OPINION OF ADVOCATE GENERAL DARMON

delivered on 19 January 1993 *

Mr President,
Members of the Court,

1. Can cheddar cheese imported from New Zealand into a Community Member State and immediately re-exported to other Member States be the subject of positive monetary compensatory amounts on export if it was not subject to negative monetary compensatory amounts or minimum price rules when it was first imported? This is the substantive question which the Finanzgericht Hamburg has referred to the Court.

2. The German company General Milk Products GmbH (hereinafter 'the company'), a subsidiary of a New Zealand company, markets in the Community a number of milk products, in particular cheese, produced by the parent company. Although all of the goods are imported through the port of Hamburg — where they are all declared in order to be placed in free circulation in Germany — a portion is re-exported to other European States, in particular Denmark and France.

3. In respect of the applicable monetary compensatory amounts, these transactions were subject to two consecutive sets of rules.

4. Initially, following the Joint Discipline Arrangement between New Zealand and the Community concerning cheese, approved by Council Decision 80/272/EEC of 10 December 1979, [1] imports into the Community of cheddar cheese from that non-member country were subject to minimum price rules under Council Regulation (EEC) No 2915/79 of 18 December 1979, [2] as amended by Article 1 of Council Regulation (EEC) No 1463/82 of 27 May 1982. [3] As amended, Article 9 of Regulation No 2915/79 makes imports of cheddar cheese subject to a *free-at-frontier value* and to the payment of a levy. According to Article 8 of Commission Regulation (EEC) No 1767/82 of 1 July 1982 [4] and Note (12) to Part 5 of Annex I to Commission Regulation (EEC) 900/84 of 31 March 1984 [5] (hereinafter 'Note (12)'), no monetary compensatory amount is applicable to imports. Consignments which are

* Original language: French.

1 — Council Decision concerning the conclusion of the Bilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, p. 129). See in particular Annex 3 to the Memorandum of Understanding (p. 149).

2 — Council Regulation determining the groups of products and the special provisions for calculating levies on milk and milk products and amending Regulation (EEC) No 950/68 on the Common Customs Tariff (OJ 1979 L 329, p. 1).

3 — Regulation amending Regulation (EEC) No 2915/79 as regards the conditions for the entry of certain cheeses under certain tariff headings and Regulation (EEC) No 950/68 on the Common Customs Tariff (OJ 1982 L 159, p. 1).

4 — Regulation laying down detailed rules for applying specific import levies on certain milk products (OJ 1982 L 196, p. 1).

5 — Regulation fixing the monetary compensatory amounts and certain coefficients and rates required for their application (OJ 1984 L 92, p. 2).

re-exported to Community Member States may qualify for the application of positive monetary compensatory amounts under Article 1 of Regulation (EEC) No 974/71 of the Council of 12 May 1971, [6] in conjunction with Article 1 of Regulation No 900/84.

5. Subsequently, the minimum price rules were *suspended*, as from 16 December 1984, pursuant to Article 1 of Council Regulation (EEC) No 3340/84 of 28 November 1984 [7] amending once again Article 9(1) and points (e) and (f) of Annex II to Regulation No 2915/79, as a result of a new agreement between the Community and New Zealand. [8] All references to a free-at-frontier value were removed. Under these new rules imports of cheddar cheese continued to be exempt from the application of any monetary compensatory amount [9] on entry into the Community.

6. On 18 December 1984, the company obtained customs clearance from the Hauptzollamt Hamburg-Ericus for a consignment of cheddar cheese for release into free circulation and immediately re-exported part of it to Denmark and part to France.

7. On the basis of Note (12), as amended by Commission Regulation No 3522/84, [10] the company claimed from the Hauptzollamt compensatory amounts for the consignments exported from Germany. That request was refused.

8. The company appealed against that decision to the Finanzgericht Hamburg. It contended that there was no provision in the relevant legislation which restricted the application of compensatory amounts on exports to products originating in the country of exportation or products imported into the Member State of exportation and which were subject to compensatory amounts or minimum price rules. It argued that Article 16(2) of Commission Regulation (EEC) No 1371/81 of 19 May 1981 [11] required only that the products must have left the territory of the exporting Member State. [12]

9. In the question which it has referred to the Court, the national court wishes to know whether the provisions of Regulation No 900/84, in conjunction with those of Regulation No 1371/81, are to be interpreted as meaning that when New Zealand cheddar cheese is imported into a Member State without being subject to negative monetary compensatory amounts or minimum price rules, positive monetary compensatory amounts are not applicable at the time of its re-exportation to another Community Member State. [13]

6 — Regulation on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (OJ, English Special Edition 1971 (I), p. 257).

