# OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 23 September 1999 *

1. By an application under Article 169 of the EC Treaty (now Article 226 EC), the Commission requested the Court to declare that the Federal Republic of Germany (hereinafter the 'FRG') had failed to fulfil its obligations under the Treaty and Commission Regulation (EEC) No 2252/90 of 31 July 1990 concerning the methods of implementation of Council Regulation (EEC) No 2060/90 on transitional measures concerning trade with the German Democratic Republic (hereinafter the 'GDR') in the agriculture and fisheries sector. [1]

In particular, the Commission charges the FRG with having prematurely discontinued customs controls at the frontier with the GDR and not having collected the import levy on a consignment of butter from that country.

## Relevant provisions

2. At the time the events took place, trade between the GDR and the FRG was governed by the *Staatsvertrag* (State treaty on economic, monetary and social union) of 18 May 1990, which had entered into force prior to the political unification of the two Germanies, which dated from 3 October that year. Under that Treaty, the GDR undertook to introduce the basic rules of a market economy. Trade with the FRG, as far as goods produced in the GDR were concerned, was treated as inter-regional trade. As regards relations with the Community, the GDR ensured free access to Community goods with effect from 1 July 1990 on condition that the Community did likewise. Customs procedures in relations with third countries were identical to those applied by the FRG. The GDR furthermore undertook to apply Community customs arrangements gradually and adopt the Common Customs Tariff. In the agricultural sphere, it undertook to introduce a system of price support and external protection similar to that built into the common agricultural policy.

3. As regards the Community arrangements, it should be observed first of all that, pursuant to Article 1(c) and Article 14(2) of Regulation No 804/68 of the Council of 27 June 1968 on the common

* Original language: Italian.

1 — OJ 1990 L 203, p. 61.

organisation of the market in milk and milk products,[2] a levy is to be charged on imports of butter into Community territory. This levy was, however, suspended — under certain conditions which I will set out below — in respect of imports from the GDR. Some regulations which the Council and Commission adopted in July 1990 with a view to regulating the transitional period preceding the union between the GDR and the FRG and, accordingly, full application of Community law in the *Länder* which were formerly part of the territory of the GDR, are of importance in this connection.

4. First among these is Council Regulation (EEC) No 1794/90 of 28 June 1990 on transitional measures concerning trade with the German Democratic Republic.[3] The first and third recitals in the preamble to this regulation are respectively worded as follows:

'Whereas the Federal Republic of Germany and the German Democratic Republic have concluded a Treaty (*Staatsvertrag*) for the immediate establishment of a monetary union and for the progressive integration of the German Democratic Republic into the economic and social system of the Federal Republic of Germany and into the legal system of the Community in advance of the formal unification of the two Germanies';

'Whereas, during the period preceding unification, rules governing trade between the German Democratic Republic, on the one hand, and the Federal Republic of Germany and other Member States of the Community, on the other, should be geared towards the free access of Community products to the German Democratic Republic and towards equivalent access to the Community for the latter's products'.

5. It is provided in Article 1(1) of that regulation that '[i]n so far as the Commission establishes, under the procedure laid down in Article 4, that the conditions of Article 2 are met, the application of customs duties... shall be suspended... in Community trade with the German Democratic Republic.'

However, the first sentence of the third paragraph of that article states that '[t]his Regulation shall not apply to the agricultural products referred to in Annex II to the Treaty'. Chapter 4 of the list in that Annex includes milk and milk products, and accordingly also the product whose importation is the subject of the present case.

2 — OJ 1968 L 148, p. 13.
3 — OJ 1990 L 166, p. 1.

Article 2 of Regulation No 1794/90 empowered the Commission to take the implementing measures to the extent that the German Democratic Republic 'introduces into its trade with third countries the Common Customs Tariff... or, particularly in the cases provided for under paragraph 2, measures ensuring that the provisions laid down by the Community with regard to third countries are not circumvented' and 'takes, or is making preparations to take, measures guaranteeing free access for Community goods.'

6. On the basis of the rules I have just cited, the Commission adopted Regulation (EEC) No 1795/90 of 29 June 1990 concerning the methods of implementation of Council Regulation (EEC) No 1794/90. [4] Given the fact that in the case of non-agricultural products 'the conditions set out in Article 2 of Regulation (EEC) No 1794/90 are fulfilled' (third recital in the preamble), Article 2 of Regulation (EEC) No 1795/90 provides as follows:

'1. The Community transit procedure shall apply to the movement of goods between the Community and the German Democratic Republic.

