OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 6 OCTOBER 1983 [1]

Mr President,
Members of the Court,

1. Introduction

A reference has once again been made to the Court in connection with the temporary suspension from 20 to 27 November 1980 by Commission Regulation No 2993/80 of 19 November 1980 (Official Journal, L 310, p. 18) of the advance fixing of export refunds on butter and butter-oil.

The question in the two previous cases, Case 217/81 *Interagra* v *Commission* [1982] ECR 2233 and Case 109/82 *Interagra* v *Forma* [1983] ECR 127, was in particular whether a special rule or the general rule as laid down in Article 3 (3) of Regulation (EEC) No 2044/75 of the Commission of 25 July 1985 (Official Journal, 1975, L 213, p. 15), as worded on 17 November 1980, applied to the issue of export certificates in the case of an invitation to tender opened in a non-member country. In the latter case the Court held that that article did not apply to all applications for export certificates fixing in advance the refund on the products mentioned in them, including applications for certificates lodged in connection with an invitation to tender opened in an importing non-member country.

This time, however, a different question, not raised in the previous cases, is involved. Briefly it is whether an application for advance fixing lodged on 17 November 1980 could be rejected on 24 November 1980 on account of the suspension of the advance-fixing system from 20 to 27 November which took place during the waiting period provided for by Article 3 (3) of Commission Regulation No 2044/75.

2. The facts

On 17 November 1980 Roomboterfabriek "De beste boter" BV submitted to the Produktschap voor Zuivel [Dairy Board] three applications for the advance fixing of export refunds on butter and butter-fat in connection with its participation in invitations to tender opened by:

(a) v/o Prodintorg Moscow, USSR (Soviet Foreign Trade organization Prodintorg) on 13 November 1980, closing date 25 November 1980, for:

10 000 tonnes (ten million kilograms) of butter-fat and 25 000 tonnes (twenty-five million kilograms) of butter;

(b) Empresa Cubana Importadora de Alimentos, Havana, Cuba, on 10 November 1980, closing date 21 November 1980, for:

9 000 tonnes (nine million kilograms) of butter.

The third application concerned an invitation to tender opened in Portugal but plays no part in this case.

1 — Translated from the Dutch.

By Circular No EEG 958 of 20 November 1980 the Produktschap notified exporters of milk and milk products that:

"The European Commission has decided to suspend the possibility of advance fixing in respect of refunds on exports of butter and butter-oil (tariff heading 04.03) to non-member countries for the period from 20 to 27 November 1980. This means that applications for advance fixing submitted between 17 and 19 November 1980, which would, upon the expiry of the five-day period, normally be accepted as from 24 November 1980, will be rejected."

The Produktschap subsequently refused the applications on 24 November 1980. The reason which it gave to "De beste boter" for its decision was that the suspension of advance fixing of export refunds was to be regarded as a "special measure" within the meaning of Article 3 (3) of Regulation No 2044/75 of the Commission.

So far as material, that provision reads as follows:

"(3) Export certificates for products of subheadings ... shall be issued on the fifth working day following that on which the application is lodged, unless special measures are taken in the intervening period."

"De beste boter" appealed against that decision to the College van Beroep voor het Bedrijfsleven. The College thereupon submitted the following questions to the Court for a preliminary ruling:

"1. Must Article 3 (3) of Regulation (EEC) No 2044/75 of the Commission of 25 July 1975 be interpreted as meaning that the expression 'special measures' includes a decision suspending the possibility of advance fixing of refunds pursuant to the provisions of Regulation (EEC) No 876/68 of 28 June 1968?

2. If the first question is answered in the affirmative, does a correct interpretation of Article 3 (3) entail the rejection of applications for advance fixing which were submitted before the period of suspension but on which a decision must be taken during that period?

3. If the second question is also answered in the affirmative, must the view be taken that Article 3 (3) is in conflict with Community law, in particular with Article 5 (4) of Regulation (EEC) No 876/68 of the Council of 28 June 1968, or with the principle of legal certainty which forms part of Community law?"

