invoice price of goods imported from a non-member country does not accord with the aims of the rules relating to the determination of the value of the goods for customs purposes.

2. The determination of the value for customs purposes in accordance with Regulations No 803/68 and No 375/69 cannot have the effect of requiring the fiscal and financial authorities of the Member States to accept that valuation for purposes other than the application of the Common Customs Tariff.
Thus if it were established that an undertaking which forms part of a company or a group of companies of which the centre of management is outside the Member State concerned adopted, in its relations with that centre of management or with other undertakings belonging to the same group, prices, the application of which might imply an illegal transfer of capital or profits, it would be for the Member State concerned to take appropriate measures, with a view to proving, and where necessary suppressing, such activities, under its own financial or fiscal legislation and not by applying Community rules relating to valuation for customs purposes.

3. Where an importer has accurately and fully completed the form of questionnaire annexed to Regulation No 375/69 and it is not disputed that the goods have actually been delivered to the purchaser in the quality and quantity stated in the invoice and the seller has received the whole of the invoice price and it is not alleged against him that he has not answered more detailed inquiries which the customs authorities may have put to him, he has not failed to fulfil any duties imposed on him by the Community rules on the valuation of goods for customs purposes or by Article 13 of the Agreement between the EEC and the Swiss Confederation of 22 July 1972. On the other hand, the consequences in other respects — such as those relating to the financial or fiscal laws other than customs laws — which are not governed by the Community rules are a matter for the legal order of the Member State concerned.

In Case 65/79

REFERENCE to the Court of Justice under Article 177 of the EEC Treaty by the Examining Magistrate at the Tribunal de Grande Instance [Regional Court], Nanterre, for a preliminary ruling in the proceedings pending before that court between

PROCUREUR DE LA RÉPUBLIQUE [Public Prosecutor]

and

RENÉ CHATAIN, Manager of the limited liability company Laboratoires Sandoz, Rueil-Malmaison,

on the interpretation of Regulations Nos 803/68, 1581/74, 375/69 and 603/72 on the valuation of goods for customs purposes, and of Regulation No 2840/72 on the Agreement between the EEC and the Swiss Confederation,

THE COURT,

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The orders making the references and the written observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

Sandoz A.G., based in Switzerland, hereinafter referred to as "Sandoz-Switzerland", sells chemical products to its subsidiary Laboratoires Sandoz S.àr.l., based in France, hereinafter referred to as "Sandoz-France". The sales are effected under an exclusive licence agreement for manufacture granted by Sandoz-Switzerland to Sandoz-France on 6 May 1935, which provides that the starting materials for manufacturing the products under licence shall be "purchased for preference" from Sandoz-Switzerland, subject to prior agreement on the prices and conditions of sale in each individual case.

The chemical products thus sold comprise two active ingredients: on the one hand ergotamine tartrate, hereinafter referred to as "ergotamine", and on the other hand dihydroergotamine methane sulphonate, hereinafter referred to as "dihydroergotamine". These active ingredients are ergots of rye used in the preparation of proprietary medicinal products manufactured by Sandoz-France.

On the occasion of an inspection carried out at the premises of Sandoz-France the customs inspectorate established the following facts:

Sandoz-Switzerland was charging 67 Swiss francs per gram of ergotamine, the equivalent of between FF 84.52 and FF 95.50, depending on the exchange rate;

and 80 Swiss francs per gram of dyhydroergotamine, the equivalent of between FF 102.40 and FF 115.46, depending on the exchange rate.

On the basis of comparisons with the invoice prices charged for the same products, and the prices at which they were being offered for importation into France, by manufacturers other than Sandoz-Switzerland, the customs authorities contested the prices fixed by the latter and took as the normal import price FF 36.52 for ergotamine and FF 54.23 for dihydroergotamine.

Thus, whereas the total value declared during the period from 4 January 1971 to 3 November 1973 was FF 89 929 024 the value recognized by the customs authorities was only FF 53 142 943, making a difference of FF 36 786 081.

Following these discoveries the customs inspectorate on 20 February 1974 drew up an official report of its findings on the basis of which it filed a charge with the Procureur de la République at the Tribunal de Grande Instance, Nanterre, alleging:

— First, a false declaration of customs value on importation, since Sandoz-France had purchased the products mentioned above at clearly inflated prices; and

— Secondly, illegal transfer of capital abroad, since by paying higher prices Sandoz-France repatriated its profits to Switzerland without paying tax on its profits in France,

which are punishable offences under Articles 35, 414, 426 (3), 435, 399 and 459 of the French Customs Code, and Decree No 68-1021 of 24 November 1968.

The Examining Magistrate at the Tribunal de Grande Instance, Nanterre, to whom the matter was referred, committed René Chatin, the General Manager of Sandoz-France, for trial charged with "importations sans déclarations de marchandises prohibées" [importing prohibited goods without declaration] and "transfert irrégulier de capitaux à l'étranger" [illegal transfer of capital abroad].

It should be noted that making a false declaration of value for customs purposes is equivalent, according to Article 426 (3) of the French Customs Code, to importing prohibited goods without declaration, which is a first degree delict and that the unlawful transfer of capital is an infringement of the provisions of Articles 1 and 3 of Decree No 68-1021 of 24 November 1968 (Journal Officiel de la République Française 25 November 1968, p. 11081).

