OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 27 JUNE 1973 [1]

Mr President,
Members of the Court,

I — Introduction

As our doyen, Mr Advocate-General Karl Roemer, explained yesterday to the Court in his opinion on Case 5/73, Balkan-Import-Export, the disturbances in the international monetary system and, in particular, the abnormal influx of speculative capital in certain Member States of the Community, led the Council to indicate, in spring 1971, that it was prepared to envisage that these countries might, for a limited period, widen the margins of fluctuation for their currencies beyond the limits permitted by the International Monetary Fund.

Germany and the Netherlands were the countries so affected at the time. So it was that we entered the era of 'floating exchange rates', the damaging effects of which we are still experiencing today.

It was inevitable that such a situation should create difficulties for the functioning of the common market, especially where agricultural policy was concerned. That is why the Council, anxious lest Governments resort to unilateral measures, decided to draw up immediately Community directives on conjunctural policy, under Article 103 of the Rome Treaty, to deal with the disruptions anticipated in the agricultural market.

By Regulation No 974/71 of 12 May 1971, as you know, a system of compensatory amounts for trade both within the Community and with third countries was introduced by the Council to compensate for the effects of currency fluctuations on agricultural prices.

Where a Member State allows the exchange rate for its currency in commercial transactions to be higher than the upper limit of fluctuation permitted by international rules, it may, under the Regulation:

— on the one hand, charge compensatory amounts on imports;
— on the other hand, grant similar amounts on exports.

These measures apply to basic agricultural products for which the market is subject to a common organization, and to processed products whose price depends on the price of the basic products.

Article 2 of the Regulation sets out the method for calculating the compensatory amounts, and Article 6 gives the Commission, after it has consulted the management committee appropriate for the type of product, the duty of adopting detailed rules for the application of the provisions and, in particular, of fixing the compensatory amounts.

This provision, which came into force immediately, was rapidly followed by two regulations adopted by the Commission under the powers conferred on it.

These were:

— Regulation No 1013/71 of 17 May, laying down detailed rules for the application of the system,
— and Regulation No 1014/71 of the same date, fixing compensatory amounts for a number of products, primarily (Annex I) cereals (Table A) and products processed from cereals (Table B).

A glance at the second table shows that no product processed from barley is mentioned there. Consequently, trade in

1 — Translated from the French.

barley groats and meal under heading 11.02 A III of the Common Customs Tariff could not qualify under this Regulation, applicable from 12 May 1971, for either the grant on exports or the charge on imports of the compensatory amounts.

It was only later that by Regulation No 1687/71 of the Commission, these products were included in the list by amendment of Table B of Annex I, and that, consequently, exports of these qualified for the grant of compensatory amounts — after 2 August 1971, the date this Regulation came into force.

And that is precisely the complaint made by the Merkur-Außenhandel Company, established in Hamburg, whose main business concerns the export of barley meal, barley groats and flaked barley.

During the period from 12 May to the end of July 1971, the company sold such products to buyers in third countries. On each occasion, it asked for the compensatory allowances granted on exports. The competent customs office could do no other than reject the claims, on the ground that as Community law stood at the time, i.e., under Regulation No 1014/71, no compensatory amount had been fixed for products processed from barley.

When the appeal against these rejections came before it, the Head Customs Office of Hamburg-Jonas suspended the proceedings pending this Court's decision in an action by another undertaking, the Nordgetreide company, which had made a direct application to the Court for an annulment of the Commission's refusal to include retrospectively certain products processed from barley and maize in the list of products entitled to compensatory amounts (Case 42/71). The Court has since dismissed the application on the ground of inadmissibility, in a judgment of 8 March 1972, invoking against the Nordgetreide company, in accordance with all past cases, the strict requirements imposed by Article 173 of the Treaty for the admissibility of proceedings instituted by private parties against acts of Community institutions.

The Merkur company, however, has chosen another approach, from which it hopes to obtain a satisfaction more nearly suited to its interests, because it has brought before the Court, not an application for annulment, but a claim for damages based on the Commission's non-contractual liability for breach of duty under the combined provisions of Articles 178 and 215 of the same Treaty.

The company says that by failing to include, for the period 12 May to 2 August 1971, products processed from barley in the list of products for the export of which compensatory amounts were payable, the Commission acted unlawfully; in particular, it infringed the provisions of Article 7 Regulation No 974/71 of the Council, which, the applicant claims, prohibits any partial application of the system and, consequently, the exclusion of any of the basic or processed agricultural products within the scope of the common organization of a market; and that such illegality constitutes a fault for which the Community is liable.