2. For the implementation of this procedure and without prejudice to the implementation of Article 3, the "German Democratic Republic" shall be considered as forming part of the Community.

3. Within the meaning of this Article the movement of goods between the Federal Republic of Germany and the German Democratic Republic shall be considered to be carried out within the territory of a single Member State.'

7. The transitional arrangements were extended to the agriculture and fisheries sectors by Council Regulation (EEC) No 2060/90 of 16 July 1990 on transitional measures concerning trade with the German Democratic Republic in the agriculture and fisheries sector. [5] Given the fact that 'Article 15 of the *Staatsvertrag* provides for the German Democratic Republic to suspend the collection of levies and the grant of refunds on trade with the Community in the agriculture sector provided that the Community does likewise' [6] and that accordingly 'in view of the scheme introduced or to be introduced by the German Democratic Republic, the Community should adopt specific rules for agricultural products, whether or not processed', [7] the regulation provides, in Article 2, that '[I]n so far as the Commission establishes,... that the conditions of Article 3 are met, the collection of levies and the application of other charges,... shall be suspended... in Community trade with the

4 — OJ 1990 L 166, p. 3.

5 — OJ 1990 L 188, p. 1.

6 — Third recital in the preamble.

7 — Fourth recital in the preamble.

German Democratic Republic.' The conditions in Article 3 comprise the establishment by the GDR of mechanisms similar to those of the common agricultural and fisheries policies and the taking of measures guaranteeing free access for Community goods.

8. On the basis of that provision, the Commission adopted Regulation (EEC) No 2252/90. Given that 'mechanisms similar to those of the common agricultural policy are to be applied by the German Democratic Republic' and it 'is to grant free access to its territory to Community goods on a reciprocal basis',[8] the Commission, in Article 1(1) of the regulation 'established that the conditions laid down in Article 3 of Regulation (EEC) No 2060/90 are met in respect of the products referred to in Article 1 of the said Regulation', among them the products concerned in the present case. Moreover, still pursuant to the last regulation cited and in order to avoid abuses or intentional 'misuses' in trade in goods, the collection of levies in trade between the GDR and the Community in the agriculture and fisheries sector was only suspended subject to a number of conditions. Pursuant to Article 1(2), that suspension could only arise in respect of products:

'— wholly obtained in the German Democratic Republic,

— imported and released for free circulation in the German Democratic Republic on collection of a levy at the Community level,

— imported from the Community and released for free circulation in the German Democratic Republic without benefit of any Community export refund.'

9. Article 2 of that regulation further provides that Articles 2 to 5 of Regulation No 1795/90 apply to the movement of the products and goods referred to in Article 1 of Regulation (EEC) No 2060/90 between the Community and the GDR, including the products concerned in the present case.

10. As regards the customs legislation in force — in particular the rules on the arising of customs debt — Article 1(2)(a) of Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt[9] defines customs debt as 'the obligation on a person to pay the amount of the import duties (...) or export duties (...) which apply under the provisions in force to goods liable to such duties.' Article 2 of that regulation provides that the unlawful introduction into the customs territory of the Community of

8 — Second recital in the preamble.

9 — OJ 1987 L 201, p. 15.

goods liable to import duties incurs a customs debt on importation. 'Unlawful' means any introduction into the customs territory of the Community in breach of Articles 2 and 3 of Council Regulation (EEC) No 4151/88 of 21 December 1988 laying down the provisions applicable to goods brought into the customs territory of the Community. [10].

Article 2 of that regulation provides that '[G]oods brought into the customs territory of the Community shall, from the time of their entry, be subject to customs supervision.' In accordance with Article 1(2), 'customs supervision' means 'action taken in general by the customs authority with a view to ensuring compliance with customs rules and, where appropriate, with other rules applicable to goods brought into the customs territory of the Community.' Article 3(1) then provides that '[G]oods brought into the customs territory of the Community shall be conveyed by the person bringing them into the Community without delay... to the customs office.' According to paragraph 2 of that article, '[a]ny person who assumes responsibility for the carriage of goods after they have been brought into the customs territory of the Community... shall become responsible for compliance with the obligation laid down in paragraph 1'.

