THE COURT

in answer to the questions referred to it by the Finanzgericht Rheinland-Pfalz, by an order of that court of 14 October 1970, hereby rules:

1. **Article 4 of Regulation No 19 of the Council of the European Economic Community on the progressive establishment of a common organization of the market in cereals must be interpreted as meaning that in calculating the threshold price of cereals the basic target price must be reduced, *inter alia*, by a fixed amount corresponding to the incidence of internal taxation levied in respect of imports, such as the turnover equalization tax.**

2. **The second paragraph of Article 4 of that regulation may not be interpreted as conferring upon the Commission the power to validate by its conduct errors which the national authorities may commit in the implementation of the tasks laid down in that article.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars

Delivered in open court in Luxembourg on 12 May 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 1 APRIL 1971[1]

Mr President,
Members of the Court,

The reference for a preliminary ruling which was laid before the Court by the Finanzgericht, Rheinland-Pfalz, and with which we are concerned, relates to the interpretation of various provisions of Regulation No 19 (Official Journal 1962, p. 933) on the progressive establishment of a common organization of the markets in cereals.

These provisions come into play with regard to the importation of barley of brewery quality from France into the Federal Republic of Germany which was effected by the plaintiff in the main action in December 1962. The competent customs office in fact not only imposed on this importation the full levy in accordance with the common organization of the market in cereals but also a turnover equalization tax of 1.5% of the import value. The Wünsche

1 — Translated from the German.

undertaking contests this. It argued that it is not permissible to levy the turnover equalization tax together with the levy; at any rate, it maintains that the turnover equalization tax must be taken into account in fixing the threshold price. After a lengthy procedure this dispute is presently pending before the Finanzgericht Rheinland-Pfalz. It appears that the arguments employed in support of the plaintiff's position impressed the Finanzgericht since, in accordance with a suggestion of the plaintiff, it stayed the proceedings by an order of 14 October 1970 and, in accordance with the second paragraph of Article 177 of the EEC Treaty, referred the matter to the European Court of Justice. In the order making the reference two questions were put:

(1) Must Articles 2 and 4 of Regulation No 19/1962 of the Council of the European Economic Community (Official Journal 1962, p. 933) be interpreted as meaning that in calculating the levy there should be deducted from the threshold price an amount equal to the turnover equalization tax levied in respect of imports, or should this tax not have been taken into consideration?

(2) If it is considered necessary to take into account the domestic charges levied in respect of imports:
Does it follow from the second sentence of Article 3 of Regulation No 19/62 that the Commission could give its assent, either tacitly or by an act from which it might be deduced that such was its intention, to an erroneous method of calculating the threshold price adopted by the national authorities with the result that the conduct of the Commission had the effect of rectifying this defect?
If so, the fact that Regulation No 122/1962 of the Commission of the EEC (Official Journal 1962, p. 2024) restricted itself to abolishing the special threshold prices fixed for seed-grain and barley of brewery quality but did not at the same time require the turnover equalization tax to be taken into consideration as regards the threshold price be considered as such a measure of assent?

Only the plaintiff in the main action and the Commission of the European Communities submitted their written and oral observations on those two questions. Before I deal with your replies I should like to make some remarks on the legal situation prevailing at the time of the importation. I can make these points relatively brief since the Court, through a series of other proceedings, has already learned how the common organization of the market in cereals operates. Thus the Court knows that the organization of the market consists above all in a system of regulating prices which is intended to ensure that producers of cereals in the Community obtain reasonable prices (it must be admitted that at this time such prices were not *uniform* in the Community) and that the markets are stabilized. In this connexion, the basic target prices play a considerable part. They are fixed by the Member States within the framework of the limits laid down by the Council for the marketing centre of the region with the largest deficit (in the Federal Republic: for Duisburg) calculated at the stage where the cereals are purchased by the wholesaler.

The market prices require to be aligned in accordance with these basic target prices which are fixed for specific standard qualities of the most important types of cereal.

