2. **Within the context of the system of monetary compensatory amounts, the tariff classification made by the exporting Member State was not binding upon the importing Member State at the time of the dispute.**

Sørensen Pescatore Mackenzie Stuart

Delivered in open court in Luxembourg on 4 July 1978.

A. Van Houtte
Registrar

M. Sørensen
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 15 JUNE 1978 [1]

Mr President,
Members of the Court,

1. The present case concerns the question whether a standard criterion laid down by the Council for the calculation of the amounts of the levy on agricultural products from third countries is applicable for the purposes of the determination of the monetary compensatory amounts in intra-Community trade. Is it permissible for the national customs authorities to apply that criterion by analogy, even though the resultant amounts may be greater than those necessary to compensate the incidence of currency fluctuations on the prices of the basic products which in fact make up the product?

The facts giving rise to the question are very simple. Between January and March 1975 the German undertaking Milchfutter imported into the Federal Republic of Germany from the Netherlands several consignments of calf fodder consisting of feeding-stuffs containing milk powder in substitution for other protein. When applying for customs clearance in the Federal Republic of Germany the undertaking declared that the feeding-stuffs fell under tariff subheading 23.07 B I a of the Common Customs Tariff, and specifically under No 3 of that subheading (products containing not less than 50% but less than 75% by weight of milk products). That was in fact the classification made by the customs authorities of the Netherlands for the purposes of calculating the monetary compensatory amounts on exportation. The German customs authorities, on the other hand, held that Article 11 of Regu-

1 — Translated from the Italian.

lation No 823/68 of the Council of 28 June 1968 determining the groups of products and the special provisions for calculating levies on milk and milk products was applicable. Under that article: "The milk product content of products falling within tariff subheading No. ex 23.07 B shall be determined by applying a coefficient of 2 to the lactose content per 100 kilograms of the product in question". As, on the basis of the aforementioned criteria, the feeding-stuff in question had a milk product content greater than 75% the competent German authorities classified it under tariff subheading 23.07 B I a 4 (instead of under subheading 23.07 B I a 3) of the Common Customs Tariff and consequently levied considerably higher monetary compensatory amounts (DM 169.90 instead of DM 127.40 and, from 3 March 1975, DM 149.40 instead of DM 112.10 per tonne).

An objection lodged by the plaintiff against the decision of the customs authorities was unsuccessful and the undertaking subsequently brought proceedings before the Finanzgericht (Finance Court) Münster. By order of 29 September 1977 that court stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

"1. Is the 'milk product content' which results from the application of Article 11 (1) of Regulation (EEC) No 823/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1968 (I), p. 199) and of Article 1 of Regulation (EEC) No 1216/68 of the Commission of 9 August 1968 (Official Journal, English Special Edition 1968 (II), p. 421) decisive with regard to the amount of the monetary compensatory amounts which it was necessary to impose during the period from January to March 1975 on compound feeding-stuffs coming under tariff subheadings 23.07 B I a 3 or 23.07 B I a 4 of the Common Customs Tariff which were imported from the Netherlands into the Federal Republic of Germany?

2. If Question 1 is answered in the negative:

   Is the 'actual' milk product content decisive?

3. If Question 2 is answered in the affirmative:

   Does it follow from Community law which method is to be used for determining the actual milk product content?

4. Within the context of the system of monetary compensatory amounts, is the tariff classification made by the exporting Member State of the European Communities binding upon the importing Member State?"

2. For determining the rates of the levies and of the monetary compensatory amounts in relation to individual products the Commission did not draw up an *ad hoc* nomenclature but relied upon the classification of the goods under the Common Customs Tariff.

As has been seen there is no doubt that the goods in question fall under tariff subheading 23.07 B I a, concerning preparations of a kind used in animal feeding other than fish solubles and containing 10% or less by weight of starch. The disputed question is whether the product should be classified under No 3, which includes feeding-stuffs containing not less than 50% but less than 75% by weight of milk products, or under No 4, which includes feeding-stuffs containing not less than 75% by weight of milk products.

In order to simplify the classification for the purposes of calculating the levy the Council departed from the criterion which is generally accepted in customs matters of the actual composition of the

goods in favour of the aforementioned standard criterion (the said Article 11 of Regulation No 823/68).

If one bears in mind the fact that the most common milk product used in compound feeding-stuffs is skimmed-milk powder, and in view of the fact that that product has an average lactose content of 50%, it is evident that the application of the coefficient 2 to the percentage of lactose contained in a feeding-stuff whose milk product component is skimmed-milk powder will produce a result which is very close to the actual level of that component.