11. Reference should finally be made to Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources. [11] Article 1 of that regulation provides that the Community's own resources, including agricultural levies, 'shall be made available to the Commission and inspected as specified in this regulation'. It is stated in the following article that '[F]or the purpose of applying this regulation, the Community's entitlement to... own resources... shall be established as soon as the amount due has been notified by the competent department of the Member State to the debtor. Notification shall be given as soon as the debtor is known and the amount of entitlement can be calculated by the competent administrative authorities, in compliance with all the relevant Community provisions'. Article 9(1) adds that 'each Member State shall credit own resources to the account opened in the name of the Commission with its treasury or the body it has appointed.' Finally, Article 17(1) provides that 'Member States shall take all requisite measures to ensure that the amount corresponding to the entitlements established under Article 2 are made available to the Commission as specified in this regulation'. In the first sentence of subparagraph (2) it is stated that 'Member States shall be free from the

10 — OJ 1988 L 367, p. 1.

11 — OJ 1989 L 155, p. 1.

obligation to place at the disposal of the Commission the amounts corresponding to established entitlements solely if, for reasons of *force majeure*, these amounts have not been collected'.

## Facts and pre-litigation procedure

12. Between 15 and 24 August 1990, consignments of butter exported from the Netherlands, benefiting from export refunds, were imported into the GDR and then immediately taken into FRG territory. At the time of importation into the FRG, the German authorities did not apply any levy to the goods in question.

13. By letter of 22 June 1994, the Commission notified the German authorities that, since the conditions in Art 1(2) of Regulation No 2252/90 had not been met, the importation from the GDR of the products referred to above should have been subject to the collection of a levy pursuant to the relevant provisions governing the importation of agricultural products into Community territory. The Commission therefore requested the German Government to make available to it, by 15 September 1994, the sum of DEM 12 684 000, corresponding to the uncollected levies. The Federal Government replied it was not bound to pay the above sum since, in its opinion, no customs obligation arose on the entry of the goods into its territory. The Federal Government also pointed out that responsibility for the detriment to Community finances should ultimately be ascribed to the conduct of the Netherlands authorities which had wrongly granted the export refunds in respect of the consignments of butter in question.

14. The Commission, finding the German Government's arguments inadequate, then initiated the infringement procedure by sending it a letter of formal notice on 13 September 1995. As the German Government, by letter of 12 January 1996, maintained its position, the Commission adopted a reasoned opinion on 30 October 1996 with which it confirmed the accusations that the obligations relating to the collection of levies on imports of agricultural products from third countries had been breached. As the German Government did not conform to the reasoned opinion within the time-limit set, the Commission brought the present action on 2 October 1997.

## Substance

*Arguments of the parties*

15. The Commission contends that the disputed consignments of butter should have been subject to the customs levies provided for by the relevant Community provisions. More specifically, the Commission charges the FRG with failure to collect

the levy due when the goods in question crossed the border and with the premature abolition of all inter-German border controls at a time when the legislation in force still required control of imports of goods from the GDR.

16. As regards the first of these charges, the Commission maintains that, in accordance with Article 14(2) of Regulation No 804/68, butter falls within those products whose importation is subject to levy. In its submission, the conditions for a suspension of the collection of the levy set out in Article 1(2) of Regulation No 2252/90 had not been met at the time the Netherlands butter crossed the FRG border. Whereas the provision referred to did permit suspension where it was proved that the products had been 'imported from the Community and released for free circulation in the German Democratic Republic without benefit of any Community export refund', in the present case the butter consignments had the benefit of refunds in the Netherlands at the time of their export to the GDR. The Commission concludes that the defendant ought accordingly to have collected the levy, the amount of which should have been made available to the Commission pursuant to Regulation No 1552/89.

17. In the Commission's submission, a customs obligation within the meaning of Article 1(2)(a) of Regulation No 2144/87 arose at the time the border between the two Germanies was crossed. Since the party which arranged the importation of the goods into Community territory had not paid the agricultural levies, the goods were improperly introduced into Community territory. In the light of Article 2(1) of Regulation No 1552/89, cited above, the failure to collect the customs debt due caused economic loss to the Community.

