JUDGMENT OF THE COURT
11 FEBRUARY 1971[1]

Rewe-Zentrale des Lebensmittel-Großhandels GmbH v Hauptzollamt Emmerich[2] (Reference for a preliminary ruling by the Finanzgericht Düsseldorf)

Case 37/70

Summary

Transitional period — General protective measures — Scope — Common organisation of the agricultural markets — Special protective measures — Powers of the Commission

(EEC Treaty, Articles 38 (2) and 226; Regulation No 804/68 of the Council, Article 21 [OJ L 148, p. 13]; Regulation No 653/68 of the Council [OJ L 123, p. 4])

The provisions of Article 226 are applicable to agricultural products. The insertion of special safeguarding clauses in agricultural regulations does not affect the scope of that article. The Commission retains the power to authorize on the basis of Article 226 the protective measures necessary to remedy economic difficulties in the agricultural sector of a Member State, even if an agricultural regulation prescribes specific measures applicable to cases of the same nature.

Reference to the Court under Article 177 of the EEC Treaty by the Fourth Senate of the Finanzgericht Düsseldorf, for a preliminary ruling in the action pending before that court between

REWE-ZENTRALE DES LEBENSMITTEL-GROSSHANDELS GMBH, 3-17 Jakordenstraße, 5 Köln,

and

HAUPTZOLLAMT EMMERICH

on the validity, or alternatively, on the scope of the Commission's Decisions of 30 October 1969 (69/375/EEC), 31 October 1969 (69/377/EEC), 3 November 1969 (69/392/EEC) and 17 November 1969 (69/410/EEC), authorizing protective measures with regard to agriculture for the benefit of the Federal Republic of Germany,

1 — Language of the Case: German.
2 — CMLR.

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi (Rapporteur), Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore and H. Kutscher, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and of procedure

The facts which form the basis of the dispute and the progress of the procedure may be summarized as follows:
Following the revaluation of the German Mark with effect from 27 October 1969 the Council of the European Communities, in view of the change in the relationship between the parity of the German Mark and the value of the unit of account and, further, of the fact that the value of the unit of account and of common prices fixed within the framework of the common agricultural policy had not been altered, considered it necessary to extend, by means of Regulation No 2111/69 of 28 October 1969 (OJ L 270 of 28. 10. 1969), the suspension of the value of the unit of account with regard to the Federal Republic pursuant to Article 4 of Regulation No 653/68 (OJ L 123 of 31. 5. 1968) until a date to be decided as quickly as possible by the Commission. The purpose of this extension was to allow the adoption of transitional measures pending the establishment of a system of subsidies necessary to ensure the maintenance of the level of prices in Germany and to avoid disturbances on the market.

In the meantime, by an application of 27 October 1969, the Government of the Federal Republic of Germany requested authorization from the Commission to take transitional protective measures to alleviate the effects of the abovementioned revaluation on the German agricultural market.
By Decision of 30 October 1969 (OJ L 273 of 31. 10. 1969) the Commission, on the basis of Article 226 of the EEC Treaty, authorized the Federal Republic of Germany to take measures in the agricultural sector with effect from 27 October 1969 until 7 December 1969 inclusive. The measures authorized were to involve:

— the increase by 9.29% of the intervention prices or purchase prices to be paid by the Federal Republic of Germany for interventions on the domestic market in accordance with the regulations on the common organization of the agricultural markets (Article 2);
— the right to increase the amount to be paid by the Federal Republic in respect of other interventions on the domestic market within the meaning of Articles 5 and 6 of Regulation No 17/64 EEC as amended by Regulation No 1892/68 (Article 3);
— the right on the part of the Federal

Republic of Germany to levy countervailing charges on imports from Member States and third countries and to grant subsidies for exports to such States, in order to compensate for the effects of the said measures (Article 4).

By a Decision of 31 October 1969 (OJ L 277 of 4. 11. 1969) the Commission laid down detailed rules for the implementation of the decision of 30 October. This decision was supplemented by the Decision of 3 November 1969 (OJ L 280 of 7. 11. 1969).

By a Decision of 17 November 1969 (OJ L 290 of 18. 11. 1969) modifying the decision of 30 October, the Commission extended the period of application of the three abovementioned decisions to 31 December 1969, considering that the period originally provided had proved to be insufficient.

The Rewe-Zentrale company, the plaintiff in the main action, which between the end of October and the end of December 1969 had obtained customs clearance in Germany for a large number of consignments of foodstuffs from the Netherlands, lodged complaints against the imposition of a countervailing charge levied independently of the turnover tax in respect of imports under provisions adopted by the Federal German Government on 3 and 5 November 1969 in accordance with the abovementioned decisions of the Commission.