However, even the Commission has recognized that that method gives inexact results where milk products are used whose lactose content differs from that of skimmed-milk powder. This is the case in particular for feeding-stuffs which contain powdered whey whose percentage lactose content is much higher than that of milk powder; in that case the standard method will have the effect of producing a milk product content which is higher than the actual content.

It should be noted, however, that that inexactitude does not cause any inconvenience in the context of the operation of a system such as that of the levies, whose nature is undeniably protectionist. In this respect the following passage from the 6th recital in the preamble to the aforesaid Regulation No 823/68 of the Council is significant: "whereas the lowest possible starch content and the highest possible milk product content should be used . . .; whereas in fact milk ingredients have a much greater effect on price formation than cereal ingredients".

In point of fact, within the system of levies the choice of a standard criterion based on the lactose content of a product such as milk powder — which, of the milk products used in making up feeding-stuffs, does not have one of the higher lactose contents — ensures an improved protection of the principle of Community preference and thus serves the full achievement of one of the essential aims of that system.

3. There is no Community rule which stipulates that the provisions of the aforesaid Article 11 on the standard criterion for the calculation of the amounts of levies should be applied with regard to monetary compensatory amounts in intra-Community trade. However, the German customs authorities and the court which has referred the questions for a preliminary ruling have held that there are good reasons for believing that the application within the context of the system of monetary compensatory amounts of criteria which differ from those used in connexion with levies is not permissible.

It appears to me necessary to determine first of all whether any indication can be derived from the Community provisions in force.

Regulation No 1380/75 of the Commission of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts draws a distinction between the application of such amounts in trade with third countries (Title II) and their application to intra-Community trade (Title III). While with regard to trade with third countries Article 6 provides that: "the provisions concerning the granting of export refunds and the charging of customs duties and import levies" are to apply to monetary compensatory amounts, there is no such provision in Article 7 *et seq.* concerning the application of monetary compensatory amounts in intra-Community trade.

Let us suppose that the provisions of the aforementioned Article 6 are to be interpreted (as its wide formulation would allow) as constituting a reference to all the provisions relating to the

charging of levies, including those which define the criteria for the classification of goods for the calculation of the levy itself. The absence of any reference of that kind in the provisions laying down the rules for compensatory amounts in intra-Community trade should therefore lead one to conclude that the standard criterion is not applicable in that field.

However, before the German court the German customs authorities argued that the adoption, for the purposes of monetary compensatory amounts in intra-Community trade, of a criterion for tariff classification which differs from that laid down for levies by the aforesaid Article 11 would result in the classification of goods of the same type under different tariff headings according to whether their origin was outside or within the Community. In the customs authorities' opinion that consequence would be contrary to the general principle that the tariff classification of a product should be made irrespective of its place of origin.

In fact, even if the aforesaid "wide" interpretation of Article 6 of Regulation No 1380/75 is accepted, the arguments of the German customs authorities do not appear to be relevant in the context of the present case. The general principle relied on by those authorities is valid in connexion with the interpretation of the Common Customs Tariff for the application of customs duties to goods imported into the Community. In that respect it would certainly be inadmissible to adopt different criteria for the tariff classification of identical goods. But in the present instance the possibility of divergent classifications relates to the application of a system of intervention which clearly differs both from customs duties and from levies. A difference in the criteria for calculation within the context of that system cannot give rise to any discriminatory treatment of goods with regard to customs procedures.

Having said that, it is worth pointing out that the "wide" interpretation of the aforesaid Article 6 is far from being undisputed. According to the Commission's Agent that provision refers to the procedure on the basis of which the national customs authorities carry out their functions, rather than to the rules relating to the calculation of the amounts to be imposed.

4. The court making the order for reference shares the view that levies and monetary compensatory amounts must be subject to uniform rules and it has expressed the fear that the application of different criteria for the classification of goods could endanger the uniform operation of the common intervention arrangements in agriculture.