18. The Commission next observes that, in this connection, no relevance can be attributed to the fact that the export refund was erroneously granted when the goods were exported from the Netherlands. Even assuming that argument were true and that, by virtue of court proceedings instituted in the Netherlands, the sums could be recovered, this could not in any event rule out liability on the part of the German authorities, since the rules governing the export and import of agricultural products are based on two autonomous Community systems, which must consequently be clearly distinguished. There is therefore nothing to prevent proceedings being taken simultaneously in respect of the two infringements of Community law, namely the erroneous grant of the export refund and the failure to collect the levies.

19. What is more, according to the Commission, it may be the case that the amounts of the agricultural levy and of

the export refund are not equivalent; this is so in the present case. While it is true that, under Article 1(2), third indent, of Regulation No 2252/90, there is a link between the suspension of collection of the levies and the export refund granted, this is to be explained, according to the Commission, solely by the special relation created through the *de facto* agricultural union established on 1 August 1990 between the GDR and the European Community. Those relations are characterised by the introduction, in the former GDR, of mechanisms corresponding to those of the common agricultural policy so as to guarantee free access to the market of the GDR for Community goods. In the present case, however, the favourable treatment cannot be granted, inasmuch as the consignments of butter in question had been exported from the Netherlands to the FRG via the former GDR, benefiting — improperly — from the export refund. No reimbursement of the refund can result in the butter being able to be considered *a posteriori* as goods which did not benefit from refunds.

20. The FRG replies that, contrary to what the Commission maintains, no customs delay arose in this case. It points out that, pursuant to Article 2(1)(b) of Regulation No 2144/87, for a customs debt to be incurred it is necessary that the goods in question should not only be among those whose importation is the subject of levy, according to the relevant Community rules, but also that the goods themselves should have been unlawfully introduced into Community territory. In its submission, in the present case there was no 'unlawful introduction' inasmuch as when the goods entered FRG Territory no Community or national rule in force regulated the presentation at the customs of products like those in question following the crossing of the inter-German border. Regulation No 2252/90, cited by the applicant, does not in fact contain any rule relating to the procedure to be followed in respect of products falling within its scope. In particular, the regulation does not provide for any control measure which the Member States ought to have adopted so as to guarantee the collection of agricultural levies in all cases where products exported from the Community with an export refund were then introduced into the FRG. At the material time, no provision existed, according to the defendant, which an economic operator could have infringed at the time of the importation of the products. This logically rules out any obligation on the part of the German authorities to guarantee the payment of agricultural levies.

21. The defendant also observes that the same conclusion ought also to be reached, as regards the absence of formalities to be complied with at the time of the introduction of the products in question into the territory of the FRG, in relation to the provisions of Regulation No 1795/90, to which Article 2 of Regulation No 2252/90 refers. The first of those regulations provides, in Article 2(1), for the Community transit system to apply to the movement of goods between the Community and the German Democratic Republic and the same system applies to agricultural products pursuant to Regulation No 2252/90. However, contrary to what is maintained by the Commission, the provisions of the two

regulations are not applicable to trade between the FRG and the GDR, but solely to trade between the GDR, on the one hand, and the other Member States of the Community on the other. This follows, according to the German Government, from the fact that Article 2(3) of Regulation No 1795/90 (a provision to which Article 2 of Regulation No 2252/90 also refers in respect of the agricultural sector) provides that '[W]ithin the meaning of this Article the movement of goods between the Federal Republic of Germany and the German Democratic Republic shall be considered to be carried out within the territory of a single Member State'.

The defendant also points out that with the constitution of a '*de facto* economic union' between the two Germanies, following the entry into force on 1 July 1990 of the *Staatsvertrag*, no rule relating to the clearance of goods at the border could have been infringed. Whatever the origin of the goods, no measure involving customs clearance or customs supervision could be applied to consignments of butter which, in free circulation in the territory of the GDR, had been introduced in August 1990 into the territory of the FRG.

22. The Commission next submits that the abolition of customs controls at the border between the two Germanies in respect of goods which, pursuant to the legislation referred to, ought to have been subject to levy, constitutes a further breach of Community law. Up to 3 October 1990 (the date of unification), the border between the FRG and the GDR continued to be an external border of the Community, a situation which could not be altered following the unilateral constitution, pursuant to the *Staatsvertrag*, of a monetary, economic and social union between the two Germanies. Regulation No 2252/90 allows a different solution solely as regards goods which could not have been subject to levy inasmuch as they fell within one of the three categories referred to in Article 1(2). The FRG is therefore guilty of having prematurely abolished controls at its own borders.

