However such a finding should not result in a declaration that the legislation adopted is invalid in its entirety.

In conclusion, the Commission proposes that the Court should rule that none of the grounds put forward is capable of affecting the validity of Regulation No 800/77, without there being any need expressly to cite the tariff headings mentioned by the Finanzgericht Hamburg.

Peiser, represented by J. Gündisch, Advocate of the Hamburg 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, P. Gilsdorf, acting as Agent, submitted oral argument at the hearing on 12 December 1978.

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

In a letter of 27 March 1979 to the President of the Court, Counsel for the plaintiff submitted observations concerning the Advocate General's opinion and asked the Court to consider re-opening the oral procedure.

Having found in the Judges' Council Chamber on 3 April 1979 that it was already in possession of all the factors necessary for the purpose of dealing with the problems arising in this case, the Court decided not to re-open the oral procedure.

Decision

1 By an order of 23 November 1977 which was received at the Court on 15 December 1977, the Finanzgericht Hamburg referred a question 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).

2 This question was raised in the context of a dispute over the charging of monetary compensatory amounts of DM 282.53 in respect of the importation into the Federal Republic of Germany of several consignments of biscuits and chocolates under Common Customs Tariff headings 18.06 C and 19.08 B, which had been bought in the Netherlands for a total price of DM 30 030.28 by the Peiser undertaking, the plaintiff in the main action.

The plaintiff asked the Finanzgericht Hamburg to annul the assessment to the said monetary compensatory amounts issued by the competent Hauptzollamt, the defendant in the main action.

3 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).

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).

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 basic 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".

4 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).

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 ..."

The monetary compensatory amounts 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.

5 The question asked by the Finanzgericht Hamburg is the following:

"Is Commission Regulation (EEC) No 800/77 of 20 April 1977 invalid in so far as monetary compensatory amounts are charged or granted on imports or exports of goods under tariff subheading 18.06 C II a 1 (code number 1806 650 20), tariff subheading 18.06 C II b 2 (code numbers 1806 650 50 and 1806 700 50), tariff subheading 18.06 C II b 3 (code number 1806 650 60) and tariff subheading 19.08 B II d 1 (code number 1908 912 32)?".

6 The plaintiff challenges the validity of the application, pursuant to the provisions of Regulation No 974/71, of monetary compensatory amounts to processed products which are not agricultural products within the meaning of Annex II to the Treaty but are derived from agricultural products.

7 Regulation No 974/71 of the Council of 12 May 1971, as amended by Regulation No 2746/72 of the Council, is based upon "the Treaty establishing the European Economic Community, and in particular Articles 28, 43 and 235 thereof".

According to Article 1 (2) of that regulation:

"Paragraph 1 shall apply:

(a) to products covered by intervention arrangements under the common organization of agricultural markets;

(b) to products whose price depends on the price of the products referred to under (a) 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 235 of the Treaty provides:

"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures."

By virtue of this provision on 28 May 1969 the Council, acting on a proposal from the Commission and after consulting the Assembly, adopted Regulation No 1059/69 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products.

Among the goods subject to the provisions of this regulation are those coming under the following tariff subheadings: 18.06 (chocolate and other food preparations containing cocoa) and 19.08 (pastry, biscuits, cakes and other fine bakers' wares, whether or not containing cocoa in any proportion).

Consequently, the products to which the question refers are the subject of a specific arrangement under Article 235 of the Treaty, and compensatory amounts can validly be fixed for those products.

8 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".

They submit that by virtue of that provision compensatory amounts on products not covered by Annex II to the Teaty 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.

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.

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.

9 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 . . .".

10 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.

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.

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.

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.

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.

Therefore the statement of the reasons on which Regulation No 800/77 was based is sufficient.

11 The plaintiff and the Italian Government submit 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 organizations of the market, but in order to deal with the difficulties complained of by Irish processing industries in trade with the United Kingdom.

They submit 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.

They submit 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.

They submit 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.

12 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%.

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.

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.

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 francs, + 1.4%; Netherlands guilder, + 1.4%; Danish kroner, 0.

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.

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.

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".

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.

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

14 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, pasta, marmalade, jam and preserved fruit containing sugar.

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.

15 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.

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.

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.

Costs

16 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.

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 Finanzgericht Hamburg, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Finanzgericht Hamburg by an order of 23 November 1977, hereby rules:

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

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