The Hauptzollamt (principal customs office) dismissed as unfounded the complaints submitted in connexion with the imports given customs clearance on 29 October 1969.

Before the Finanzgericht Düsseldorf, Rewe-Zentrale pleaded against this decision of rejection that Article 21 (2) (4) of the Zollgesetz (German Customs Code), cited in the abovementioned provisions as the national enabling provision, renders their legal basis dependent on a decision of the Commission based on Article 226 of the Treaty. It alleged that the abovementioned decisions of the Commission in this connexion were wrongly based on Article 226. That article was not applicable since the necessary conditions of law and of fact were not present. In particular, Article 226 (3) required the avoidance of any difficulties which might have arisen in German agriculture following the revaluation of the German Mark, owing to an increase in intervention prices for German products alone, designed to compensate for loss of income by agricultural producers; this would have made it possible to avoid the serious disturbance of the normal functioning of the common market in agriculture involved in establishing countervailing charges in respect of imports.

Alternatively, the question arises whether the abovementioned decisions of the Commission are void to the extent to which they are deemed to have retroactive effect for the period before their publication in the Official Journal of the European Communities. By their very nature, such authorizations may only confer legislative powers with regard to the future. Apart from this, Regulation No 653/68 does not permit retroactive effect.

Finally, there is the further question of whether the extension of validity of the Commission's Decision of 30 October 1969, effected for political reasons, is in accordance with Regulation No 2111/69 of the Council and with Article 226 (3) of the EEC Treaty.

If the abovementioned decisions of the Commission are considered valid, and if it is found that those decisions may directly provide valid authority within the national legal system for provisions of the national executive it may be conceded that the national provisions are valid, although they may not be founded on Article 226. The question is whether higher Community law has precluded the application of Article 80 of the German Basic Law which provides that the legal basis must be indicated and consequently declares void under national law provisions adopted without the necessary authority.

As a result of the foregoing, the German court, by an order of 15 July 1970, recorded in the Court Register on 23 July 1970, brought the following questions before the Court of Justice:

(I) Are the Decisions of the Commission of the EEC of 30 October 1969 (69/375/EEC), 31 October 1969 (69/377/EEC), 3 November 1969 (69/392/EEC) and 17 November 1969 (69/410/EEC) invalid in that they authorize the levying of a countervailing charge in connexion with the revaluation of the German Mark because Article 226 of the EEC Treaty on which they are founded was not applicable, having regard to the special protective measures for the organizations of agricultural markets and to Regulations of the Council Nos 804/68 of 27 June 1968 and 653/68 of 30 May 1968?

(II) If a negative reply is given to Question I, do the said decisions of the Commission constitute illegal authorizations to levy the said countervailing charge because:

(1) the factual conditions for the application of Article 226 of the EEC Treaty were not fulfilled;

(2) the Commission did not fulfil or failed sufficiently to fulfil the duty to provide a statement of reasons which is incumbent on it under Article 190 of the EEC Treaty?

(III) If a negative reply is given to Questions I and II, are the said decisions illegal to the extent to which they were given retroactive effect with regard to the period before their publication in the Official Journal of the European Communities?

(IV) If a negative reply is given to Questions I and II, is the Decision of the Commission of 17 November 1969 illegal because it extended the authorization beyond 7 December 1969, although the conditions in Article 226 of the EEC Treaty were not satisfied at that time, that is to say, for the period after 7 December 1969?

(V) (1) In the event of the abovementioned decisions of the Commission being valid, even if they may not be based on Article 226 but solely on some other enabling provision of Community law, can they in turn, from the point of view of the Community, directly provide the necessary internal authority for provisions of the executive bodies?

(2) If so, does this apply even if under national law the executive does not have legislative powers?

In its decision making the reference the Finanzgericht observes that only Question IV is not of decisive importance to the question whether levying the countervailing charge is lawful in the disputed cases, but it considered that this question should also be submitted to the Court because the present action was initiated as a test case and because a considerable number of complaints are still outstanding in principal customs offices with regard to goods cleared through customs between 7 and 31 December 1969.

The plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

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.

At the hearing of 8 December 1970 the plaintiff in the main action, the Government of the Federal Republic of Ger-

many and the Commission submitted their oral observations.
The plaintiff in the main action was represented by H. Ditges and D. Ehle of the Cologne Bar.
The Government of the Federal Republic of Germany was represented by R. Morawitz, Adviser at the Ministry for Economic Affairs.
The Commission of the European Communities was represented by its Legal Adviser, H. Matthies, acting as Agent.
The Advocate-General delivered his opinion on 13 January 1971.