3. Background to the suspension

The system of fixing export refunds on butter and other products had already been suspended five times (counting extensions) in 1980 before the suspension in question in this case took place. The summary contained in the Commission's written observations shows that in 1980 the system was suspended from 12 January to 1 February, 13 May to 15 May, 12 November to 14 November and from 20 November to 11 December.

As regards the suspension in question, that of 20 November, the Commission has also stated that applications for an impressive quantity were involved which made it clear that the suspension was not uncalled for. The quantity involved was more than all butter exports to non-

member countries in 1980. The speculative nature of the applications was thus quite plain. At the hearing Counsel for "De beste boter" took issue with the Commission on the exact figures which it had given but he also stated that he attached no legal importance to them for the purposes of the answers to the questions submitted.

Moroever, the suspension itself was not called in question by "De bester boter" during the proceedings.

4. The Community rules

For a correct understanding of the case I think that it would be as well if I first summarized the system of the relevant Community rules which is not exactly clear.

The case concerns an application for the advance fixing of refunds on exports to non-member countries of certain dairy products. For this purpose an export certificate is necessary on which the advance fixing must be noted. The possibility of advance fixing depends on the way in which the issue of the certificate is regulated.

The basic rules of the system are laid down in Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176).

As far as the certificates are concerned, reference may be made to Article 13, paragraph (3) of which provides that the detailed rules of application are to be adopted in accordance with the so-called Management Committee procedure.

As far as the refund is concerned, Article 17 is relevant. As regards implementation, that article prescribes a differentiated system. The Council is to adopt "general rules for granting refunds, for fixing their amount and for their advance fixing" (paragraph (3)) whilst the "detailed rules for the application of this article" are again to be adopted in accordance with the Management Committee procedure (paragraph (4)).

Pursuant to paragraph (3) the Council adopted Regulation No 876/68 of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds (Official Journal, English Special Edition 1968 (I), p. 234).

Articles 2, 3 and 4 of that regulation state the criteria to be taken into account for the fixing of the refunds.

Article 5 (3) provides that the amount of the refund may be fixed in advance. It then provides, so far as material, "in that event, if the party concerned so requests when applying for the licence, the refund applicable on the day on which the application for a licence is lodged shall be applied to exports effected during the period of validity of the licence".

Article 5 (4) concerns the suspension of the advance-fixing system and is of great importance in this case. It was inserted by Regulation (EEC) No 2429/72 of the Council of 21 November 1972 concerning the suspension of the application of the provisions for the advance fixing of levies and export refunds in different sectors of the common organization of the market.

It is stated in the preamble to that regulation *inter alia* that:

"... however, experience has shown that in certain circumstances and, in particular, in cases of abnormal resort to

this system" (of fixing the refund in advance) "by the persons concerned, there was a threat of difficulties on the market in question; ... in order to remedy such a situation it must be possible for measures to be taken rapidly; ... therefore, provision should be made for the Commission to adopt such measures ...".

Article 5 (4) reads as follows:

"(4) When examination of the market situation shows that there are difficulties due to the application of the provisions concerning the advance fixing of the export refund, or that such difficulties may occur, a decision may be taken, in accordance with the procedure laid down in Article 30 of Regulation (EEC) No 804/68, to suspend the application of these provisions for the period strictly necessary.

...

Applications for certificates accompanied by applications for advance fixing lodged during the period of suspension shall be rejected."

The relevant suspension of advance fixing for butter and butter-oil from 20 to 27 November was effected by Commission Regulation No 2993/80 of 19 November 1980 (Official Journal, L 310, p. 18), which is expressly based on Council Regulations Nos 804/68 and 876/68 and in particular Article 5 (4) thereof.

Regulation (EEC) No 2044/75 of the Commission on special detailed rules for the application of the system of import and export licences and the advance fixing of refunds in respect of milk and milk products, based on Regulation No 804/68 of the Council "... and in particular on Article 13 (3) and Article 17 (4)" is also relevant.