In order to attain the objectives in view it is necessary to increase the prices for imports from other countries with lower price levels (at that time these might include third countries as well as other Member States) to the domestic price level. This was brought about through levies. With regard to these levies the important factors are: first the cif price (on imports from third countries) or (on imports from other Member States) the free-at-frontier price. These prices are fixed on

flat-rate basis by the Commission in accordance with the most advantageous purchasing prices obtainable respectively on the world market or in the exporting State. Other factors relate to the threshold prices of the importing Member States. These are fixed annually by the State within the limits prescribed by the Community for uniform standard qualities of the individual types of cereal. In this respect it is possible to speak of a basic target price projected on a single frontier crossing point, which in the Federal Republic of Germany is Emmerich. In fact, Article 4 of Regulation No 19 reads as follows:

> 'With regard to common wheat and barley, as also maize and rye, in Member States which are major producers of those cereals, the threshold price shall be fixed annually by the Member States for an identical standard of quality in such a way that the selling price of the imported product in the marketing centre of the zone having the largest deficit shall, after taking account of the standard amount laid down in Article 2 (1) and the coefficient of equivalence laid down in Article 12, be level with the basic target price provided for in Article 5'.

If the fixed amount which was introduced in order to ensure a Community preference and the coefficients of equivalence for differences in quality are left out of account the fixing of the threshold prices is effected by reducing the basic target price by the marketing expenses entailed by the first wholesale stage when the product arrives at the first place where the said basic target price is applied. In particular there are deducted the transport costs incurred between the frontier crossing point at Emmerich to the unloading place, the harbour at Duisburg (in accordance with the shortest distance and the cheapest rates) together with a reasonable margin for the importers, namely, a fixed amount for business expenses and profit. The intra-Community levy corresponds to the difference between the threshold price and the free-at-frontier price.

With regard to the present case the German threshold price was fixed for the period from 1 July 1962 to 30 June 1963 in the second order implementing the Law on the application of Regulation No 19 of 30 July 1962. In this, as I have already said, the turnover equalization tax payable in respect of imports was not taken into account. With regard to the German order it must also be said (because this is important for the argument of the parties in the main action) that provision was made in particular for higher threshold prices for barley of brewery quality and seed-grain. This point was amended by Regulation No 122 of the Commission of 6 August 1962 (Official Journal 1962, p. 2024), that is to say, it was expressly provided that the threshold price fixed for barley other than barley of brewery quality should also apply to barley of brewery quality and seed barley. In fact, provision is made for this in the second paragraph of Article 4 of Regulation No 19 in these terms: 'Where the threshold price has not been fixed as stipulated above, it shall be reviewed in accordance with the procedure laid down in Article 26'. However, since in the foregoing case the review did not extend to the turnover equalization tax the court making the reference put the said second question. Finally, it should be mentioned that, having regard to the Commission's objections to the levying of the turnover equalization tax, the German threshold price was altered by an order of the Federal Minister for Food, Agriculture and Forestry of 27 December 1962. It was reduced by the average rate of the turnover equalization tax (that is, by DM 4). The amendment however did not take effect with regard to the period from 1 July 1962 to 31 December 1962 and only entered into force from 1 January 1963.

Against the background of these observations I shall now undertake the reply to the questions which have been put.

First question

Since, in accordance with certain judgments of the Court listed by the Commission on page 2 of its written observations the levying of the turnover equalization tax is to be considered as compatible with the common organizations of the market (this section of the plaintiff's objections in their original form is thus now no longer in dispute), the first question of the Finanzgericht thus asks whether within framework of the system of levies of Regulation No 19 the turnover equalization tax must be *taken into account*. Thus formulated and with the subject-matter restricted as aforesaid (that is to say, by leaving out of account the problems which arose in addition in the course of the oral procedure) the reply to the question does not cause any difficulties in principle. In fact, not only the court making the reference, but also the plaintiff in the main action and the Commission concur in advocating that the said tax be taken into account. This holds good for other Member States and indeed was approved by the Federal Government, as may be concluded from the German order issued in December 1962.

It is indeed impossible to refer to particular express provisions in Regulation No 19 or in implementing provisions in order to support the correctness of this view; however it follows conclusively from the general scheme of the organization of the market in cereals and not least from Article 4 of Regulation No 19.