II — Written observations submitted to the Court

The observations submitted under Article 20 of the Statute of the Court may be summarized as follows:

Question 1

The *plaintiff in the main action* maintains that the agricultural market is subject to special rules issued for a special purpose and applicable to this particular sphere through special procedures. Whereas the general provisions of the Treaty are intended to create certain conditions in the policies and the legal systems of the Member States, the articles relating to agriculture must also help to define a Community policy in this particular sphere, together with special Community legal arrangements, as is clear from Article 38 (4) of the Treaty. As a result, the general provisions of the Treaty are excluded whenever the Community institutions have issued measures concerning the common agricultural policy, in particular in order to attain the objectives of Article 39. In those circumstances, whenever the application of Article 226 of the Treaty is not expressly provided for by the provisions establishing a special system applicable to agriculture, the application of this general protective clause is excluded.
Furthermore, any possibility of application of Article 226 would also be contrary to the conferment of powers effected by Article 43 (2) of the Treaty and, *ipso facto,* to the particular objectives laid down in Article 39. In fact in the sphere of the common agricultural policy the Council and not the Commission has power to take decisions. The Council might be divested of the responsibility relating to the elaboration and implementation of the common agricultural policy if the Commission were able to substitute itself for it without consultation, acting on the basis of Article 226 of the Treaty. The Commission thus had *no power whatsoever* to take the decisions in question. Furthermore, the very general objective contemplated in Article 226 does not necessarily take account of the specific objectives of the common agricultural policy set out in Article 39 of the Treaty.
Thirdly, the plaintiff in the main action maintains that the application of Article 226 is also precluded by the provisions of Regulations Nos 804/68 and 635/68. Article 22 of Regulation No 804/68 contains a straightforward prohibition against the levy of any customs duty or charge having equivalent effect. Furthermore, Regulation No 653/68, which deals with problems of an economic nature on the agricultural markets as a result of an alteration in the parity of the currency of a Member State, does not authorize any exemption from the abovementioned prohibition of Article 22, with the exception of measures which do not adversely affect the free movement of agricultural products (fourth paragraph of Article 3). In addition, as Regulation No 804/68 terminated the transitional period for the milk and milk products sector by establishing a system of common prices, it must be recalled that Article 226 of the Treaty applies only during the transitional period.
In any event, the provisions of Regulations Nos 804/68 and 653/68 take precedence over Article 226 of the Treaty and preclude its application. Since the

Council has not amended those regulations there is no provision enabling the Commission to exempt the Federal Republic of Germany from the prohibition against levying taxes on intra-Community trade in the products in question. The abovementioned decisions of the Commission consequently infringe the EEC Treaty owing to their lack of any legal basis and the Commission's lack of power.

The decisions of the Commission are also contrary to Regulation No 2111/69 of the Council of 28 October 1969, one of the recitals of which declares that any loss of income suffered in German agriculture is to be compensated through the grant of aids.

The *Commission of the European Communities* observes that under Article 38 (2) of the Treaty the rules laid down for the establishment of the Common Market shall apply to agricultural products, save as otherwise provided in Articles 39 to 46, and that Article 226 is also one of the rules laid down for the establishment of the Common Market. There is nothing in Articles 39 to 46 to indicate that Article 226 shall not apply to agricultural products. The regulations establishing common organizations of the market cannot have precluded the application of Article 226, in particular because the object and the proper functioning of the common organizations of the market require that the particular provisions adopted within the framework thereof come within the derogation provided for in Article 38 (2). The protective measures contained in the regulations relating to the organizations of the market apply solely to trade with third countries and lay down measures relating to the Community as a whole. Consequently agricultural regulations are not capable of excluding the application of the general protective measure of Article 226 which applies within the Community.

The argument of the plaintiff in the main action based on the fact that the transitional period with regard to the organizations of the agricultural markets was already past cannot prevent the application of Article 226. It is true that within the framework of each of the organizations of the market intra-Community protective measures are not in accordance with the system established after the end of the period intended for the progressive introduction of those organizations: however, disturbances manifesting themselves in intra-Community trade following the complete introduction of the organization of a market exceed the framework of that organization and it is impossible to remedy them by means of particular protective clauses provided for in the agricultural regulations. Furthermore, from the legal point of view, there is only one transitional period and this alone governs the application of Article 226. The practice followed by the Commission and by the Member States in recent years confirms the generally accepted view that Article 226 and the protective provisions in the agricultural regulations are not mutually exclusive.