The company therefore asks that the Court order the defendant to pay it, by way of damages, the sum of 50 000 DM.

II — Admissibility of the application

Before approaching the substance of the case, I think it necessary to make a careful survey of the problems raised concerning the admissibility of this action. For while the Commission makes no formal objection on the point, yet it has seen fit to criticize in advance any result confirming admissibility and, drawing support from a recent judgment of 25 October 1972 in Case 96/71 — *Haegeman* —, asks the Court to rule that the applicant should 'first exhaust the national administrative and judicial remedies, in its efforts to obtain payment of the compensatory amounts claimed by the company'.

For my part, I would have been content merely to request that the Court expressly reaffirm the law established by its judgments of 28 April 1971 (Case 4/69, *Lütticke,* Rec. 1971), 2 December 1971 (Case 5/71, *Zuckerfabrik Schöppenstedt,* Rec. 1971), and 13 June 1972 (Cases 9 and 11/71, *Compagnie d'Approvisionnement and Grands Moulins de Paris,* Rec. 1972), had I not thought I could discern, in the *Haegeman* judgment, a slight bending of that law — I do not care to say a change — which, in all conscience, I would find it difficult to follow — at least without first giving a very frank explanation of my views on the matter.

At the risk of going over once more the ideas already most lucidly expressed on several occasions by Mr Roemer and Mr Dutheillet de Lamothe, Advocates-General, I must remind the Court of the arguments in favour of inadmissibility adduced by the Council, as also by the Commission, on many occasions.

1. Their first argument was based on the theory that 'a claim for damages based on the illegality of a regulation is, in reality, an application for an annulment disguised so as to evade the provisions of Article 173 of the Treaty, which set strict limits on the possibility of private parties making such applications directed against the regulations of the Community institutions' (Opinion of Advocate-General Dutheillet de Lamothe in the *Compagnie d'Approvisionnement* case).

This reasoning is derived from the notion that by limiting the admissibility of claims the authors of the Treaty intended to safeguard against the possibility that private parties might impugn the legality of regulations indirectly by means of a claim for damages.

Such a notion, in our opinion, distorts the spirit of the Treaty, and fails to take account of the provisions contained in Articles 178 and 184.

Indeed, the only grounds for denying to private parties access to a claim for the annulment of a regulation are that such annulment takes effect *'erga omnes'*, and retrospectively.

A remedy such as that is in the nature of an objective action, the aim of which is to ensure respect for Community legality, quite apart from any *subjective right* claimed.

That is why it is understandable that the use of that kind of action should have been restricted to the Council and the Commission, and to Member States; while private parties, on the other hand, cannot use it and may make an application for annulment only against acts which are of 'direct and individual' concern to them.

Those who drafted the Treaty of Rome, benefiting by the experience gained of the system of actions in the Treaty of the Coal and Steel Community, were clearly anxious lest a too generous availability of the action for annulment — however little the Court might entertain a liberal interpretation of the concept of an interest in the action — might lead to a permanent litigation on Community regulations and open the way to a veritable 'popular action' to be resorted to at will by any natural or legal person belonging to a class whose interests were capable of being prejudiced by a regulation.

One can thus appreciate, and must recognize, the reason for the restrictive provisions of the second paragraph of Article 1973.

But it would be unreasonable to maintain this view against private parties who have recourse to this Court in pursuance of their *subjective rights*, whether seeking the annulment of a particular devision injurious to them, or redress for a direct and personal injury sustained.

In the first instance, it is certainly permissible for them to plead the illegality of the regulation on which the decision was based which prejudiced their rights. Article 184 indisputably permits them to raise in this Court an

objection based on the illegality or the invalidity of a regulation, in the course of any action in which the Court is competent.

In the second instance, it is equally permissible for them to raise the issue of the Community's liability, even where this rests on the illegality of a regulation, providing — and this is precisely the point at issue — that this illegality gives rise to liability. In any case, no provision in Articles 178 and 215 authorizes the exclusion of such actions on the grounds of inadmissibility.

On either of these hypotheses, individual cases concerning subjective rights are properly brought before this Court. The judgments to be given by the Court, should it acknowledge that the actions are well-founded, do not have effect *'erga omnes'*; they do not entail the retrospective annulment of the regulation the legality of which has been questioned.