Article 3 (3) of that Commission regulation, which I have already quoted, stands at the centre of this case. It established a waiting period for the issue of certificates in connection with the advance fixing of the refund on butter and was introduced by Commission Regulation (EEC) No 445/77 of 2 March 1977, which was based *inter alia* on Article 13 (3) and 17 (4) of Council Regulation No 804/68 and the preamble of which states *inter alia* that:

"... experience of fixing in advance the refund for butter shows that export licences applied for in respect of this product should not be issued until after a delay of three days so that the market situation may be assessed and, if necessary, the appropriate measures may be taken with regard to the applications in question ...".

Finally, for the sake of completeness I refer to the "horizontal" Commission Regulation No 193/75 of 17 January 1975 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal, L 25, p. 10). Article 2 provides *inter alia* that advance fixing may take place under the conditions laid down by the rules relating to the relevant sector. In respect of the products involved in this case — butter and butter-fat — I have already given them. As regards invitations to tender opened in non-member countries I refer in particular to the provisions of Article 19 of that general Commission regulation, from which it is clear that the certificate is to be issued only in respect of those quantities for which the applicant has been awarded a contract. The position of the security corresponding to any remaining quantity is to be released.

5. Consideration of the questions submitted

With reference to a preliminary point made by the plaintiff in the written observations I would first observe that in its judgment of 27 January 1983 in Case 109/82 *Interagra* the Court found, as I have already indicated, that Article 3 (3) is relevant to all applications for the advance fixing of the refund on the products mentioned therein, including those relating to invitations to tender opened in non-member countries.

Consequently, for the answer to the questions it is as well to remember that they relate to a situation which arose from the coincidence of two provisions — first the five-day waiting period laid down in Article 3 (3) of Commission Regulation No 2044/75 for the issue of the certificate in which it was possible for "special" measures to be adopted and secondly the suspension of the advance-fixing system during that period pursuant to Article 5 (4) of Council Regulation No 876/68 in conjunction with Commission Regulation No 2993/80 which is based upon it.

6. The first preliminary question

The first question of the College van Beroep is in essence whether a decision to suspend advance fixing, as provided for in Regulation No 876/68, must be construed as a "special measure" for the purposes of Article 3 (3) of Regulation No 2044/75.

In my view that question must be answered in the affirmative.

It is true, as the plaintiff in the main proceedings contends, that the expression "special measure" is not defined. In its view reference should therefore be made to the scheme of the Community provisions. In that light it contends that suspension is one of the Commission's day-to-day administrative tasks and cannot therefore be described as "special". On the other hand the plaintiff refers to protective measures which may be adopted only in "exceptional" circumstances and which may therefore be referred to as "special".

In my view, however, in the interpreting of the expression "special measure", as it appears in Article 3 (3) of Regulation No 2044/75, the starting point should be the purpose and effect of that provision and of the suspension measure, which is based on Article 5 (4) of Regulation No 876/68 in conjunction with Regulation No 2993/80.

The purpose of Article 3 (3) of Regulation No 2044/75 and in particular of the waiting period laid down in that provision is, as is clearly stated in the previously cited preamble to Regulation No 445/77 which introduced it, to enable the market situation to be assessed during that period in order, if necessary, for appropriate measures to adopted with regard to outstanding applications.

The decision to suspend the advance-fixing system in so far as the situation necessitates such a drastic measure is therefore logical. In this connection I refer to the wording of Article 5 (4) of Council Regulation No 876/68 which provides that advance fixing may be suspended "when examination of the market situation shows that there are difficulties due to the application of the provisions concerning the advance fixing of the export refund, or that such difficulties may occur". In my view the

suspension of advance fixing must naturally be described as a "special" measure as the normal operation of the advance-fixing system is so fundamentally disrupted by it. I again refer, needlessly perhaps, to the preamble to Regulation No 2429/72 introducing the suspension measure in which it is stated *inter alia* that measures are necessary in the event of the threat of difficulties on the market in question ". . . in particular, in cases of abnormal resort to this system by the persons concerned".

Finally, I would point out that the reason given for the suspension in Regulation No 2993/80 was that the refund on the products concerned might lead to speculative advance fixing.