According to the Commission, Regulation No 2252/90 was expressly aimed at preventing the entry of products into the FRG — as part of Community territory — being able to take place via the GDR without collection of the levy. In this connection, the Commission refers to the wording of the fifth recital in the preamble to that regulation, cited above. It considered it to be obvious that the maintenance of the control measures was essential for verifying compliance with the conditions imposed by the regulation for goods originating from the GDR to be able to benefit from the suspension of collection of levies. Goods not falling within the three categories had, in the Commission's view, to be subjected to the levies provided for by general legislation, so that the customs supervisory measures did not in any way become pointless. The premature abolition of all border controls, on the other hand, opened up a breach of the single market's external protection system, from which the parties involved in the trade in the goods in

question have knowingly benefited, as is shown by the investigations carried out in March 1992 by the Düsseldorf customs investigation services. The Commission therefore concludes that, by prematurely abolishing customs control in the trade in the butter consignments between the two Germanies, the FRG committed an infringement of Community law which encouraged failure to collect the levies payable and therefore caused a loss to Community finances.

23. The FRG replies that the purpose of customs and agricultural union between the Community and the GDR was precisely to discontinue controls on goods crossing the border between the two Germanies. The establishment of the *de facto* union with effect from 1 July 1990 (and from 1 August 1990 in the case of agricultural products) was not only provided for by the agreement between the two Germanies but expressly called for by the Commission in the course of meetings held between the German customs administration and officials from the Commission. The defendant further observes that the only parties on whom obligations are incumbent in connection with customs relations are private individuals and not States. No customs debt can therefore be imputed to the State for discontinuing formalities at the border between the two Germanies. The conduct — allegedly not in accordance with Community obligations — which the Commission attributes to the FRG is therefore at a different level from that of customs debts, involving the legal relations between the Community, on the one hand, and a Member State or the GDR, on the other.

**On the existence of the failure to fulfil obligations**

24. Proceeding now to examine the merits of the pleas put forward by the Commission, it should be observed first of all that the facts on which those pleas are founded are not disputed. In August 1990, consignments of butter were introduced into FRG territory which were not subjected to any levy pursuant to the relevant Community provisions relating to the system of agricultural prices. These goods came from GDR territory which they had reached from the Netherlands, a Member State where they had benefited from export refunds. The dispute between the two parties in the present proceedings relates to the conformity, or otherwise, of the FRG's failure to collect agricultural levies when the goods from the GDR entered its territory, with the obligations arising from the Treaty and from the Community regulations on trade in agricultural products with third countries. It is further alleged — and this, as in my opinion, is a plea which, in one way or another, is subsumed under the first plea, alleging that the Community provisions in relation to customs control (and therefore Regulation No 4151/88) were infringed by reason of the premature abolition of customs formalities. In the Commission's view, that abolition facilitated the failure to collect levies payable on

the importation of the consignments of butter into Community territory.

25. While not denying that the relevant Community requirements are not of shining clarity, I would say at the outset that the pleas put forward by the Commission do appear well founded. At the time when the disputed consignments of butter entered FRG territory, the relevant Community provisions required customs controls to be maintained at the inter-German border. Before the actual incorporation into the FRG of the five *Länder* which previously constituted the GDR, which took place with the entry into force in October 1999 of the Treaty on Union, [12] the GDR was to be regarded in law as a third country in relation to the Community, with obvious consequences in terms of customs controls on the crossing of goods at the border and therefore of the application of the rules relating to the collection of agricultural levies. Any deviations from the general system could not plainly arise from the application of the *Staatsvertrag*, which established a monetary, economic and social union between the two Germanies with effect from 1 July 1990. Formally, the *Staatsvertrag* is an agreement concluded between one Member State and a third country, which cannot bind the Community inasmuch as it is not a contracting party. Accordingly, the entry into force of that agreement cannot, as such, have the effect of amending Community provisions or creating new obligations for the Community. Relations between the GDR and the Community, in short, continued to be governed by the Community provisions applicable — in the case before us with, by the general rules governing the importation of agricultural products from third countries.