For similar reasons Regulation No 653/68 cannot prevent the application of Article 226 of the Treaty. The period of suspension of the value of the unit of account which prevented the settlement of current transactions could be only marginally extended. Between the point when the automatic readjustment took effect and the time when the measures to compensate the effects of those readjustments were to take effect, that is to say, from 27 October to 31 December 1969, there was a lacuna which the Member States and the Commission agreed should be filled by measures maintaining the earlier price conditions in Germany. In order to do so without affecting the existing market organizations recourse to Article 226 of the Treaty was necessary.

The *Government of the Federal Republic of Germany* makes the initial observation that the effects on agricultural prices of the revaluation of the German Mark could have been avoided

if the Commission had raised the value of the unit of account by a percentage amount equal to the rate of the revaluation in accordance with the procedure laid down by Regulation No 653/68. However, various considerations induced all the parties concerned to refrain from thus increasing the value of the unit of account. In fact such a measure would have resulted in an increase in the volume of excess production in the other Member States.

For reasons similar to those of the Commission, the German Government maintains that neither the specific provisions on agriculture laying down preventive measures nor Regulations Nos 653/68 and 804/68 resulted in the exclusion of the application of Article 226.

Question II (1)

The *plaintiff in the main action,* having observed that the Court has the power and the duty to consider in each individual case whether the various conditions for the application of Article 226 have been fulfilled, maintains that it is doubtful whether with regard to the application of the arrangements for compensation the agricultural sector may be divided on the basis of a distinction made on the ground of the existence or otherwise of an intervention system for products subject to a market organization. The difficulties referred to by the Commission in fact relate to the intervention agencies, which do not constitute a sector of the economy within the meaning of Article 226.

Moreover, there were no grounds for fearing any difficulties either in practice or in theory, since a loss of income for German agricultural producers cannot be considered as constituting such difficulties within the meaning of Article 226. If imports were increased domestic producers could in fact reduce their prices by an amount equal to the rate of revaluation, which would not have brought about serious consequences since the resultant loss of income would have been limited to the transitional period of some six weeks prior to the adoption of the system of aids laid down by the Regulation of the Council dated 9 December 1969. Besides, it should have been foreseen that, as events in fact proved, foreign producers would pass on no more than part of the price advantage following the revaluation. There was thus no justification whatsoever for the fear of 'serious difficulties'.

The fall in intervention prices resulting from the alteration in the parity of the German Mark in relation to the unit of account could have meant that German agricultural producers now had a marketing guarantee only at a proportionally reduced price level, which however did not yet constitute a serious difficulty since it was for a limited period only, and in general interventions are extremely rare during the period in question and finally because any prejudicial consequences would have been compensated by the grant of subsidies.

The condition relating to difficulties 'liable to persist' would have been even more difficult to fulfil once the end of the critical period was in sight. Furthermore, an authorization to levy countervailing charges cannot eliminate the difficulties which may be inherent in a loss of income for agricultural producers. On the other hand, a rise in the level of intervention prices would have constituted a marketing guarantee for agricultural products at a fixed price and would have been the least prejudicial method. Any increase of offers to intervention agencies of speculators could have been warded off by other methods. The intervention agencies could have been authorized to restrict purchases at the new prices to domestic products.

The fact that the Commission restricted the application of the compensation arrangements to closely specified products shows that the measures in question were not taken with a view to compensating the loss of income of

German agricultural producers, but rather in order to maintain the guaranteed minimum prices following from the intervention prices, which constitutes a misuse of powers.

The *Commission of the European Communities* considers that it is doubtful whether individuals are competent to criticize before the Court of Justice the comprehensive economic appraisal necessary for the application of Article 226, at least otherwise than in cases of manifest failure to observe provisions or of misuse of powers in terms of Article 33 of the ECSC Treaty. The Commission emphasizes that the Council initially concurred in considering that the difficulties threatening German agriculture were serious and liable to persist if special measures were not taken to assist that sector. Until the entry into force of the system of aids it was necessary to fill the lacuna existing in the transitional period. For this purpose, as in other previous cases, recourse was had to Article 226 since the relatively weak state of German agriculture gave grounds for fearing the abovementioned difficulties. The finding which was made that measures of support were necessary 'for an initial period of four years' shows the extent and the duration of the difficulties expected for German agriculture. In those circumstances the fact that other protective measures were taken as quickly as possible and were not based on Article 226 does not imply, with regard to the period before that application, that the conditions of Article 226 were not fulfilled.