In this connexion, the Commission rightly emphasizes from the outset that in relation to the questions which now concern us the States had no discretion in the sense that the basic target price (from which the threshold prices are calculated) merely represented a lower limit on the basis of which the Member States might raise market prices, especially through the taxation of imported goods. In fact, the opposite concept would involve a failure to observe the function of basic target prices, namely, that with regard to the interest of consumers in particular they should constitute a stabilizing guideline for the adjustment of market prices which, in accordance with the preamble to Regulation No 19, should be based as closely as possible on the target prices. The incorrect view to which I have alluded would also disregard the fact that the organization of the market provided for a gradual diminution of the difference existing between the target prices, and thereby between the market prices, in order to be able to fix a common target price at the end of the transitional period. In accordance with those objectives not only was a limitation imposed on the powers of the Member States to fix intervention prices higher than the derived intervention price as normally fixed, but it is also to be assumed that the basic target prices were not independent national prices but rather represented figures fixed in accordance with specific principles of Community law.

As I have shown, once a discretionary power for the Member States is precluded in the interests of a uniform development of prices, the reply to the first question must furthermore be deduced in accordance with the principles laid down in Article 4 of the regulation. According to this provision' ... the threshold price shall be fixed ... by the Member States ... in such a way that the selling price of the imported product in the marketing centre of the zone having the largest deficit shall ... be level with the basic target price'. This objection in fact can only be attained if there are taken into consideration not only *certain* marketing costs (such as transport costs and profit margins) but also the turnover equalization tax which is due in respect

of all imports and thus constitutes an essential cost component.

It would be possible to arrive at another decision only if the turnover equalization tax could be separately passed on to the wholesale trade. This was, however, impossible under the German cumulative multi-stage tax system which was in force at the time and was accordingly precluded because the prior stages of the turnover tax on *domestic* products were already included in the target price and thus could not be passed on separately to the wholesale trade. In order to achieve the equality which must exist between the selling prices of imported cereals and the basic target prices it is therefore necessary that the turnover equalization tax should be included beforehand in the offer price of cereals imported free at Duisburg, the first wholesale stage, or, in other words, that this tax burden should be taken into consideration within the framework of the system of levies.

Furthermore, contrary to the view expressed by the Bundesfinanzhof in a parallel case, arguments against the view which has just been set out cannot be derived from the structure or the wording of other provisions regarding the organizations of the markets, in particular, those in milk products and olive oil. The Commission has likewise demonstrated that this is so. First of all with regard to Regulation No 13/64 of the Council on the organization of the market in milk products (Official Journal of 27 February 1964, p. 549) which in fact expressly prescribes that the turnover equalization tax shall be taken into account in the form of a deduction from the levy, it must be recalled that in this instance the threshold price is not calculated by projecting the basic target price on the frontier crossing point. Rather, this organization of the market has its particular criteria for calculation (that is, deduction on the basis of special reference prices) and for this reason it was necessary to make express provision for turnover equalization tax to be taken into account. Having regard to the system of Regulation No 19 on the organization of the market in cereals and to the wording of Article 4 thereof it is evident that a provision of this nature might be omitted. The Commission was able to refer to the fact that the threshold price under the organization of the market in olive oil, dealt with in Regulation No 136/66 of the Council (Official Journal, English Special Edition, 1966, p. 221), is not comparable in the present context with the threshold price under the organization of the market in cereals. It is rather the projection of a target price on a single frontier crossing point; there are however no national threshold prices, only a *single* price for the whole Community, that is, the Italian threshold price. If there might be deducted from this threshold price the turnover equalization tax actually levied in Italy, the Italian legislature would be capable of determining the threshold price by altering the rate of the tax. Furthermore, there would then be no guarantee, in Member States where a tax of this nature is not levied, of sufficient protection against imports. This is why, therefore, under the relevant organization of the market, all prices for olive oil are fixed '*free of tax*'. But it is also clear from this that it is impossible for the purposes of the present question to use the particular features of the organization of the market in olive oil in order to draw conclusions with regard to the organization of the market in cereals which is differently constituted.