26. It is true that, taking account of the *Staatsvertrag* [13] and in the perspective of the extension of Community law to the five *Länder* of the former GDR, the Community introduced a transitional system which partly derogated from the general system for customs treatment of goods from third countries in the case of goods coming from the GDR. Pursuant to 2(1) of Regulation No 2060/90, the collection of levies and the application of other charges, quantitative restrictions and measures having equivalent effect under the common arrangements is suspended for agricultural products referred to in Annex II to the EC Treaty, under certain conditions. By Regulation No 2252/90, the Commission, while it established that the conditions stipulated by the Council were met, limited this suspension exclusively to the products listed in Article 1(2), specifically those 'wholly obtained in the German Democratic Republic', 'imported and released for free circulation in the German Democratic Republic on collection of a levy at the Community level' and 'imported from the Community and released for free circula-

12 — It is therefore only from that time that, pursuant to the provisions relating to the territorial sphere of the Treaties (Article 227 of the EC Treaty (now, after amendment, Article 299 EC), Article 79 of the ECSC Treaty and Article 198 of the Euratom Treaty), Community law extended automatically to the new territories.

13 — The agreement is in fact cited in the first recital in the preamble to Regulation No 1794/90 and the third recital in the preamble to Regulation No 2060/90.

tion in the German Democratic Republic without benefit of any Community export refund.'

In the case we are concerned with, the importation of the consignments of butter does not fall within any of the categories listed. Although imported from the Community (the Netherlands) and placed in free circulation in the GDR, these goods had benefited in the Netherlands from export refunds. It is therefore obvious that they were not among those goods which could have benefited from the suspension of levies under Article 1(2) of Regulation No 2252/90.

27. However, the defendant maintains that the rules just cited do not apply *erga omnes* but concern solely relations between the GDR and the Member States of the Community other than the FRG. In other words, it maintains that at the time when the goods at issue crossed the inter-German border, the Community legislation in force did not require any customs formality for goods passing from the territory of the GDR to the territory of the FRG. In its view, this results from Article 2 of Regulation 2252/90 which reads: 'Articles 2 to 5 of Regulation (EEC) No 1795/90 shall apply to the movement of the products and goods referred to in Article 1 of Regulation (EEC) No 2060/90 between the Community and the German Democratic Republic'. [14] That provision refers to Article 2 of Regulation No 1795/90, and in particular paragraph 3 thereof, which provides that the movement of goods between the FRG and the GDR is to be considered to be carried out within the territory of a single Member State.

28. I do not consider that the interpretation of the Community legislation applicable which is put forward by the defendant is correct. On the contrary, it appears reasonable to consider that the reference made by Article 2 of Regulation No 2252/90 to Article 2 of Regulation No 1795/90 in fact concerns only goods falling within the categories listed in Article 1 of the former regulation, in other words those not subjected to levies by reason of crossing the inter-German border. In other words, the transitional arrangements governing trade in agricultural and fisheries products between the two Germanies were more rigorous and restrictive than those applicable to other products under Regulation No 1795/90. As the preamble to Regulation No 2252/90 points out, the limitation of the suspension of levies — which is not to be found in the general system for the movement of products between the GDR and the Community during the transitional period — is justified by the need to 'avoid products that are not priced at a similar level to that in the Community being imported into the Community without any levy being collected.' On a proper view, what is involved is precisely the situation which has come about in the case before us, in which the goods, originating in the Community, were re-introduced into

14 — The products in question are, I would point out, the agricultural products referred to in Annex II to the EC Treaty and goods resulting from the processing of agricultural products.

the common market while benefiting from both the export refund with a view to that introduction on to the market of a third country and from agricultural levies failing to be collected at the time of entry into FRG territory.

Any other reasoning would be tantamount to inferring from the Commission's regulation that there are two different systems for agricultural products imported from the GDR: the first, concerning trade between the GDR and the Member States of the Community excluding the FRG, would consist, on the one hand, of the suspension of the collection of agricultural levies and therefore the application of the Community internal transit system under the particular circumstances listed in Article 1(2) and, on the other, the collection of agricultural levies where those circumstances did not exist. The second system, applicable solely to trade between one Member State of the Community (the FRG) and the GDR, would mean that the movement of all goods, including agricultural products, would have had to be regarded as taking place in the territory of one Member State alone. I consider first of all that such a distinction ought to have emerged clearly from the text of the regulation concerning the treatment of agricultural products; yet this refers explicitly to the movement of goods between the Community (as a whole) and the GDR as an autonomous subject of international law. It cannot, however, be inferred from a general reference to a preceding regulation. Secondly, I would observe that accepting this reconstruction would risk rendering the rule referred to in Article 1(2) of Regulation No 2252/90 meaningless, inasmuch as all the products passing from the GDR to the FRG would have not only benefited from the complete abolition of agricultural levies on crossing the inter-German border but would then have been able to benefit from the system of the free movement of goods which is the subject of in Article 9 et seq. of the EC Treaty (now, after amendment, Article 23 et seq. EC) once they had entered Community territory.