7 — Regulation amending Regulation (EEC) No 2915/79 as regards the implementation of new rules for importing certain cheeses from Australia and New Zealand (OJ 1984 L 312, p. 5).

8 — See Council Decision 84/561/EEC of 22 November 1984 concerning the conclusion of an Agreement in the form of an exchange of letters between the European Economic Community and the Government of New Zealand amending the Joint Discipline Arrangement between New Zealand and the Community concerning cheese (OJ 1984 L 308, p. 59), and the second recital in the preamble to Regulation No 3340/84.

9 — Pursuant to Note (12), as amended by Commission Regulation (EEC) No 3522/84 of 14 December 1984 amending Regulation (EEC) No 900/84 with regard to the non-application of monetary compensatory amounts on certain cheeses imported from Australia and New Zealand (OJ 1984 L 328, p. 18).

10 — See references in footnote 9.

11 — Regulation laying down detailed rules for the administrative application of monetary compensatory amounts (OJ 1981 L 138, p. 8).

12 — Order of the national court, pages 3 and 4 of the French translation.

13 — Order of the national court, p. 2 of the French translation.

10. It is well known that the purpose of monetary compensatory amounts is to safeguard the principle of guaranteed institutional prices in a Community in which there are no fixed exchange rates or monetary union, through a mechanism which in practice avoids the exchange risk. [14] They operate within the framework of the common agricultural policy.

11. The objective of that policy is to stabilise the income of farmers by providing, for a large number of agricultural products, common organizations of the markets with guaranteed prices fixed in a common monetary unit, the unit of account. These prices are converted into national currency at an exchange rate known as the 'green rate'. By definition, the guaranteed prices cannot vary each week in response to currency fluctuations. The prices fixed in each national currency may vary between two agricultural seasons as a result of a depreciation or revaluation of the currency.

12. The purpose of monetary compensatory amounts is precisely to compensate for the price differences on exports and imports resulting from the monetary discrepancy between the green rate, in which prices are fixed, and the market rate of the relevant currency. By neutralizing the disturbances on the market in agricultural products caused by fluctuations in national currencies, the compensatory amounts make it possible to guarantee a single price. [15]

13. Compensatory amounts are positive or negative. They are positive when they compensate for a national price level which is higher than the level of Community prices and they are negative if the opposite is the case. [16] Positive amounts are charged on imports and granted on exports by way of levies and refunds. Conversely, negative amounts are charged on exports and granted on imports. [17]

14. Although there is no intervention price in the Community for cheddar cheese, it may nevertheless be subject to the application of monetary compensatory amounts as a derivative of a product subject to an intervention price (milk).

15. As we have seen, this product was originally subject to minimum price rules the effect of which was to bring its import price closer to or align it with Community prices.

16. As the minimum price was expressed in ECU, it was not necessary to apply monetary compensatory amounts for the importation of the product in question. [18]

17. In the case of re-exportation to another Member State, however, it was necessary to apply monetary compensatory amounts in the event of differences between the market rates and the green rates of the currencies in

14 — Judgment in Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 41.

15 — See, for instance, the judgment in Case 4/79 *Providence Agricole de la Champagne* v *ONIC* [1980] ECR 2823, paragraph 22.

16 — See Article 2 of Council Regulation (EEC) No 1677/85 of 11 June 1985 on monetary compensatory amounts in agriculture (OJ 1985 L 164, p. 6). See also Barthelemy and Heine, 'Les montants compensatoires monétaires et leur démantèlement', *Cahiers de droit européen*, 1987, pp. 397-434.

17 — Article 1 of Regulation No 1371/81.

18 — See the second recital in the preamble to Commission Regulation (EEC) No 3014/79 of 27 December 1979 amending Regulation (EEC) No 2140/79 as regards certain monetary compensatory amounts for milk and milk products (OJ 1979 L 337, p. 73).

question. It was therefore justifiable, in the case of re-exportation of a product to a Community Member State with a weaker currency, to make that product eligible for positive amounts granted on exports, in order to make it possible to market it in any Member States whose currency, at the time, had depreciated in relation to that of the State of origin.

18. What is the position when the goods imported into the Community are no longer subject to a minimum price?

19. Here also, it is not necessary to apply monetary compensatory amounts to imports from non-member countries. The freely negotiated prices are automatically converted, at the market rate, into the currency of the importing State without any risk of change arising from the application of the green rate.

20. If at the time of its introduction into the Community a product was not made subject to the monetary policy of the common organization of the markets, would it not be true to say that a positive amount, granted on export, would amount in effect to a *bonus* given without consideration, in short, a present to the exporter, since the product was never made subject to the conditions of the Community market?