The Commission emphasizes that, in the absence of countervailing charges levied at the frontier, imports on a very large scale at reduced prices must have been expected which would have driven German products from the market; a development of the agricultural market would have followed from this, impelled by speculation and thus contrary to all economic logic. Restriction of the increase in purchase and intervention prices to German products would not have avoided those consequences, as imports at low prices from Member States or third countries would have involved an immediate fall in the level of prices on the market for agricultural products. Furthermore, it would have had harmful consequences for the common market in agriculture, such as the conversion of German basic products, for which there is no intervention price, into products subject to intervention; for example, fresh milk would be made into butter or skimmed milk powder, resulting in increased surpluses. Finally, since the German intervention agencies lacked sufficient warehouses they would have been incapable of making the necessary purchases of German products. The appearance of surpluses and of artificial patterns of trade would have had serious consequences for large sectors of the economy, which would have been difficult to rectify. In addition, the retroactive grant of aids would have met with insoluble practical problems.

The *Government of the Federal Republic of Germany* puts forward considerations similar to those of the Commission. Furthermore, it calculates the losses which, without the protective measures in question, would have been suffered by German agricultural producers, distinguishing between goods dependent for their prices on products subject to intervention arrangements and goods to which intervention may apply.

Moreover, the countervailing charges at the frontier do not affect importers adversely in relation to the situation existing before the revaluation.

Question II (2)

The *plaintiff in the main action* maintains that the obligation to state reasons is stricter for decisions than for regulations, and that with regard to decisions constituting exceptions this obligation is even more imperative. With regard to a decision authorizing a State to adopt measures derogating from the Treaty it

must be duly demonstrated in the decision itself that all the conditions laid down in the safeguarding clause are present. In the present case the Commission limited itself in essence to paraphrasing the wording of Article 226 without giving any indication of what constituted the difficulties allegedly threatening 'German agriculture', a concept which it employs instead of that of a 'sector of the economy'.

The recitals in the preamble to the Decision of 30 October 1969 contain a factual contradiction in that in the second sentence of the first recital it is stated that the Council had come to the conclusion that it must refrain from introducing measures taking effect at the frontier, whereas the same decision authorizes such measures.

No reasons are provided for the retroactive nature of the decision.

If the decision of 30 October is void this necessarily implies the nullity of the decisions of 31 October and of 3 November 1969 which were taken in implementation of the former. A similar fate must be shared by the decision of the Commission of 17 November 1969 which extended until 31 December the duration of the validity of the abovementioned decisions.

This latter decision gives no indication whatsoever why the period originally prescribed proved insufficient.

The *Commission of the European Communities* observes that the degree of precision of a statement of reasons in a decision must be weighed against practical realities and the time and technical facilities available for making it, as is clear from the judgment of the Court in Case No 16/65. The brevity of the statement of reasons for the decisions in question affects neither their clarity nor conclusiveness. Furthermore, the threat of difficulties for German agriculture was evident and also recognized by all the Member States.

The *Government of the Federal Republic of Germany* also considers that a sufficient statement of reasons was supplied for the decision of the Commission, also taking into account the case-law of the Court and in particular the judgment in Case 2/56.

Question III

The *plaintiff in the main action* considers that owing to the exceptional nature of the measures referred to by Article 226 this provision cannot be applied with retroactive effect. Contrary to the rule contained in the second paragraph of Article 115 of the Treaty, Member States are not empowered to take protective measures independently. Through the expedient of retroactive measures the States would attain what Article 226 wished to prevent. In this connexion the plaintiff refers to the *ratio decidendi* of the judgment of the Court in Joined Cases 2 and 3/62.

The general rule that the Commission's measures shall not be retroactive corresponds to the requirement of legal certainty and could only be subject to exceptions where the confidence of the persons concerned in a specific legal situation was manifestly ill-founded. In the present case the defendant in the main action could rely on the fact that a protective measure could not be introduced before notification of the Commission's decision of authorization and its conversion into national law on 31 October 1969. As the revaluation of the German Mark had been expected at least since 29 September 1969 the German Government had sufficient time to apply to the Commission for authorization to take protective measures. Nor did the interest of the Community require the grant of a retroactive authorization.

The *Commission of the European Communities* observes that notification of the decisions in question took place on the very day when they were adopted. It is thus incorrect to speak of a retroactive effect except for the periods between 27 October on the one hand and 30 and 31 October and 3 November 1969 on the other hand.