29. I therefore consider that the reference to Article 2 of Regulation No 1795/90 should be regarded as a supplement to the rule contained in Article 1(2) of Regulation No 2252/90; on the one hand, the Community transit system, for the relations between the Community and the GDR, and, on the other, the legal fiction assimilating the territory of the two Germanies to that of a single Member State (with the result of excluding the internal transit system in respect of that trade) obviously can only relate to those products which benefit from the suspension of import levies on goods from the GDR, in other words products which have been obtained entirely in the GDR, or which have been imported and placed in free circulation there following the collection of a Community levy, or finally imported from the Community and placed in free circulation in the GDR without having benefited from any export refund. The products which did not fall within the three categories which I have just referred ought to have been subject to the collection of agricultural levies when

passing into the Community (as a whole) from the GDR.

30. The defendant's assertion that Regulation No 2252/90 does not lay down any provision governing the procedure to be followed for the presentation at customs of goods which fall within the scope of that regulation is devoid of merit. It is sufficient to observe, in order to dispose of that objection, that, in allowing the suspension of levies, under certain conditions, in respect of the transfer of agricultural products from the GDR to the FRG, that regulation merely introduces an exception to the general rules on the customs treatment of agricultural products from third countries. It is obvious that the general rules remain in force outside the scope of the derogating provision.

31. It should be added that the infringement by the FRG of the Community provisions governing customs formalities for the introduction of goods from third countries cannot be cured by any recovery of the sums improperly granted by way of export refunds in another member country (in this case, the Netherlands). The defendant refers, in particular, to the decision of a Netherlands court which is said to have upheld the claim by the Netherlands administrative authority for the reimbursement of refunds wrongly obtained at the time of export.

To dispose of this point, the following should be observed. While it is true that suspension of the collection of levies under the system laid down by Regulation No 2252/90 is conditional on the same goods not having previously benefited from an export refund, no recovery, years later, of the refunds wrongly granted will make the conduct of the Member State lawful after the event. The breach of Community law with which the FRG is charged in fact took place at a precise moment, that is to say when the goods at issue, although not falling within any of the categories cited by Regulation No 2252/90, were introduced into FRG territory without the State ensuring payment of the customs levies. The recovery of the sums unduly paid, by way of refunds, at the time of the export of the goods, cannot retroactively cure the breach of Community law committed by the FRG.

To answer the argument of the FRG that, once the refund of what was unduly obtained in the Netherlands at the time of export has been obtained, there is no detriment to Community finances, it should be added that, in the context of the infringement proceedings under Article 169 of the Treaty, the finding by the Court of Justice of the breach of a Community obligation leaves the Member State free to determine the specific measures to be adopted in order to comply with the Court's judgment. In the case before us, the breach of Community law committed by the FRG did, admittedly, entail detriment to Community finances. However, it is the responsibility of the Member State in question to determine whether the proper compliance with the Court's judgment

does, or does not, entail the obligation to pay the Commission the amount of the agricultural levies not charged at the time of the importation of the consignments of butter in question from third countries. [15] The assessment which the Member State makes of the measures needed to comply with the Court's judgment may, in its turn, be the subject of scrutiny by the Commission and possibly of new infringement proceedings under Article 171 of the EC Treaty (now Article 228 EC). I do not think, therefore, that it is for this Court to decide what the specific consequences of a judgment declaring the FRG to be in breach of its obligations must be.

