Community of goods from non-member countries, which were placed in a private customs warehouse in a Member State in September 1971 and subsequently put into free circulation.

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 20 March 1980.

The Registrar
by order
H. A. Rühl
Principal Administrator

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 24 JANUARY 1980 [1]

Mr President,
Members of the Court,

I — The present case concerns the field of application in point of time of the monetary compensatory amounts and in particular the reference date for their application. The question is raised in so far as the matters at issue occurred at a time when the Community rules thereon were not fixed with the same precision as today.

Between 20 August and 24 September 1971 the plaintiff in the main action, the company Interatalanta, Frankfurt am Main, complied with the necessary formalities for placing consignments of frozen beef and veal from South America in a customs warehouse. When it withdrew the meat from the warehouse, the customs office responsible levied monetary compensatory amounts in accordance with the provisions of Regulation No 974/71 of the Council of 12 May 1971. For this purpose it applied the amounts in force *on the day of withdrawal from the warehouse.*

The plaintiff on the other hand took the view that the applicable rate should have been that in force when the meat *entered the warehouse* and lodged an administrative objection with the Hauptzollamt [Principal Customs Office] Essen. The objection was rejected and the plaintiff then brought an action before the relevant Finanzgericht [Finance Court] and was successful. The Hauptzollamt thereupon appealed on a point of law to the Bundesfinanzhof [Federal Finance Court]. In accordance with the first and third paragraphs of Article 177 of the Treaty the Bundesfinanzhof refers the following question of interpretation to the Court for a preliminary ruling:

"Was it *ultra vires* for the national legislature, under its power to charge

1 — Translated from the French.

compensatory amounts on imports under Article 1 of Regulation (EEC) No 974/71, to specify, in the case of goods which have been given customs clearance for storage in a private customs warehouse ('offenes Zollager'), the day on which the goods are removed from the private customs warehouse as the relevant date for the application of the rate of compensatory amounts?"

II — At the time when the events took place the provisions of Regulation No 1013/71 of the Commission of 17 May 1971 implementing Regulation No 974/71 did not specify the effective date for calculating the monetary compensatory amount as was subsequently specified by Regulations No 648/73 of the Commission of 1 March 1973 and No 1380/75 of 29 May 1975 which are still in force.

Article 7 (1) of Regulation No 648/73 provides: "In trade with third countries provisions concerning the granting of export refunds and the charging of customs duties and levies shall apply to 'monetary' compensatory amounts." It is common ground that as regards customs duties, refunds and levies the rate applicable is that of the day of import.

In trade between Member States Article 8 (1) of that regulation expressly provides: "The compensatory amount to be levied shall be the amount applicable on the day of importation."

Articles 6 and 8 (1) of Regulation No 1308/75 which respectively replace Article 7 (1) and Article 8 (1) are to the same effect.

Today therefore the answer to the question submitted would be clear from a simple perusal of those articles.

Nevertheless in the judgment of 31 January 1978 in Case 94/77 *Zerbone* v *Amministrazione delle Finanze dello Stato* [1978] ECR at p. 118 in respect of imports which had also taken place before the entry into force of the aforementioned regulations the Court ruled:

"For the purpose of determining whether the conditions for applying and determining monetary compensatory amounts are fulfilled reference must be made in respect of each commercial transaction (importation or exportation) to the day of the importation or exportation."

The answer to the question put by the Bundesfinanzhof is therefore that in the event of importation it is the day of import and not for example the date of the contract, the delivery of the goods or the payment of the price to which reference must be made for determining whether a monetary compensatory amount is to be applied and if so at what rate.

That answer was already implicit in the important judgment of 24 October 1973 in Case 5/73 *Balkan Import-Export* v. *Hauptzollamt Berlin-Packhof* [1973] ECR 1091. In that case the compensatory amount applied was that of the day of import on 24 March 1972 and not that of the conclusion of the contract in the autumn of 1971. Although the concept of importation was not expressly in question, the statements in that judgment show that the Court approved the calculation of the compensatory amount and therefore approved the date of import as the relevant date.

The reasons for that choice were clearly expounded by Mr Advocate General Warner on 15 June 1976 in his opinion in Case 113/75 *Frecassetti* [1976] ECR

998, which be cited in his opinion in the aforementioned case of *Zerbone* ([1978] ECR at p. 123):

"They were that —

(1) the day in question must be readily ascertainable;

(2) it must be so ascertainable in all cases and in all Member States;

(3) it must be such as to enable the rate of levy applicable to be determined before the levy became payable.

It seems to me that those considerations are relevant here also and that they point to the day of importation".