That is why I can only approve wholeheartedly the grounds which you gave, as regards this first point, for your decision in the *Zuckerfabrik Schöppenstedt* case and which I think it appropriate to quote:

'The action for damages provided for in Articles 178 and 215 of the Treaty was put in as an autonomous kind of action with a particular purpose within the system of actions and subject to conditions on its use dictated by its specific nature; it differs from an application for annulment in that it seeks nor the cancellation of a particular measure but compensation for damage caused by an institution in the performance of its duties.'

But such considerations alone do not answer the question.

2. A second argument was in fact advanced to block the admissibility of an action for damages founded on the illegality of a regulation. It is based on the existence of Article 177 of the Treaty, and maintains that by virtue of that Article the applicant has open to him a method of legal recourse whereby he may obtain a ruling that a Community regulation is unlawful; he need only make submissions before the national court based on the invalidity of the regulation, in the course of litigation concerning the particular decision implementing it which affects him.

The national court can — or even must — depending on the distinction drawn here by Article 177, refer the question to this Court for a preliminary ruling; a judgment will then be given by this Court and, should it confirm that the provision in the regulation is not valid, a subsequent claim for damages would be admissible.

I do not hesitate to say that such an argument makes short work of the interests of the parties and, more important, of the proper functioning of the judicial process.

Firstly, is it not obvious that if, to use my predecessor's expression, the applicant was obliged first to take the 'long march' through Article 177, it would surely be years before he came to the end of his judicial circumambulation. This Court is known to despatch cases with the greatest speed compatible with the proper hearing and careful treatment of preliminary references and, up to now, it is rare for a judgment not to be given within six months of the date the reference from the national judge was made. But the Court cannot be unaware that to go from the court of first instance to the final appeal court or to the court of cassation, taking in a first appeal, can sometimes take more than five years before a preliminary question raised in proceedings in one of the Member States is finally referred to this Court.

In the light of your ruling on interpretation or validity, the competent national court will, finally, be able to give judgment on the substance of the case before it. But while it has to deduce the domestic consequences of the invalidity — confirmed by this Court — of a Community regulation, it will never

be competent to order the Community to compensate for the damage caused by its illegal act. Therefore the applicant will have to return here. By the time he is able to do so, it is highly probable that the five year limitation period provided for in Article 43 of the Statute of the Court of Justice for actions for damages will, in many cases, have expired.

For the sake of avoiding what amounts to a denial of justice, would it then be possible for the Court — and on the basis of what provision — to concede that the limitation period is broken by proceedings before a national court resulting from the individual act of an internal institution?

A further point, still more important because in concerns the policies of this Court in case law, should be considered by the Court. It occurred to me on thinking over the tendency which appears discernible in the *Haegeman* judgment.

To send an applicant back to appeal to the courts of his own country when he has, by means of a claim for damages, placed in issue the illegality of a Community regulation, amounts in effect to a revival of the concept of 'parallel actions', experience of which — in France at least — proved it so prejudicial to parties seeking justice in the courts that the theory was jettisoned. To give just one example, the objection known as that of 'parallel actions', in tax law, stated that a direct application by the plaintiff for the annulment of an administrative provision determining the basis or the level of tax which, he maintained, was illegal, was inadmissible on the grounds that in his capacity as a taxpayer the same plaintiff could, in the course of proceedings stemming from a claim for recovery of tax charged on him, raise the objection that the provision was not lawful.

He would be obliged to commence lengthy and probably costly proceedings in the fiscal courts when he could have achieved his object more simply and at less cost by means of a claim of excess of powers.

For these reasons, the theory of parallel actions was abandoned, only its historical origins seeming to support it.

But is not the Commission inviting the Court to adopt a similar notion by maintaining in the present case that private parties claiming damages based on the illegality of a Community regulation must first 'exhaust national administrative and judicial remedies'?

To adopt its reasoning, one would have to concede that the remedy provided for by Article 178 was of a purely subsidiary nature, a conclusion which not only is in no way supported by the Treaty provisions but which, moreover, seems wholly incompatible with the fact that this Court is the sole court competent to rule on the Community's liability.