32. Next, I consider that the Commission's second plea is also well founded. I would point out that the Commission charges the FRG with prematurely abolishing customs formalities in respect of the goods subjected to levy under Regulation No 2252/90. The German Government replies that the discontinuation of customs formalities was due to the institution of a *de facto* customs and agricultural union between the two Germanies with effect from 1 July 1990, this being the consequence of the entry into force of the *Staatsvertrag*. In this connection, it need merely be observed that no unilateral conduct by a Member State at international level (in the present case, the conclusion of an agreement with a third country, which is what the GDR had to be regarded as being as until 3 October 1990), can justify the breach of a Community obligation. Given that trade in agricultural products between the FRG and the GDR also fell within the scope of the special measures adopted by means of Regulation No 2252/90, it follows that the proper implementation of the requirements set out in that regulation — and specifically checking that the goods correspond to the three categories indicated in Article 1(2), with the consequent suspension of payment of the duties — plainly required the Community's mechanisms for external protection provided for by the relevant regulations to be maintained. In other words, the FRG should have ensured by appropriate customs controls, that, even in inter-German trade, no goods not falling within the scope of Regulation No 2252/90 could be introduced into Community territory while enjoying freedom from agricultural levies.

Equally lacking in relevance are the assertions by the defendant that the Commission, by its conduct, induced the German authorities to consider their conduct as lawful, particularly the effective dismantling of customs formalities which took place when the goods crossed the inter-German border. Even assuming that in the meetings cited by the defendant certain Commission officials did express opinions as regards the lawfulness of the German authorities' conduct — although the facts

15 — I note that the Commission refrained — and rightly so — from asking the Court to order the FRG to pay the sums not collected but only to declare its failure to fulfil Community obligations. I therefore consider any assessment as to the existence or otherwise, in the system laid down by regulations cited above, of any obligation on the part of the Member State to provide itself for the payment to the Commission of the sums which should have been paid by the private individual at the time of the importation of the products in question, to fall outside the scope of the proceedings.

in question do not seem adequately established and are in any event contested by the applicant — it is sufficient to observe in this connection that, as the Court has constantly stated, 'except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty. In no circumstances does it have the power to authorise practices which are contrary to the Treaty.' [16] That applies both to the conduct of private individuals and to that of Member States.

33. To conclude, I consider that the regulations which governed trade in agricultural products with the GDR in the period immediately preceding its incorporation in the FRG should have been applied in all the Member States, including the FRG: it is plain that no article of the regulations exempts the FRG from applying them. The fact that, as the FRG maintains, there were no longer any controls at the inter-German border at the material time is of no relevance; on the contrary, that is precisely the conduct, contrary to Community law, which made the failure to collect the levy payable in respect of the goods in question possible. It is equally clear that the entry into force of the *Staatsvertrag* between the two Germanies was no basis for exempting the FRG from the obligations assumed in a Community context. Until the political unification of 3 October 1990, the inter-German border continued to be an external border of the Community, albeit one subject to specific regulation. Pursuant to Regulation No 2252/90, the FRG should have checked that the products imported into its territory via the GDR met the requirements for suspension of the levies. In the case of the Netherlands butter, a levy should have been charged inasmuch as the product in question was imported from the Community and released into circulation in the GDR after benefiting from an export refund. It is of no relevance, for the purpose of a finding of an infringement by the FRG, that the refund had been reimbursed in the country of origin: the time when the FRG failed to fulfil its own obligations coincides with the time when the products crossed the inter-German border.

I therefore concur with the Commission's contention that the elimination of all customs controls at the inter-German border was not permissible: the FRG infringed Community law by prematurely abolishing the controls at what were still external borders of the Community, even taking account of the combined provisions of Articles 1 to 3 of Regulation No 1795/90, referred to in Article 2 of Regulation No 2252/90. The FRG and the GDR are regarded as a single Member State, for the limited purposes of the Community transit system, exclusively as regards the treatment of goods not subject to levy in accordance with Article 1(2) of Regulation No 2252/90.

16 — Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 136; Case C-340/96 *Commission* v *United Kingdom* [1999] ECR I-2023, paragraph 31.

## Conclusions

34. For all the foregoing reasons, the Commission's application should be allowed. I accordingly suggest the Court should:

— declare that the Federal Republic of Germany has,

(a) by allowing, contrary to Article 2 of Regulation No 2252/90, goods from the German Democratic Republic for which export refunds had been granted on their export from another Member State, to be brought into its territory without a levy corresponding to the Community level of prices being charged, and

(b) by abolishing all customs formalities in inter-German trade and by not adopting the measures required to implement Regulation No 2252/90,

failed to fulfil its obligations under the EC Treaty;

— order the Federal Republic of Germany to pay the costs.