21. An analysis of the underlying principle is enlightening here: it would appear *prima facie* that the absence of minimum price or monetary compensatory amounts on imports into the Community must preclude any right to receive monetary compensatory amounts on re-exportation to another Member State.

22. In the *Lesieur Cotelle* case, [19] Advocate General Warner stated that:

'... there is ample authority in this Court that monetary compensatory amounts may only be applied where they are necessary to avoid disturbance of the functioning of the common organization of the market in particular products; that the Commission is bound to abolish them where it is satisfied that market conditions make them unnecessary for that purpose; and that the Commission has in this respect a wide power of appraisal'. [20]

23. Was the suspension of the minimum price rules as from 16 December 1984 accompanied by that of compensatory amounts on exports?

24. In a matter as technical and complex as that of monetary compensatory amounts, the principle of legal certainty requires that legislative texts be self-explanatory and that the rights and obligations of traders be clearly set out in the legislation on which they must be able to rely.

25. Applying that principle to the subject-matter at present under discussion, the Court held in its judgment in Joined Cases 92/87 and 93/87 *Commission* v *France and United Kingdom* [21] that:

'according to the case-law of the Court (see the judgment of 9 July 1981 in Case

19 — Judgment in Joined Cases 67/75 to 85/75 *Lesieur Cotelle and Others* v *Commission* [1976] ECR 391; Opinion at p. 412.

20 — At p. 418.

21 — [1989] ECR 405.

169/80 *Administration des douanes* v *Gondrand frères* [1981] ECR 1931), the principle of legal certainty requires that rules imposing charges on the taxpayer be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly'. [22]

26. On the basis that compensatory amounts on imports were no longer applicable, did the rules on monetary compensatory amounts applied to cheddar cheese imported from New Zealand clearly suspend the granting of those amounts on re-exportation of the product in question with effect from the day on which it was no longer subject to minimum price rules?

27. The granting of compensatory amounts on re-exportation of cheddar cheese is based on Article 2(1) of Regulation No 1371/81, which provides that compensatory amounts are to be applied to products being imported or exported, provided that other regulatory provisions do not exclude such application.

28. It should be stated at the outset that none of the provisions applicable to the product in question provides for such an exclusion.

29. The original version of Note (12) provided that no monetary compensatory amount was to be applicable to certain *imported* cheeses, whether subject to minimum price rules [23] or excluded therefrom. [24]

30. Similarly, the previous regulations referred to the exclusion of monetary compensatory amounts only in the case of *imported* cheeses. [25]

31. Note (12), as amended by Article 1 of Regulation No 3522/84, provides that:

'No compensatory amounts shall be applicable on imported cheeses covered by the provisions of Articles 7(1), 9(1), 10 and 11 of amended Regulation (EEC) No 2915/79, provided that the free-at-frontier value applicable for the cheese in question, if one has been laid down, is respected or that the import price is not less than the amount specified in Article 11(1) of that Regulation for the cheese in question, or on the cheeses specified in Article 11(2) of that Regulation, provided that they are covered by (e), (f) or (r) of Annex II to that Regulation if it is established that they correspond to the description given therein'. [26]

32. The first half of the sentence primarily concerns products imported on the basis of a minimum free-at-frontier value. It excludes monetary compensatory amounts on *imported* cheeses. Only the second half of the sentence concerns New Zealand cheddar cheese imported without being subject to the

22 — Paragraph 22.

23 — First part of the sentence.

24 — See point (r) of Annex II to Regulation (EEC) No 2915/79 inserted by Council Regulation (EEC) No 3042/82 of 15 November 1982 amending Regulation (EEC) No 2915/79 with regard to the application of a reduced levy in respect of certain cheeses (OJ 1982 L 322, p. 1).

25 — See in particular Note (13) of Commission Regulation (EEC) No 2140/79 of 28 September 1979 (OJ 1979 L 247, p. 1) as amended by Regulation No 3014/79, and the Commission's answer to the second question put by the Court.

26 — Points (e) and (f) of Annex II apply to cheddar cheese.

minimum price rules. It does not specify whether the exclusion of monetary compensatory amounts applies only to *imports* of cheeses or whether it also applies to their *re-exportation* to another Member State.

33. Like the Commission, I take the view that Note (12), as amended, excludes the application of monetary compensatory amounts to products *imported from a non-member country* but does not prohibit such amounts from being applicable on the *re-exportation* of such products to another Member State.

34. The first half of the sentence relates to products which are subject to minimum price rules and provides that no monetary compensatory amount is applicable so long as the free-at-frontier value is respected. Such a value exists only for imports from non-member countries.

35. Taking into account the suspension of the minimum price, the second half of the sentence, which covers *inter alia* cheddar cheese, does not refer to the free-at-frontier value. It refers back to the designation of cheddar cheese described in points (e) and (f) of Annex II, which refer to an annual tariff quota which can relate only to imports from non-member countries.