On the present line of reasoning, the interpretation held by the Commission amounts to saying that proceedings in the national courts are a necessary preliminary to affording access for claimants to the Community court, alone competent in such matters. Such a situation is of course in the natural order of events where the case comes here by way of a reference for a preliminary ruling, the making of which is only a step in proceedings where, in the main action, the national court has exclusive jurisdiction. But to attempt to apply the selfsame solution in dealing with an action to obtain a decision that the Community has non-contractual liability, even when founded on the illegality of a regulation, seems to me absurd.

Just what is in issue here? My view has always been that no decision on the admissibility of an action can be made without reference to the nature and subject matter of the claims it contains.

And there we have the heart of the matter.

It is important to discover what the applicant is seeking, and not with what submissions and arguments he is trying to support his claim. So, if he is asking the

Court to order the Commission to pay him damages as compensation for injury he claims to have suffered by a breach of duty on the part of that body, there is no doubt that this Court is competent to make such an order.

The Court has only to ascertain that the applicant has the capacity to sue and that the claim is not out of time.

Provided these requirements are fulfilled, the claim is in itself admissible, irrespective of the submissions used to support it. Whether or not these submissions are based on the alleged illegality of a provision is, *so far as we are concerned with the question of admissibility,* unimportant. It is not necessary to see whether the grounds are pertinent or well-founded. All that is required is a decision that the Court will proceed to make such an assessment by starting an investigation of the substance of the case. Put simply, that is all that the question of admissibility entails.

The outcome of the Haegeman case in this respect was partly the natural result of the nature and content of some of the claims made to the Court.

I think it pertinent to quote the first grounds stated in that judgment:

'The Haegeman firm has asked the Court to declare that Regulations Nos ... and ... of the Commission and all other regulations having equivalent effect do not apply to imports of Greek wine into the Belgo-Luxembourg Economic Union, to annul the decision of 15 October 1971, which refused to exempt the applicant company from the countervailing charge, and to order the refund of the amounts of countervailing charge paid but not due.

... The Commission rejected the applicant company's request for a refund of the levies which it alleged it had wrongly paid on its imports of Greek wine. *In substance, the application seeks the annulment of this rejection and, thereby, the refund of the disputed charges.*'

Thus, the Court interpreted these first claims as seeking only to have annulled the rejection of a request for the refund of countervailing charges by the national authorities and, in consequence of that, as seeking to recover the amount of the duty.

It was a logical consequence of that interpretation that, after drawing attention to the fact that the regulations governing the collection of the countervailing charges in dispute were the responsibility of the competent bodies in each Member State, this Court held that proceedings concerning the imposition of such duties on private parties should be dealt with by the national administrative and judical authorities, and in accordance with the provisions made by the laws of Member States.

It was no less logical that at the same time the Court made mention of the fact that the jurisdiction of the above authorities embraced the procedure under Article 177 of the Treaty ensuring the uniform application of Community law whenever questions bearing on the interpretation or validity of Community regulations were raised before them.

On reading the grounds given subsequently in your judgment, on the other hand, I am rather more puzzled. What the Court says is this:

'The applicant company submits further that, because of the conduct of the respondent, it suffered exceptional injury due to loss of profit, on incurring unexpected financial outlays and on losses on outstandig contracts.

Whether the Community is liable or not is a question primarily linked to that of the *lawfulness of the collection of the disputed charge.* It has been held above that, in the context of relations between private parties and the tax authorities which have imposed the said charge such a question is one which falls within the jurisdiction of the national courts. It follows that at the present stage, the claim for compensation for any damage must be dismissed.'

In your opinion, then, the alleged damage was inseparable from consideration of whether the collection of the disputed charges was lawful.

Without pausing to consider the fact that the redress there sought was not solely the recovery of the charges unlawfully collected but was also directed at obtaining compensation for harm done to the business, I turned to the question what was meant by the phrase *'lawfullness of the collection of the disputed charge'*.

One must distinguish between disputes relating to the creation of the basis of assessment of the charge and the fixing of the rate of charge, and disputes relating to its recovery, or its collection.

Now, while disputes relating to recovery of the charge, where it is the responsibility of Member States, are unquestionably within the *exclusive jurisdiction* of national courts and put in issue internal tax laws, the same surely cannot apply in the case of proceedings relating to the existence in law of such charges, to their bases of assessment or to their rate. For it is by the institutions of the Community that these charges or compensatory amounts are introduced, their bases of assessment determined and their rates fixed.