It is true that monetary compensation in part pursues aims similar to those of the levy: in fact it too serves to ensure normal currents of trade and price stability. There are, however, fundamental differences between the levy and the system of monetary compensatory amounts. In the first place, the system of levies is characterized, as has been said, by the aim of protecting Community production and trade against competition from products from third countries. Such an element is not to be found in the system of monetary compensatory amounts. Secondly, while the system of levies fulfils on a permanent basis a standard function of regulating and protecting the common agricultural market, the system of monetary compensatory amounts constitutes a temporary and exceptional system which, by way of derogation from the rules of the common market, serves to avoid the more serious disturbances which currency fluctuations might cause in the flow of trade and in the functioning of the Community intervention system. Because of its exceptional character the application of that scheme is subject to strict limits, as is clear from the

established case-law of the Court of Justice which I have recently had occasion to recall in my opinion in Case 131/77 *(Milac).* It must, therefore, not only be held that the system of monetary compensatory amounts fulfils functions which are clearly distinct from those of the levies, but in addition it is to be noted that the adoption of criteria for calculation laid down for levies in a protectionist context is barely compatible with the restrictive tendency which must be adhered to in any interpretation with regard to the phenomenon of monetary compensatory amounts.

The Court of Justice has already had occasion to state that while the provisions implementing the Common Customs Tariff must be conclusive as regards the imposition of customs duties they serve merely as a guide with regard to the classification of goods for levies (judgment of 26 April 1972 in Case 92/71 *Interfood* ([1972] ECR (I) 231). *A fortiori* it must be admitted that the criteria laid down for the application of levies cannot have binding force in the very different context of monetary compensatory amounts, which primarily concerns intra-Community trade.

The Commission has stated it is in favour of a discretionary extension of the criteria in question. In fact it confines itself to stating, at the end of its observations in the present proceedings, that in 1975 Community law formed no obstacle to the application by the German customs authorities of the standard method of calculation in the context of monetary compensatory amounts. It put forward above all practical reasons relating to the advantages inherent in the adoption of uniform classification criteria in connexion with the imposition of levies and of monetary compensatory amounts by the national customs authorities. In particular, the Commission stated that it was convinced that the adoption of the standard criterion based on an easily ascertainable objective element such as the lactose content would contribute towards facilitating the discharge by those authorities of their duties, thus ensuring legal certainty and uniformity of treatment of Community nationals.

The fact should also however be noted, as was stated in the course of the present proceedings by Milchfutter, that the Netherlands customs authorities had regard to the actual composition of the product in calculating the monetary compensatory amounts granted on exportation. The Commission has not denied that statement, nor has it stated that it regards that method of calculation to be invalid. It seems to me that the Commission has thus adopted a standpoint which is wholly incompatible with its previous assertions. The fulfilment of general requirements such as legal certainty and the uniformity of treatment of Community nationals in relation to the application of a Community intervention scheme should indeed be ensured throughout the common market and not within a Member State taken in isolation. It is clear that those general requirements are disregarded if, in the application of a single scheme, the authorities of each Member State may choose between different criteria which are such as to lead to the divergent classification of a single product for the purposes of the calculation of the monetary compensatory amounts (as occurred in the present instance on exportation from the Netherlands, on the one hand, and on importation into Germany, on the other).

5. It is necessary therefore that a single criterion should be adopted for classification within the context of the scheme of monetary compensatory amounts. The question, however, is: which one?

The first hypothesis to be examined is that of the analogous application of the aforementioned Article 11 of Regu-

lation No 823/68 to monetary compensatory amounts. However, the clear difference referred to above between the levy scheme and that of monetary compensatory amounts leads me to conclude that any similarities between the two cases such as to justify such analogous application are lacking. It must be added that the application of the standard criterion in connexion with the calculation of the monetary compensatory amounts and the consequent classification of the products in a way which differs from that which would be required by their actual composition, and which thus serves to increase the burden of the compensatory amount, may constitute a penalization of producers from other Member States as compared with producers in the importing Member State which is likely to distort competitive conditions in the latter State to an extent greater than that permitted for the pursuit of the aims of the system of compensatory amounts.

It has already been seen that the increased charge resulting from the application of a fictional method compared with the charge which would result from consideration of the actual milk product content of the goods in question is certainly not negligible. Thus the straightforward application in this context of the standard criterion for calculation would be in danger of conflicting with the system of monetary compensation, the impact of which, according to the last recital in the preamble to Regulation No 974/71 of the Council, "should be limited to the amounts strictly necessary to compensate the incidence of the monetary measures on the prices of basic products covered by intervention arrangements". The contrast would exist to the extent to which the application by analogy in this context of the standard method of calculation has the effect of imposing on goods coming from a Member State a charge greater than that necessary to compensate the negative incidence of the monetary measures within the meaning of the aforesaid Regulation No 974/71.