It seems to me clear from the foregoing considerations that a suspension measure of the kind introduced by Regulation No 2993/80 must be construed as a "special measure" within the meaning of Article 3 (3) of Regulation No 2044/75.

7. The second question

The second question of the College van Beroep is in essence whether Article 3 (3) means that applications for advance fixing must be rejected if the advance-fixing system is suspended after the application has been submitted but before the waiting period expires.

To answer that question the starting point must again be the wording and rationale of Article 3 (3) of Regulation No 2044/75 on the one hand and the consequences of a decision to suspend advance fixing on the other.

Article 3 (3) provides that export certificates for the products mentioned in them are to be issued five days after the application is lodged unless special measures are adopted in the intervening period. The particular significance of that article is the provision that during the five-day period special measures may be adopted with regard to the application. That means that the submission of the application creates only a deferred right to the issue of a certificate, or, in other words, a right subject to the suspensive condition that no measure affecting it is adopted during the five days following the submission of the application.

In so far as it is not immediately clear, the purpose of that provision may be seen from the preamble to Regulation No 445/77 which introduced it, in which it is stated that the aim of the waiting period for certain products is "so that the market situation may be assessed and, if necessary, the appropriate measures may be taken with regard to the applications in question . . .".

In the present case the "special" or appropriate measure referred to in Article 3 (3) is the measure suspending advance fixing. The question then arising is what are the consequences of such a measure upon an application for advance fixing which is still outstanding on account of the five-day waiting period.

In my view the effect of the suspension is clearly indicated by the last subparagraph of Article 5 (4) of Regulation No 876/68 in which it is stated that applications lodged during the period of suspension shall be rejected. It is clear from this that the advance-fixing system is rendered inoperative by the suspension. An application for advance fixing is therefore devoid of purpose and must be rejected.

It must be admitted that it cannot be inferred from the wording of Article 5 (4) that the suspension of advance fixing has the same legal effect on applications lodged before the suspension. Nor is this clear from the wording of Article 3 (3) of the Commission regulation. However, it is clear to me that the manifest aim of the waiting period would not be achieved if suspension did not have the same effect on all applications lodged during the waiting period.

Therefore in my view the suspension means that in so far as an application has already been lodged within the five-day waiting period it too is rendered devoid of purpose as the operation of the advance-fixing system is suspended. Consequently the application is no longer admissible and will thus have to be rejected.

From the considerations set out above I arrive at the conclusion that Article 3 (3) must be construed as meaning that applications for advance fixing which were lodged before the period of suspension but in respect of which the five-day waiting period has still not expired at the time of suspension must be rejected.

8. The third question

By its last question the College van Beroep asks the Court whether, if the second question is answered in the affirmative, Article 3 (3) is in conflict with Community law, in particular with Article 5 (4) of Regulation No 876/68, or with the principle of legal certainty which forms part of Community law.

Clearly that question is closely connected with the second question. The plaintiff in the main proceedings contends that the interpretation of Article 3 (3) given above, to the effect that applications for advance fixing which are affected by a measure suspending the advance-fixing system during the waiting period must on that ground be rejected, is in conflict with Community law and with Article 5 (4) of Regulation No 876/68 in particular. That contention is based on the fact that the third subparagraph of that provision expressly states the effect of suspension only as regards applications for advance fixing lodged during a period of suspension. As is clear, those must be rejected.

I have already pointed out that the question of how outstanding applications affected by a suspension measure during the waiting period are to be treated is not settled anywhere. According to the plaintiff in the main proceedings, the provisions of Article 5 (4) cannot be extended to applications which are still pending and consequently such applications cannot be rejected.

In view of what I have stated with regard to the second question it will come as no surprise to the Court to learn that in the final analysis I find it impossible to agree with the plaintiff, although I consider it a matter of regret that the legislature did not even manage to express its intrinsically clear intentions appropriately in the relevant provisions. On this point I have in fact little to add to what I have already said in this regard when dealing with the second question.