I am aware that the national courts are equally competent to apply any provisions of Community law which are directly applicable; at first instance and at appeal level, it is even open to them not to exercise the option of making a reference given them by Article 177 and to interpret or assess the validity of a Community regulation themselves. But if the applicant declines to follow their decision and takes his claim to the competent Supreme Court, the latter is compelled to refer the question to this Court, especially where the validity of a Community regulation is concerned.

It follows that one of two situations may arise:

— either the only fact in dispute is the *unlawful implementation* by a country's administration of a Community provision creating a charge or compensatory amount, or laying down the conditions of their application; if no objection is raised as to the actual validity of the Community regulations, if only the improper collection of a charge or, *mutatis mutandis*, the improper refusal to grant a compensatory amount, is in question, then the case will be decided in the ordinary way in the national courts, without need to refer to this Court;

— or the Community regulation is alleged to be unlawful or invalid; in which case the decision will come — or should come — from this Court, after a reference for a preliminary ruling.

But that is not the whole story. If, as in the present case, the Community regulation is alleged to be unlawful or invalid only in order to support a claim for damages based on Article 215 of the Treaty, it is well-known that in no case will the national courts be able, even when this Court has given a preliminary ruling confirming the invalidity, to decide the legal consequences thereof within the sphere of Community liability drawn by the applicant.

That is exclusively the province of this Court.

Consequently, to require that the applicants in such a case first exhaust national remedies is no longer simply a matter of condemning them to a 'long march', but also starts them on a circular route which must inevitably lead them back to where they started, that is, to this Court.

I find it difficult to believe that condemning the parties to make such a detour is compatible in law with the existence of the 'autonomous kind of action with a particular purpose within the system of actions laid down by the Treaty and subject to conditions on its use dictated by its specific nature', your interpretation of the action for damages provided by Article 178.

For the purposes of case law, is this not

the place to apply the principle known as that of 'procedural economy', so that if the validity of a Community regulation is questioned in a case submitted directly to this Court and within its jurisdiction, it is highly desirable from the point of view both of the applicant and of the Court, to decide the question at once rather than wait for it to be sent back, perhaps after a lapse of several years, under the Article 177 procedure?

Finally, I cannot follow the Commission when it professes to fear that a decision in the present case consistent with the precedents of *Zuckerfabrik Schöppenstedt* and *Compagnie d'Approvisionnement* might open the way to claims for compensation by every businessman in a position the same as, or similar to, that of the applicant.

I do not see how such fears can possibly enter into the purely legal dispute as to admissibility and I am convinced that such reasoning cannot in any way influence your judgment.

Even were the Court to consider the substance of the case, confirmation that a regulation was unlawful would not *ipso facto* justify the inference that the Community is liable. Some superior rule of law designed for the protection of the individual would also have to have been violated, and in a flagrant manner.

I think there remains one final observation to make.

Should the validity of the regulation impugned in the present case fall to be considered by this Court under a reference for a preliminary ruling, the Court would have to weigh the legality of an *omission* in the exercise of regulatory powers, since the Merkur company alleges here that the Commission has infringed basic Regulation No 974/71 of the Council by *failing to include*, in the list of products for the export of which compensatory amounts may be granted, barley meal and groats.

Surely it is possible for the Court to declare Regulation No 1014/71 invalid insofar as it excludes certain products unlawfully, if in the opinion of the Court the Commission was under a duty to fix compensatory amounts for all the agricultural products falling under a common organization of the market.

But imagine how powerless the national court would be in such a case — it is hard to see how it could make good the Commision's omission. At best it could, and must, draw from the preliminary ruling of this Court the legal consequence that the applicant has a subjective right to be granted compensatory amounts, but since only the Commission can fix their rate, and the national court has no power to compel the Commission to do so, it could only send the applicant to appeal to a more appropriate authority. In other words, to claim in the Community court.

I leave with you, Members of the Court, the fruits of my examination of this case as regards the problem of the admissibility of claims for damages.

From the various observations I have just made you will have gathered that, in my view, the primary consideration is that admissibility should depend on the nature and object of the claims made in the case, which are binding on the competent court before which the case is duly brought.

To close this first question, then, I need only remind the Court that the Merkur company asks the Court to order that the Commission pay compensation for a particular injury alleged to have been suffered by the company as a result of the Commission's unlawful conduct in the exercise of its regulatory activities.