III — It thus remains to decide what the "day of importation" means in the special case in which the goods are put in a customs warehouse.

The Commission considers that Article 10 of Council Directive No 69/74 of 4 March 1969 is relevant here. That article provides.

"... when goods deposited in warehouses are cleared for home use the customs duties, charges having equivalent effect and agricultural levies chargeable on importation shall be collected on the basis of the rates or amount applicable on *the date of removal from the warehouse,* and according to the nature of the goods, the value for customs purposes and the quantity, as ascertained or accepted for that purpose by the customs authorities."

That article however does not expressly refer to monetary compensatory amounts, nor could it have done so since it dates from before their inception.

Further I hesitate to agree with the Commission when it takes the view that "although having regard to their special function, monetary compensatory amounts cannot be equated in every respect with 'charges having equivalent effect', they must nevertheless be linked with that concept as regards the sphere of application of the customs rules and in particular of the directive in question".

It is clear from the case-law of the Court and in particular, as regards the most recent period, the judgments of 20 April 1978 in Joined Cases 80 and 81/77 *Commissionnaires Réunis* v *Receveur des Douanes* [1978] ECR at p. 947, of 25 May 1978 in Case 136/77 *Racke* v *Hauptzollamt Mainz* [1978] ECR at p. 1257, and of 25 January 1979 in Case 98/78 *Racke* v *Hauptzollamt Mainz* [1979] ECR at pp. 82 and 83, that monetary compensatory amounts far from constituting obstacles to trade in agricultural products are intended to avoid disturbances which may arise in this respect as a result of variations in the exchange rates of the currencies of Member States. That is why the Court expressly stated that "monetary compensatory amounts are not levies introduced by some Member States unilaterally but Community measures adopted to deal with the difficulties resulting for the common agricultural policy from monetary instability. The monetary compensatory amounts are not therefore covered by the prohibitions on levying charges having an effect equivalent to customs duties." (paragraph 7 of the decision in Case 136/77).

On the other hand the Commission is no doubt right in maintaining that the connexion between monetary compensatory amounts and levies is such that, if the date of importation were not

uniformly fixed for both, distortion would result. The Commission pertinently reminds us that such distortion may be all the more serious since in extreme cases there may be as much as five years between the placing in and removal from the warehouse.

For these reasons I think that the principles enunciated in the judgment of 15 December 1971 in Case 35/71 *Schleswig-Holsteinische Hauptgenossenschaft* v *Hauptzollamt Itzehoe* [1971] ECR 1083 in respect of levies may be applied by way of analogy to monetary compensatory amounts. As the court making the reference recalls, it was there held "that the day of importation is that on which the goods, having been cleared through customs and stored in a deferred levy warehouse, are removed from store *and irrevocably put into free circulation.*"

The Bundesfinanzhof nevertheless hesitates to extend those principles to monetary compensatory amounts because of their specific objective. It states that "the charging of levies is intended to prevent variations in prices on the world market for products governed by common organizations of the markets from having effects within the Community, whereas the objective of the charging or granting of compensatory amounts, according to Regulation No 974/71, is to compensate for variations in the exchange rates which jeopardize the functioning of the Common Market."

Both compensatory amounts on imports and levies however are intended to protect the price level in the importing country against imports at prices capable of fluctuating considerably and persistently.

It is this partial similarity in aim which in my opinion makes it right to assimilate monetary compensatory amounts to levies for purposes of determining the day of importation.

Such assimilation seems to me all the more justified since it is what has been done since the Community rules, namely Regulation No 648/73, expressly regulated the matter. As I have already pointed out, Article 7 (1) of that regulation states that in trade with third countries the provisions concerning the grant of export refunds and the charging of customs duties and levies are to apply to monetary compensatory amounts. On the issue with which we are concerned the applicable provision for levies and refunds is obviously Article 10 of Directive No 69/74. For monetary compensatory amounts applicable in trade between Member States Article 8 (3) of the regulation is even more precise since it provides: "For the purposes of determining the compensatory amount to be levied, the date of importation shall be the date used for determining customs duties and levies." Articles 6 and 8 (5) of Regulation No 1380/75 confirmed the position.

In these circumstances I think the question put by the Bundesfinanzhof should be answered as follows:

As regards importations into the Community of goods from a non-member country which have been stored in a customs warehouse in the Federal

Republic of Germany during August and September 1971, and have been removed therefrom during September and November 1971 and then put into free circulation, the effective date for determining the rate of compensatory amounts in accordance with the provisions of Regulation No 974/71 of the Council of 12 May 1971 is the day of removal from store.