It is true that the interpretation of Article 3 (3) of Commission Regulation No 2044/75 given above, considered in connection with a measure to suspend advance fixing, is not expressly laid down anywhere. However, as I have said, I believe that that interpretation is in keeping with the purpose and intent of Article 3 (3) and with the nature of the

suspension measure, as described in the case of the previous question. I again refer to the recital accompanying the introduction of that provision by Regulation No 445/77 in which it is expressly stated that the aim of the delay was precisely to enable the appropriate measures to be adopted if necessary with regard to the "applications in question".

Nor does that interpretation conflict with the last subparagraph of Article 5 (4) of Regulation No 876/68 for the simple reason that the situation in question is not regulated in that article but is a result of the combined effect of Article 3 (3) of Commission Regulation No 2044/75 and the measure suspending advance fixing.

As I have already pointed out, it is important to understand that this case concerns the combined effect of those two provisions, namely the effect of a suspension of the advance-fixing scheme within the system of a suspended and conditional right to the issue of a certificate under Article 3 (3).

The second part of this question is whether the interpretation of Article 3 (3) in favour of which I have argued is contrary to the principle of legal certainty.

The plaintiff maintains that the advance-fixing system affords exporters certainty as regards the amounts they will receive upon exportation; they conclude their transactions on the basis of the rate of refund at the time of application; the interpretation of Article 3 (3) given above might make it difficult for exporters to fulfil the contracts into which they have entered; such an interpretation of that provision is therefore contrary to the principle of legal certainty.

At the hearing Counsel for the plaintiff further explained that on 17 November 1980 "De beste boter" submitted the applications for certificates to the Produktschap at the same time as its tenders lodged in response to the invitations to tender in question. He clarified that point by further explaining that the tenders were submitted without any proviso as to what should happen if any change in the refund were to occur. I assume that the question raised is primarily concerned with the latter point, although it is not stated that the plaintiff is involved in proceedings with the organizers of the invitations to tender.

In my view this reliance upon the principle of legal certainty can be of no avail to the plaintiff either.

I wonder how far the wording of Article 3 (3) ought by itself to make a trader in the products concerned exercise some caution. Apart from the specific questions raised by this case, the very phrase "unless special measures are taken in the intervening period" does indicate that the issue of certificates is surrounded by some uncertainty. Furthermore, it certainly could not have escaped the attention of a trader in the products in question that the advance fixing of the refund had already been suspended five times during 1980, which after all might have been a sufficient indication of the uncertain situation in 1980 as regards the relevant products. It seems to me that a trader can take

account of that uncertainty by making his contract subject to the suspensive condition that the certificate stating the rate of refund is issued to him after five days have elapsed. As is clear from the closing dates mentioned earlier, the plaintiff in the main action could not wait, especially in the case of the Cuban invitation to tender, until the end of the waiting period to submit its tender, but this still did not necessarily preclude a proviso along the lines I have suggested.

It is clear too from the established case-law of the Court that the applicant's argument cannot succeed as the Court has on many occasions held that traders cannot invoke the principle of the protection of legitimate expectiation to claim that existing rules should remain unchanged if it was foreseeable that they might be amended (Case 146/77 *British Beef Company Limited* v *Intervention Board for Agricultural Produce* [1978] ECR 1347, paragraphs 11 to 15).

9. Conclusion

In conclusion I propose that the Court should answer the three question as follows:

(a) Article 3 (3) of Commission Regulation No 2044/75 of 25 July 1975 should be construed as meaning that a decision to suspend the advance-fixing system pursuant to Council Regulation No 876/68 of 28 June 1968 together with Commission Regulation No 2993/80 of 19 November 1980 may be regarded as one of the "special measures" referred to in that provision.

(b) In conjunction with the decision to suspend the advance-fixing system applicable in this case, Article 3 (3) of Regulation No 2044/75 must be construed as meaning that applications for advance fixing which are lodged before the period of suspension but in respect of which the waiting period has not expired at the time of suspension must be rejected after the expiry of that period if advance fixing continues to be suspended.

(c) Such a rejection does not conflict with Article 5 (4) of Council Regulation No 876/68 or with the principle of legal certainty recognized in Community law.