The compensatory amounts of which the applicant company claims it has been deprived as a result of that conduct were introduced by a regulation issued by the Council. And it is for the Commission to determine which agricultural products, whether basic or processed, are to benefit from these subsidies on export, and to fix the rates for them.

The national authorities are responsible only for implementing the relevant

regulations; they have no power to alter Community regulations, nor to supplement them, nor to restrict their sphere of application.

The German customs authorities were therefore obviously unable to accede to the applicant company's requests, while there was no mention of products processed from barley in Regulation No 1014/71. The case before you does not in any way impugn their decision to reject the requests, since no other decision could lawfully have been given.

The case appears to be no more than an action against the Community concerned solely with Article 215 of the Treaty.

I therefore strongly recommend the Court to declare the action admissible.

III — Discussion of the substance

In order to define more clearly the area covered by the discussion relating to the substance of the case, I think I should state at the outset that the application by the Merkur company does not in any way question the validity of Regulation No 974/71 of the Council, a matter which came before you on a reference for a preliminary ruling from the Berlin Finanzgericht in Case 5/73, Balkan-Import-Export.

Since the Court has not yet given judgment in that case, I shall refrain from forming any opinion on the matter. The Council Regulation will be taken as it stands.

In the light of the applicant's submissions, however, the expression of an opinion on the interpretation of some of its provisions is unavoidable.

The applicant maintains, in the first place, that products processed from barley are covered by Article 1 (2) of the Regulation; and that consequently Article 7, which provides that 'partial or temporary use may not be made' of the authorization to charge compensatory amounts on imports or grant them on exports of agricultural products, obliged the Commission to fix compensatory amounts for all such products without exception.

The company adds that since Regulation No 974/71 is designed mainly to protect traders in agricultural products from the harmful consequences of decisions made by some Member States in monetary affairs, the Commission was obliged to ensure that such protection was afforded to all parties affected, and consequently to the Merkur company, under conditions of strict equality.

Section 1

The first submission rests on a false analysis both of the terms of the Regulation and of the general structure of the compensatory amounts scheme.

It may well be true that under Article 1 (2), the scheme can apply, on the one hand, to all products 'covered by intervention arrangements under the common organization of agricultural markets', which means primarily cereals, dealt with by Regulation No 120/67 of the Council, and, on the other hand, 'to products whose price depends on the price of the (basic agricultural) products' just mentioned, i.e., processed products; doubtless too, by the same token products based on barley fall within the sphere of application of this Regulation; still, the inference that the Commission was under a duty to fix compensatory amounts for all products without exception is in no way supported by the text.

A — Paragraph 2 which I have cited above is in fact supplemented by a sentence which reads: 'This option shall be exercised only where application of the monetary measures . . . would lead to *disturbances* in trade in agricultural products'.

One may therefore conclude that, since it is the Commission which is expressly given power under Article 6 of the Regulation to adopt detailed rules for the application of the scheme and to fix the rates of the compensatory amounts, it must make some assessment of the

effect of the monetary measures adopted by Member States on trade in agricultural products. There is therefore no question of its automatically applying compensatory amounts in relation to all products or to any particular ones. It merely has the power to do so, to the extent that there exists an appreciable risk that disturbances may occur.

B — But the argument put forward by the applicant amounts to saying that when the Commission actually exercises that power, Article 7 of the Regulation prohibits it from 'making partial or temporary use' of the authorization provided for by the Regulation.

This is precisely the point at which the applicant's reasoning breaks down. The Council Regulation lays down the general framework of the system designed to avoid, where the need arises, disturbances in agricultural trade which might result from fluctuations in the exchange rates of certain currencies.

The Council places this system — the compensatory amounts scheme — more or less at the disposal of the Member States concerned and, in Article 1, *authorizes* them to make use of it.

Article 7 contains a prohibition against making a *'partial or temporary use'* of this authorization.

To whom could such a prohibition be addressed, if not to the Member States concerned?

The very manner in which the provision is drafted supports this interpretation: the substantive 'authorization' in Article 7 obviously complements the verb 'authorized' used in Article 1 (1).

I readily agree that the text is poorly drafted and the provision in Article 7 would have been better placed at the end of Article 1 (1).

But the meaning is nonetheless clear.

C — Moreover, it is confirmed by the general structure of the Regulation.