It may thus be accepted that within the framework of the organization of the market in cereals it appears necessary to take account of the turnover equalization tax in assessing the levy, and the sole remaining question is therefore whether, as the plaintiff considers, the *actual* turnover equalization tax must be deducted from the threshold price or, which amounts to the same thing, from the levy, or whether, as the Commission

believes to be correct, only a fixed amount is to be taken into consideration in determining the threshold price. I must say from the outset that on this point too I incline to the of the Commission. As I have already said, it appears that the question whether the turnover equalization tax should be levied fell within the discretion of the Member States (in this connexion, it is unnecessary at this point to consider the *price* from which the tax could be calculated). On the other hand, the power of the Member States was restricted to fixing the threshold prices (whilst under the system of Regulation No 19 the Member States had no decisive power to make up the levies). It thus follows that the fixing of threshold prices is the only sphere in which it must be held that the Member States were entitled to calculate the deduction. Article 4 of Regulation No 19, the source of the solution to the present problem, must also be understood in this sense. However, since the rules on threshold prices were plainly concerned with the setting of fixed amounts corresponding to the principles of the structure of the system of levies under Regulation No 19 which was operated by using fixed figures whereas the actual production cost of imported goods was of no importance it cannot be doubted that in principle only a method of using fixed amounts could be taken into account with regard to all the relevant marketing costs. Thus it is ultimately of no moment whether, as the plaintiff asserts, the turnover equalization tax must be assessed in accordance with the actual import value, or whether the interpretation of the Commission must prevail, namely, (in accordance with data supplied by the German financial authorities) fixed average values formed the basis of the turnover equalization tax on imported cereals.

In sum, the reply to the first question must be that in accordance with the system of Regulation No 19 the national threshold price was to be reduced, by means of a calculation of a general nature, by an amount which took the turnover equalization tax into consideration, thus reducing the levy.

The second question

In a further question the Finanzgericht asks whether a calculation of the threshold price which does not accord with the principles of Article 4 of Regulation No 19, may become binding through its being approved through the conduct of the Commission. In this connexion the Court clearly had in mind the fact that Regulation No 122 of the Commission on the revision of the German threshold prices made no criticism of the failure to take the turnover equalization tax into consideration and likewise that no objections were raised with regard to the subsequent modification of the provisions on threshold prices which took effect exclusively with regard to the future.

Also, with regard to this question, little comment is required since once again both parties to the main action are in agreement and both propose that the reply should be in the negative. It is clear from the system of the organization of the market in cereals that a negative reply is in fact appropriate. The organization of the market was based on a clear separation of duties and responsibilities. Whereas certain powers belonged to the Community institutions, the fixing of threshold prices was certainly the concern of the Member States. The authorization of the Commission was not required and, in accordance with the system of the regulation, an express provision would have been necessary for such a requirement. In this connexion, then, only the objective criteria exhaustedly listed in Article 4 of Regulation No 19 were binding on the Member States. If these criteria had not been observed it would indeed have been possible to have recourse to proceedings to rectify matters swiftly, or more pre-

cisely to the Commission's power of direct review. Nevertheless, the Commission had no margin of discretion in this sphere and indeed was also bound by the objective criteria of Article 4. The result is this: if the Commission failed to exercise its power of revision, or did so incompletely or erroneously, it in no way thereby rectified the fixing of a national threshold price which was not in unison with Article 4 of Regulation No 19. To decide otherwise amounts not only to ignoring the difficulties which were present in the initial stages of the operation of the Common Market, but in addition to failing to observe the powers reserved to the authorities whose duty it is to exercise a judicial review of the life of the Community.

Thus the second question must also in fact be answered in the negative, which indicates that on this point too the view expressed by the Bundesfinanzhof in a parallel case is untenable.

Conclusion

In conclusion, I accordingly propose the following reply to the questions which have been referred:

1. Article 4 of Regulation No 19 must be interpreted as meaning that in fixing threshold prices there must be deducted from the basic target price a fixed amount equivalent to the turnover equalization tax payable in respect of imports.

2. Although under the second paragraph of Article 4 of Regulation No 19 the Commission was empowered to review threshold prices, it could not sanction the erroneous calculation of national threshold prices either tacitly or by actions giving rise to presumptions of such sanction.