In addition, it is certain that national protective measures may only be adopted after the authorization granted by the Commission has taken effect. But this is quite a different question from that of the point at which protective measures may be declared applicable and whether they may be applied retroactively. No support may be deduced from Article 226 for the existence of a prohibition against authorizing the State concerned from applying protective measures retroactively.

The suspension of the value of the unit of account with effect from the day of revaluation, which was effected in accordance with the provisions of the first paragraph of Article 4 of Regulation No 653/68, constitutes a means of rendering retroactive measures necessitated by the alteration in parity during the period between this alteration and the adoption of the decision containing the said measures. In fact the purpose of the suspension was temporarily to create a legal hiatus so that settlement of transactions to be carried out during this period should take place at the end of the period of suspension on the basis of the value of the unit of account then applicable, also taking account of any measures adopted for the adjustment of various agricultural prices. It is true that Regulation No 653/68 only directly guarantees the retroactive application of the measures for which it provides: but it may not be deduced from this that other measures may not also be retroactively applied.

From the date of the entry into force of the revaluation of the German Mark, on 27 October 1969, it is no longer possible to invoke the principle of the protection of legitimate expectation against the retroactivity of the protective measures required by the new situation.

The *Government of the Federal Republic of Germany* observes that in terms of the fifth paragraph of Article 4 of Regulation No 653/68 it was logical to apply the new value of the unit of account from 27 October and that in those circumstances it was necessary also to make the system of compensation applicable from the same date.

With regard to its legal nature, the decision taken by the Commission on the basis of Article 226 amounts to acceptance (*Genehmigung*) of the application made by the State concerned. This situation differs from that referred to in Article 115 of the Treaty which relates to an authorization (*Ermächtigung*), because it relates to a unilateral act of the Commission which need not be preceded by an application from the State concerned. On the other hand, implementation of Article 226 must necessarily be preceded by an application from the Member State, which implies cooperation between the Member States and the Commission. In this context the Commission's authorization can only take effect from the date on which the application was lodged. In this case there is thus no problem in connexion with retroactivity.

With regard to the argument based on the maintenance of legal certainty, the German Government refers to the possibility of recourse to retroactive measures provided for by Regulation No 653/68 and the relationship existing between such measures and the arrangements for compensation at the frontier.

Question IV

The *plaintiff in the main action* states that even if it were to be conceded that a period of six weeks was necessary for the introduction of the system of aids, which it disputes also with reference to the possibility of applying this system retroactively, the extension of that period until 31 December 1969 was in no way justified.

The *Commission of the European Communities* declares that it does not oppose consideration of this question, which is naturally and closely connected with the foregoing questions, and it observes that if the question were to remain unanswered a number of the transitional provisions applied from 27 October to

31 December 1969 would remain obscure.

The Commission observes that the arguments put forward by the plaintiff in the main action as they emerge from the order making the reference are indistinct and formulated on the basis of incorrect arguments. Regulation No 2111/69 of the Council which extended with regard to the Federal Republic the period of suspension of the value of the unit of account was intended to provide time for the adoption of measures guaranteeing the *status quo* of prices in Germany and to avoid disturbances on the market. The Council regulation necessary to introduce the system of aids is that of 9 December 1969 and the German law granting compensation for the consequences in the agricultural sector of the revaluation of the German Mark was dated 23 December 1969. Consideration of those dates is sufficient to account for the necessity for extending the decision of the Commission of 30 October 1969.

The *Government of the Federal Republic of Germany* declares that it would also be very glad if, in the interest of the equitable administration of justice, the Court would also give a ruling on the fourth question, which is closely connected with the third, even if in the present case the Finanzgericht Düsseldorf would be able to deliver its judgment without obtaining a reply to this question.

The German Government observes in addition that the adoption of legislative measures in connexion with compensation for loss of income was delayed not only by the formation of the new German Government but also by reason of the considerable time required for the discussions which took place in Brussels.

Question V

The *plaintiff in the main action* states that, considered from the viewpoint of Community law, the decisions of the Commission of 30 October and 17 November 1969 constitute a directly applicable authorization for the body which, according to German constitutional law, is competent to transform the enabling decisions of the Commission into national law. On the other hand, such decisions are incapable of modifying either the separation of powers under the constitution or the regulatory powers of the executive bodies in the Federal Republic.