Each of the Member States with a 'floating' currency is authorized to grant and to charge compensatory amounts. But it has no power either to determine the basis of assessment unilaterally, i.e., to draw up a list of the products covered, or to fix rates for them.

Such decisions are the responsibility of the Community; Article 6 of the Regulation reserves them expressly to the Commission. Member States concerned have no choice but to implement the system of compensatory amounts *en bloc*, in accordance with the detailed rules for its application determined by the Commission, neither adding to nor detracting from it.

Such a limitation on Member States' freedom of action is justified by the object of the scheme which, in the words of the preamble, is designed to forestall a 'disruption of the intervention system laid down by the Community rules and abnormal movements of prices jeopardizing a normal trend of business in agriculture'.

Hence the proper functioning and the equilibrium of the common agricultural market are at stake, since these depend primarily on the intervention and threshold prices of products.

These are the considerations which justify the facts that, first, only Community organs have power to make an assessment of the injurious effects of monetary instability on the common market and, secondly, the Commission has a widely discretionary power of assessment in determining the detailed rules for application of the compensatory measures adopted, in particular in drawing up the list of products for which compensatory amounts apply on export or import.

Decisions taken by the Commission in this field entail 'choices of economic policy'; the jurisdiction exercisable by the Court over decisions of this nature is necessarily strictly limited, insofar as 'the nature of things requires that Community authorities be given the greatest freedom of action in the matter'.

This was confirmed by the Court, notably in relation to the implementation of Article 226 of the Treaty

authorizing the Commission to determine a number of protective measures during the transitional period of the common market:

— Judgment of 17 July 1963, Case 13/63, *Government of the Italian Republic v Commission,* Rec. 1963;

— Order of 5 October 1969, Case 50/69, *Government of the Federal Republic of Germany v Commission,* Rec. 1969.

The Court likewise confirmed that 'by giving the Council power, without imposing on it a duty, to decide upon measures appropriate to the situation, Article 103 vested in that institution a wide power of assessment, which it must exercise as a matter of common concern and not in the private interest of any particular group of business operators':

— Judgment of 13 June 1973, Cases 9 and 11/71, *Compagnie d'Approvisionnement and Grands Moulins de Paris.*

Lastly, it is significant that by its Regulation No 974/71, issued under Article 103, the Council empowered the Commission to adopt detailed rules for the application of that provision, in accordance with the so-called management committee procedure, which, according to the case law of this Court, enables the Commission to be given 'extensive powers of execution' in relation to the general structure and objectives of the basic regulations and within the general scheme of the aims of the agricultural policy:

— Judgment of 17 December 1970, Cases 25/70 *EVSt v Köster,* 30/70 *Scheer v EVSt,* Rec. 1970;

— Judgment of 7 February 1973, Case 40/72 *Schroeder.*

The following conclusions may be drawn from the observations set out above:

1. Article 7 of the Council Regulation 974/71, applicable to individual Member States, has neither the object nor the effect of restricting the powers of the Commission, which are all the more extensive for being exercised, after consultation with the management committee, over the inclusion or otherwise of particular agricultural products in the list of products for which compensatory amounts may be granted on export.

2. Here we are in the territory of short-term economic policy, faced with measures designed to maintain the stability of Community prices in the agricultural market organizations; consequently the Commission has a margin of discretionary power such that, unless it be proved that the Commission has made an error of substance, an obvious error or a misuse of powers, the legality of its decisions is not open to scrutiny.

3. Finally, the Council introduced the compensatory amounts system in exercise of the powers conferred on it by Article 103 of the Treaty, as a matter of common concern and not in the private interest of a particular group of business operators; bearing in mind this object, the provisions contained in Regulation 974/71 do not lay down *superior rules of law designed for the protection of the individual,* the *flagrant violation* of which could alone give rise to non-contractual liability on the part of the Community.

For these reasons I am led to the conclusion that, there being no such violation, the Commission cannot be held to have committed any breach of duty in the exercise of its regulatory powers.

This conclusion alone would suffice to have the application dismissed, had the Merkur company not also put forward an argument based on Article 4 of Regulation 974/71.

Paragraph 2 of this states: 'No compensatory amount shall be fixed for

products for which the amount calculated . . . is negligible in relation to their average value'.