The objections to a standard and therefore approximate criterion for assessment might fall if by virtue of the particular nature of the product in question or by reason of other relevant factual circumstances the Community legislature expressly stated that recourse to that criterion in order to guarantee the practical effectiveness of the Community rules was mandatory. It was only on those conditions that the Court of Justice accepted a standard criterion laid down by the Council for determining the refunds on exports of cereal-based feeding-stuffs to third countries (judgment of 11 October 1977 in Case 125/76 *Cremer* [1977] ECR 1593). In this instance, however, the Community legislature has not specified the use of the standard criterion in the field in question and the Commission itself, while holding that the use of that criterion was permissible in 1975, has subsequently had to provide, as we shall see later, that in classifying the goods in question for the purposes of monetary compensation the national authorities should start by examining the actual composition of the goods themselves. I would note in parentheses that this probably explains the above-mentioned lack of consistency in the standpoint adopted by the Commission in these proceedings.

6. There can be no doubt that the restrictive requirement expressed in the said last recital in the preamble to Regulation No 974/71 can be adequately satisfied only by making the compensatory amount commensurate with the actual composition of the product. However, it would not be proper to ignore the difficulties of a practical nature which were mentioned by the Commission and which may stand in the way of any check on that

composition and thus of the determination of the actual proportions of the milk product components in the goods to be classified. Having said that, we must examine whether the practice followed by the Commission does not provide any useful indications which would enable the problem to be solved in a way which is not only correct from the point of view of the principles involved but which also satisfies considerations of a practical nature.

I would recall first of all that by a judgment of 3 May 1978 in Case 131/77 *(Milac)* the Court of Justice ruled that Regulation No 539/75 of the Commission of 28 February 1975 was invalid in so far as it fixed monetary compensatory amounts in respect of trade in powdered whey, since whey is not one of the products for which the application of monetary compensatory amounts is provided by Regulation No 974/71 of the Council. That means that, at least with regard to transactions still pending, Community and national authorities should not take account of whey in calculating compensatory amounts. We know that powdered whey is often used as a component in feeding-stuffs; it would appear that that is also the case with the goods whose classification is at issue here.

It is clear that the straightforward application of the standard criterion referred to above, based on the lactose content of the product, without the undertaking's having the opportunity to submit proof to the contrary would not take account of the aforesaid necessity to leave whey out of account in calculating compensatory amounts. It is highly significant that the Commission, having ceased to apply monetary compensatory amounts to powdered whey (by virtue of Regulation No 1824/77), should in consequence have amended the implementing rules relating to monetary compensatory amounts by Regulation No 3005/77 of 22 December 1977. In relation *inter alia* to tariff subheading 23.07 B, that regulation provides that on the occasion of the completion of customs formalities the person concerned must state the actual content by weight of the various milk components specifically listed. In its observations submitted in the present proceedings the Commission stated that the customs authorities may check the soundness of those indications by the use, *inter alia*, of the documents relating to manufacture submitted by the producer. Only if they are unable to allay any doubts they might have may the national customs authorities have recourse to the standard criterion for calculation based on the lactose content of the product. This shows that the Commission now believes that it is practicable and preferable to rely principally on a method of classification based on the actual composition of the goods.

It is evident, however, from the aforesaid *Milac* judgment that the situation with which the Commission intended to deal in adopting Regulation No 3005/77 had existed ever since 1975. For that reason, in my opinion, the same criteria should also be applied to operations such as that involved in the present instance (at least in so far as they concern transactions which have not yet been concluded).

In cases in which there did not exist adequate means of ascertaining the actual composition of the goods and where doubts existed as to that composition the desire to avoid the risk of fraud, while not increasing to an excessive degree the burdens on the frontier authorities in connexion with monetary compensatory amounts, might possibly justify recourse to a standard method of calculation based on an objective element which on average might be regarded as representative. In that context it would be permissible, but only on a *subsidiary* basis, to have recourse to the standard criterion based on the lactose content of feeding-stuffs,

determined on the basis of the product which is most widely used in the composition of the goods in question, that is, skimmed-milk powder.

7. The reflections set out above serve to answer the first three questions referred for a preliminary ruling.

The fourth question asks whether, within the context of monetary compensatory amounts, the tariff classification made by the exporting Member State is binding upon the importing Member State.

This problem is wider in scope than the others as it concerns an important aspect of the operation of the system of compensatory amounts taken as a whole.

The Commission has stated that for some time it has been trying to induce the Member States to accept the principle that the first tariff classification is binding, but that up to the present it has been unsuccessful. It states that until specific rules have been adopted in this regard each Member State will retain the power to decide independently on the tariff classification of products, both on importation and on exportation.