The *Commission of the European Communities* considers that this question is hypothetical and so ill-defined that it seems impossible to reply to it. Furthermore its admissibility is subject to reservations, as it appears to relate solely to the interpretation of national law

The *Government of the Federal Republic of Germany* also considers that this question raises problems unrelated to the interpretation of Community law. It observes that in the absence of an adequate enabling rule laid down by the national legislature the provisions of German law providing for the levy of countervailing charges are void under German law, even if under Community law they are covered by the decisions of the Commission. However, this is a question relating to the interpretation of national law on which the Court has no jurisdiction to give a ruling.

Grounds of judgment

1 By order of 15 July 1970, received at the Court Registry on 23 July 1970, the Finanzgericht Düsseldorf referred to the Court several preliminary questions under Article 177 of the EEC Treaty on the validity or, alternatively, on the interpretation of the Decisions of the Commission of 30 and 31 October 1969 (69/375 and 69/377 ECC) and of 3 and 17 November 1969

(69/392 and 69/410 EEC) on the authorization of preventive measures with regard to agriculture for the benefit of the Federal Republic of Germany.

The first question

2 The Court is asked to rule whether those decisions, in so far as they authorize the Federal Government, owing to the revaluation of the German Mark, to levy a countervailing charge on agricultural products, are invalid because of the fact that Article 226 of the Treaty on which they are based does not apply in agricultural matters, having regard to the safeguarding clauses specifically concerned with the organizations of the agricultural markets and to Regulations of the Council Nos 804/68 of 27 June 1968 and 653/68 of 30 May 1968.

3 In accordance with Article 226 of the Treaty, during the transitional period prescribed in Article 8 protective measures may be taken if difficulties arise which are serious and liable to persist in any sector of the economy. In accordance with the principle set out in Article 38 (2) of the Treaty, the provisions of Article 226 apply to agricultural products. The scope of Article 226 cannot be affected by the insertion of safeguarding clauses in agricultural regulations, taking account of the specific nature of those protective mechanisms and in particular of the fact that they relate to trade with third countries.

4 The circumstance that a regulation, in this case Regulation No 804/68, prohibits the levying of any customs duty or charge having equivalent effect with regard to agriculture cannot restrict the application of a general provision of the Treaty such as Article 226. Likewise, Regulation No 653/68, relating to the difficulties arising for the agricultural markets from the alteration of the parity of the currency of a Member State, cannot exclude the application of Article 226 of the Treaty. Although this regulation lays down measures in anticipation of situations of the type which led the Commission to implement Article 226 of the Treaty, this fact does not deprive it of the power to authorize on the basis of Article 226 the protective measures necessary to provide an initial remedy for the economic difficulties arising for the agriculture of a Member State from the alteration in the parity of its currency. Since this provision remained applicable in the exceptional situations which it has in view until the expiry of the transitional period laid down in Article 8 of the Treaty, the fact that Regulation No 804/68 terminated the transitional arrangements laid down by other regulations for particular agricultural sectors is not capable of limiting the period of the validity of Article 226.

5 The validity of the decisions of the Commission is consequently unaffected by the fact that they are based on Article 226 of the Treaty.

The second question

6 In the event of a negative reply being given to the first question the Court is asked to rule whether the decisions in question are invalid either because 'the factual conditions for the application of Article 226 of the EEC Treaty were not fulfilled' or because 'the Commission did not fulfil or failed sufficiently to fulfil the duty to provide a statement of reasons which is incumbent on it under Article 190 of the EEC Treaty'.

7 In its decision of 30 October 1969 the Commission finds that the revaluation of the German Mark by 8.5% would involve a decrease in German agricultural prices, which are fixed in units of account but expressed in German Marks, and therefore a loss of income for German agricultural producers.

8 Owing to its extent and unexpectedness such a decrease in income would have constituted *per se* a serious difficulty liable to persist in a sector of the economy justifying the adoption of protective measures to rectify the situation.

For this purpose provision had to be made during a brief transitional period for the establishment of a system of levies at the frontier isolating the German agricultural market until a system of long-term aids for agricultural producers could be introduced.

It was therefore necessary, in order to avoid a collapse in German agricultural prices, provisionally to maintain the level of prices until German agriculture was capable, with the help of the introduction of the projected system of aids, of withstanding and adapting itself to the fall in prices which would inevitably follow from the revaluation of the German Mark within a system based on the free movement of agricultural products. The text of the decisions sets out these reasons succinctly but adequately.

9 The German court referred in addition to the argument put forward by the plaintiff in the main action, according to which the difficulties which the revaluation of the German Mark might have caused for German agriculture could have been avoided by an increase in intervention prices exclusively for German products so as to compensate for the loss of income of agricultural producers.