In the applicant's view this provision limits the extent of the Commission's power of assessment, insofar as it prohibits it from fixing compensatory amounts when these are too low in proportion to the value of the products; while it is for the Commission to determine on a flat-rate basis the fluctuation limit above which compensatory amounts are to be fixed, at least it has a duty to apply that same limit in respect of all products without exception.

On the basis of this appraisal, the Commission had in fact set the limit at 1 % of the price of the products. Being bound by the limit it had thus set for itself, it should have observed it for products processed from barley just as for products processed from other cereals.

But, Members of the Court, the existence of any rule such as that claimed is in no way implied by Regulations 1013 and 1014/71 made by the Commission; it is at most a matter of internal practice which, however, has not been automatically or consistently adhered to. One cannot therefore conclude that the Commission intended to be bound by the practice and so limit its decision-making powers.

In the same way, as I have said, the last sentence of Article 1 (2) of the Council Regulation makes the fixing of compensatory amounts subject to the general condition that the monetary fluctuations will cause disturbances in trade in the agricultural products concerned. This provision gives to the Commission alone, whatever the circumstances, the right to exclude some products insofar as the relatively low volume of trade in them justifies its conclusion that disturbances capable of upsetting the equilibrium of the common market are unlikely to occur in the markets for those products.

Against that it is of course possible to argue that the Commission was forced to alter its crew when, in late July 1971, it decided to include barley derivatives in the scheme of compensatory amounts for exports, by means of amending Regulation No 1687. But it is in the nature of assessments involving choices of economic policy to develop along with the current situation and to be revised in the light of experience. That is purely a matter of expediency, not of legality. And in the Judgment of 7 February 1973 — Schroeder — this Court held that the validity of a Community regulation cannot be questioned in the light of a retrospective assessment of its effects.

Section 2

It remains to examine the second submission in the application, founded on the plea that discrimination, contrary to Article 40 (3) of the Treaty, was involved in temporarily excluding products processed from barley, to the detriment of German exporters of those products, both in relation to traders from other Member States whose currencies had remained unaffected by the widening of the margins of fluctuation beyond the limits permitted by the International Monetary Fund, and in relation to German concerns trading in products processed from cereals other than barley derivatives on the export of which compensatory amounts could be granted from 12 May 1971.

The Treaty provision invoked was intended to exclude from the area covered by agricultural policy 'any discrimination between producers or consumers within the Community', and stipulates that 'any common (agricultural) price policy shall be based on common criterion and uniform methods of calculation'.

First, it should be borne in mind that the Community organs were faced, as the circumstances stood in spring 1971, with a situation which required urgent measures to counteract the exceptional

decisions on monetary affairs taken by some Member States. These short-term policy measures, adopted on the basis of Article 103 of the Treaty, could — and inevitably would — entail certain derogations from the rules in force in the common organizations of the agricultural market.

Secondly, the alleged discrimination which the applicant claims to have suffered as compared with exporters from those Member States the fluctuation of whose currency was still contained within the limits permitted by international rules originated, not in the measures adopted by the Community institutions, but in the actual decisions taken by the national authorities on the monetary situation. Now, no provision in the Treaty, nor any general rule of Community law, obliged the Council or the Commission to provide full compensation to German businessmen for all the effects of the Federal Government's decision to 'float' the Deutsch Mark, although the Council had expressed on the subject the view that it was 'prepared to envisage' such a monetary policy, which was, after all, the sole responsibility of the Federal Republic.

Finally, the argument based on discrimination between German exporters does not appear to be sound. Apart from the fact that the rules contained in Article 40 (3) of the Treaty were clearly introduced for the benefit of agricultural producers and consumers, and not for that of traders and exporters, the Commission rightly explains that when it fixed by Regulation No 1014/71 compensatory amounts for certain products processed from cereals, it was prompted by two considerations.

— the products were to some extent interchangeable with the raw product;

— and the incidence of the compensatory amount for those products was relatively high.

This was not so in the case of barley derivatives, where the incidence of the compensatory amount would have been low.

Furthermore, for there to have been discrimination, for treatment to have ceased to be equal, the factual circumstances of the various groups of business operators would have to have been identical or at least analogous. But the barley market and the destination of its products did not bear the same characteristics as other cereal markets, the processed products of which, moreover, were not used for the same purposes.

In the circumstances I believe that the submission based on unlawful discrimination cannot stand.

I therefore recommend;

— that the application be declared admissible;

— that it be dismissed as unfounded;

— that the applicant be ordered to bear the costs.