A system of this kind is clearly likely to cause distortions, an example of which is supplied by the differing classifications of a single product which, as we have seen, were undertaken in the present instance by the authorities of the exporting Member State and the importing Member State. The result is in fact, as I pointed out above, that the compensatory amount paid by the Netherlands on exportation is less than the compensatory amount charged on importation by the German authorities.

In practice, the use of common basic criteria for the classification of goods could reduce the occurrence of such distortions. In addition, it should be recalled that by Regulation No 1556/77 of 11 July 1977 (Official Journal L 173, p. 10), which amended the aforesaid Regulation No 1380/75, the Commission, apart from requiring undertakings to supply in the customs declaration all information concerning the composition of the goods which might be of relevance for the calculation of the monetary compensatory amounts, also provided for co-operation between the authorities of the exporting Member State and those of the importing Member State, in order to guarantee the uniform application of those rules and to avoid any irregularities. It is clear that, with regard to the composition of goods, checks which can be carried out in the country of production tend to be more precise and effective, as well as being simpler, than those which can normally be carried out when the goods are given customs clearance in the importing country.

For its part Milchfutter has relied on the principle accepted by the Court of Justice in its judgment of 15 December 1976 in Case 35/76 *(Simmenthal* [1976] ECR 1871). That judgment stated that with regard to veterinary and public health inspections of meat the harmonized system of inspections introduced by the Community directives and based on the principle that the guarantees required by each of the Member States in this context are equivalent in nature seeks to transfer supervision to the exporting Member State; that therefore systematic veterinary and public health inspections at the frontier by the authorities of the importing Member State are rendered superfluous and accordingly no longer justified under Article 36 of the EEC Treaty. In the view of Milchfutter that principle, which is laid down in relation to the application of harmonized national schemes, should *a fortiori* apply within the context of the system of monetary compensation, which is a uniform Community system and is moreover financed by the Community itself. Furthermore, it adds that if the

customs authorities of the importing Member State do not agree with the tariff classification made by the exporting country they can always turn to the Commission by way of the relevant management committee to obtain an opinion in order to ensure the uniform classification of the product at issue.

It must be said, however, that the decided cases referred to by Milchfutter are to be distinguished from the present instance. The carrying out by the customs authorities of their normal function regarding the tariff classification of goods cannot be placed on the same footing as restrictions on imports which can be justified only on the basis of Article 36 of the Treaty.

In my opinion the freedom of each Member State to undertake, through its own customs authorities, the classification of imported or exported goods, whatever the purpose of that classification, cannot, in the present state of Community law, be denied.

However, nor can it be denied that the execution by each customs authority of its own duties may constitute an obstacle to trade between the Member States when, as in the present instance, it impedes the proper functioning of the Community intervention measures and may constitute an improper burden upon exporters or importers.

Taking account of the interest in avoiding such disadvantages it seems to me that it would also be reasonable in this respect to apply a criterion such as to exclude systematic national checks, similar to that which the Court held to be applicable with regard to veterinary and public health inspections.

In substance, the customs authorities of the importing Member State should normally accept, without the need for any check, the classification made by the exporting Member State; that does not, however, prejudice their power to re-inspect the goods and, where necessary, to make an independent classification. In view of the clear requirements of Community co-operation, and until rules excluding the repetition of inspections have been adopted, the exercise of that power should be restricted to those cases in which there is reliable evidence for doubts as to whether the decision of the customs authority in the State of origin was correct. In such cases a different classification from that in the State of origin would be permissible only if it were shown, in the light of the uniform criteria which I have sought to set out above, that the preceding classification was incorrect.

8. In conclusion, therefore, I submit that the Court should rule in answer to the questions referred by the Finanzgericht Münster by order of 29 September 1977 that:

(a) The amount of the monetary compensatory amounts on feeding-stuffs under subheadings B I a 3 and B I a 4 of tariff heading 23.07 in trade between the Member States, including transactions completed in 1975, is to be determined on the basis of the actual milk product content;

(b) Reference to the standard criterion for calculation laid down by Article 11 (1) of Regulation No 823/68 of the Council of 28 June 1968 on the application of levies to imports from third countries is permissible with regard to monetary compensatory amounts only when it is not possible,

in the event of a dispute, to ascertain the actual composition of the product;

(c) The classification made by the State of origin for the purpose of applying the system of monetary compensatory amounts is not, in principle, binding upon the importing State; however, the requirements of the proper functioning of the system of monetary compensatory amounts should induce the importing State to refrain from carrying out systematic inspections of the goods and in any event to avoid adopting a classification of the goods which is different from that of the State of origin unless it is objectively shown that the first classification was incorrect.