10 However, even supposing that this system were as effective as that of the Commission it has not been shown that such an arrangement would have involved less serious difficulties for the operation of the Common Market. In making its choice as it did the Commission did not exceed the discretion allowed it by Article 226.

11 The plaintiff in the main action has furthermore maintained that it would have been sufficient for the German Government to give retroactive force to the systems of aids established by it.

12 However it is clear from the oral procedure that such a solution would have encountered serious practical difficulties and could not have had the protective effect desired, at least not to the extent necessary to avoid the threat of serious and persistent difficulties for German agriculture. It does not therefore appear that the contested decisions infringed the conditions laid down by Article 226 (1) and (3). It may be concluded that the objections which have been raised do not affect the validity of the contested decisions.

The third question

13 In the event of a negative reply being given to Questions I and II, the German court asks whether the said decisions are invalid to the extent to which they were rendered retroactive for the period before their publication in the Official Journal of the European Communities.

14 This question relates to the fact that the decision of 30 October 1969 (Article 6), published in the Official Journal of 31 October 1969, authorized the Federal Republic of Germany to take protective measures with effect from 27 October 1969.

15 Until a system of aids for German agricultural producers was established it was necessary to avoid any interruption in the maintenance of the level of agricultural prices existing in Germany at the time of the revaluation of the German Mark.

The transitional protective measures authorized by the decision of 30 October 1969 would not have been capable of attaining their objective fully if they had not been applicable from the entry into force of the new parity of the German Mark.

16 It was thus proper to fix at this same date the point when the protective measures authorized could take effect. The decision of the Commission of 30 October 1969 and those of 31 October and 3 November 1969 which supplemented it are consequently not invalid to the extent to which they have retroactive effect.

The fourth question

17 The question is then asked whether the disputed decision of the Commission of 17 November 1969 is invalid because it extended the authorization beyond 7 December 1969.

18 It is clear from the foregoing considerations that the aim in authorizing protective measures under Article 226 could have been attained only if agricultural prices prevailing in Germany at the time of the revaluation were maintained until the German Government could establish a system of aids. Despite the best endeavours of the German authorities it was only possible for this system to enter into force on 1 January 1970.

19 The Commission was consequently justified in extending the effect of the initial exceptional authorizations. Consequently their validity is unaffected on these grounds.

The fifth question

20 In view of the reply given to the first question the fifth question is devoid of object.

Costs

21 The cost sincurred by the Commission and by the Government of the Federal Republic of Germany, which have 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 national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the plaintiff in the main action, the Commission of the European Communities and the Government of the Federal Republic of Germany;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 8, 38, 177 and 226;
Having regard to the Decisions of the Commission of 30 and 31 October 1969 (69/375 and 69/377 EEC) and of 3 and 17 November 1969 (69/392 and 69/410 EEC);
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Finanzgericht Düsseldorf by order of that court of 15 July 1970, hereby rules:

Consideration of the questions put does not reveal any factor capable of affecting the validity of the Decisions of the Commission of the European Communities of 30 and 31 October 1969 (69/375 and 69/377 EEC) and of 3 and 17 November 1969 (69/392 and 69/410 EEC).

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 11 February 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 13 JANUARY 1971[1]

Mr President,
Members of the Court,

The present case will lead the Court to give a ruling on the validity of various Community acts taken consequent upon the revaluation of the German Mark in October 1969.

To clarify the matter I think it best to review briefly for the Court the chronological order both of the facts and of the decisions taken, to the extent to which they are relevant to the present case.

I shall not consider the measures which the German Government was led to take in order to check the speculation which took place at the end of the summer and the beginning of autumn of 1969 in connexion with the Mark and which, especially with regard to agriculture, was beginning to pose extremely grave problems.

In fact the Court will certainly recall Sunday 5 October 1969 when, at the request of the German Government, the Court was required to give a ruling on an application for suspension of the execution of a decision taken by the Commission which, in the view of the Government of the Federal Republic, was inadequate.

At the time Mr Advocate-General Gand said that the dispute in the main action before the Court would perhaps be rendered irrelevant in a few days; events have proved him right.

In fact on 24 October 1969 the Federal Government announced its decision to revalue the Mark by 8.5% from 27 October 1969. Such a measure of necessity affected the various prices laid down in provisions relating to the common organization of agricultural markets—target prices, threshold prices and intervention prices—since such prices are expressed in units of account but paid in national currency and thus, without appropriate correcting factors, the automatic result of a revaluation is a fall

1 — Translated from the French.