36. Furthermore, the concept of monetary compensatory amounts cannot be interpreted differently in the first and second halfs of the same sentence.

37. Finally, the second recital in the preamble to Regulation No 3522/84 shows that the amendments to Note (12) were designed to take account of the new situation created by the suspension of minimum prices for cheddar cheese imported from Australia and New Zealand. This explains why the reference to Article 9(1) of Regulation No 2915/79, in so far as it concerns cheddar cheese, was transferred from the first to the second part of the Note, in order to take account of the suspension of minimum price rules without amending the rules of monetary compensatory amounts, particularly in the case of re-exportation.

38. Therefore, the suspension of minimum prices on imports did not give rise to different rules regarding monetary compensatory amounts: in particular, it did not make it impossible to charge compensatory amounts on re-exportation. The rules do not make the application of compensatory amounts to exports conditional on the existence of minimum price rules or monetary compensatory amounts on imports.

39. Moreover, Article 8 of Regulation No 1767/82 expressly provides that 'no monetary compensatory amounts shall apply when the products specified in Annex I (a), (b), (d), (e), (f), (g), (i), (k), (l) and (m) are put into free circulation'. [27]

40. In view of Article 10(1) of the Treaty and Article 1(2)(b) of Regulation No 1371/81, the phrase 'release for free circulation' must be interpreted in this case as

27 — Cheddar cheese from Australia and New Zealand is mentioned in points (e) and (f) of the annex.

applying specifically and in a restrictive sense to imports from a non-member country.

41. It should be noted that Article 8 of Regulation No 1767/82 was amended by Article 1 of Commission Regulation (EEC) No 611/88, [28] which provides that where certain products, already put into free circulation in the importing Member State, are despatched to another Member State or re-exported, no monetary compensatory amount can apply. New Zealand cheddar cheese, however, is not included among the products referred to.

42. Accordingly, there is no legislative provision which excludes the granting of monetary compensatory amounts on the re-exportation to a Member State of cheddar cheese imported from New Zealand into the Community. There was therefore no express provision which could have made traders believe that they would have no entitlement to monetary compensatory amounts in the event of re-exportation.

43. Those amounts are therefore applicable, pursuant to Article 2(1) of Regulation No 1371/81, provided that the conditions imposed by that provision are satisfied. If it is shown that the product has left the territory of the exporting Member State, the monetary compensatory amount may be payable. [29]

44. There is one final point. Will the solution be the same in the case where the goods were imported into the first Member State only to be immediately re-exported to another Member State without effective release on to the market of the first State?

45. In the *Töpfer* case, [30] a cargo of wheat was loaded in Denmark for delivery in the Federal Republic of Germany. The exporter planned to stop in the United Kingdom on its way, for the sole purpose of obtaining the 'accession' monetary compensatory amount, since prices were lower in this new Member State. The Court held that:

'... an exporter who sends agricultural products to a new Member State from a Member State which applies higher prices may not claim payment of "accession" compensatory amounts if the completion of customs formalities in the Member State declared to the competent authorities in the exporting Member State as the State of destination is not followed by the *effective release* of those products on to the market of the latter State'. [31]

46. On the face of it — a point which in any event is for the national court to decide — there is no evidence in this case which would suggest that the release for free circulation in Germany was purely fictitious in order solely to qualify for positive monetary compensatory amounts on re-exportation.

28 — Regulation of 4 March 1988 amending Regulations (EEC) No 1767/82 and (EEC) No 3938/87 as regard the non-application of monentary compensatory amounts for certain cheeses imported under special conditions (OJ 1988 L 60, p. 19).

29 — Article 16(1) Regulation (EEC) No 1371/81.

30 — Judgment in Case 250/80 [1981] ECR 2465.

31 — Paragraph 18, emphasis added.

47. As observed by the court making the reference, [32] the application of positive monetary compensatory amounts may be excluded only if it can be shown that the exporter had intended to abuse the system of monetary compensatory amounts, which has not at all been established.

48. I propose therefore that the Court reply to the question submitted in the following terms:

The provisions of Regulation (EEC) No 1371/81, in conjunction with those of Regulation (EEC) No 900/84, as amended by Regulation (EEC) No 3522/84, are to be interpreted as meaning that positive monetary compensatory amounts may be applied to the re-exportation, to a Member State, of cheddar cheese imported from New Zealand into another Member State, although no negative compensatory amount or minimum price rules were applied on the importation into that latter State, unless it can be shown that the release of the product into free circulation in that State was dishonestly effected for the sole purpose of improperly benefiting under the above rules.

32 — Order of the national court, p. 7 of the French translation.