Sandoz-France contested these two charges chiefly on the basis of the following arguments:

— In the first place, as regards the false declaration of value for customs purposes:

1. Regulation No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (Official Journal, English Special Edition 1968 (I), p. 170) excludes downward adjustments, that is to say reductions of the contract price;

2. It is impossible to compare the prices declared with the prices of goods of different origin;

3. Regulation No 375/69 of the Commission of 27 February 1969 on the declaration of particulars relating to the value of goods for customs purposes (Official Journal, English Special Edition 1969 (I), p. 63) restricts the obligations of the importer as to the declaration to be made;

4. In the present case there is no incorrect invoice;

— Secondly, as regards the infringement of exchange control rules, the French authorities are in error in applying the Community rules on valuation for customs purposes since their purpose is quite different from that of the exchange control rules.

Sandoz-France concludes its arguments with a series of questions to be referred to the Court of Justice, which were adopted by the Examining Magistrate at the Tribunal de Grande Instance, Nanterre, by an order of 7 March 1979, and to which he added an eleventh question by an order of 14 May 1979.

The questions put to the Court are as follows:

"Question 1:

Do Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes, in particular Articles 1 to 10 of that regulation, and Regulation (EEC) No 1581/74 of the Commission of 24 June 1974 on the price reductions to be taken into account when determining value for customs purposes, allow the competent authorities of a Member State to attribute to goods imported from a non-member State a value for customs purposes less than the value declared by the importer or, for imports subsequent to the entry into force of Regulation (EEC) No 375/69 of the Commission of 27 February 1969, less than the value which results from the particulars relating to value for customs purposes declared by the importer?

Question 2:

If Question 1 is answered in the affirmative: Do the aforesaid regulations allow the competent authorities of a Member State to reduce the value declared by the importer or, in the application of Regulation No 375/69, the value resulting from the particulars furnished by that importer, and rely for that purpose upon the comparison between that value and one or more prices charged in other contracts of sale concerning the same product?

Question 3:

If Question 2 is answered in the affirmative: What are the country or countries of exportation and/or importation from which and/or to which sales must have been made in order for the competent authorities of a Member State to be empowered by the aforementioned regulations to found, upon the prices charged in those sales, a reduction of the declared value or the value resulting from the particulars furnished by the importer?

In particular:

(a) Must the sales of which the prices may be used as reference prices necessarily have been made between an exporter and an importer respectively established in the same countries as those between which the sale was made in relation to which the importer's declaration of value or the particulars furnished by him for valuation for customs purposes are disputed?

(b) If Question 3 (a) is answered in the negative: Do the aforementioned regulations and Regulation (EEC) No 603/72 of the Commission of 24 March 1972 on the buyer to be taken into consideration when determining the value of goods for customs purposes, allow regard to be had to sales:

— By exporters established in other Member States?

— To importers established in other Member States?

— By exporters established in non-member States?

— To importers established in non-member States?

— Between a supplier and a purchaser both established in non-member States?

Question 4:

If Question 2 is answered in the affirmative: Do the aforementioned regulations allow the competent authorities to take as reference prices for reducing the value declared by the importer or, in the application of Regulation No 375/69, the value resulting from the particulars furnished by the importer, prices charged

(a) in sales of products coming from countries whose external trade is governed by a State monopoly or by public undertakings?

(b) in sales of imitations of the products forming the subject-matter of the sale in relation to which the value for customs purposes is reduced?

Question 5:

If Question 1 is answered in the affirmative; If either in law or in fact no reference price can be used, are the competent authorities of the importing country entitled unilaterally to employ other methods or facts, and if so which ones?

Question 6:

If and in so far as the methods applied by the French Administration to determine the value for customs purposes are not permissible, according to which criteria is that value correctly to be established where no valid price is available for comparison and where the matter concerns patented products forming the subject-matter of sales between two companies which are not independent of one another?

Question 7:

If Question 1 is answered in the affirmative; Are the competent authorities of a Member State entitled to charge an importer with a "false declaration of value for customs purposes made by means of a false, incomplete, inaccurate or inapplicable invoice" (facts which are treated by the national law in the same way as "importation of prohibited goods without declaration"), an offence punishable by heavy fines and prison sentences, even where the said importer has complied with the aforesaid Regulation No 375/69 by correctly furnishing the particulars relating to the value of goods for customs purposes which are the subject-matter of the questionnaire set out in the annex to the said regulation, and where it is not disputed that the goods have actually been delivered to the purchaser in the quality and quantity stated in the invoice and that the seller has received the whole of the invoice price?

Question 8:

Are the practice of reducing the declared value and the serious consequences which it entails for importers compatible with the customs union set up by Articles 12 to 29 of the EEC Treaty, having regard to the deflections of trade and distortions of competition to which that practice may lead?

Question 9:

(a) Does not Article 13 of the Agreement between the EEC and the Swiss Confederation of 22 July 1972 (Regulation (EEC) No 2840/72 of the Council of 19 December 1972), which prohibits any measures having an effect equivalent to quantitative

restrictions on imports in trade between the Community and Switzerland, thereby prohibit the competent authorities of a Member State from reducing the declared value or the value resulting from the particulars furnished by the importer?

(b) In particular does Article 13 allow heavy fines and prison sentences to be imposed upon an importer of a Member State of the EEC who has duly fulfilled his obligations by correctly and completely giving the competent national authorities the information required by Regulation No 375/69 of the Commission of 27 February 1969, where it is not disputed that the goods have actually been delivered to the purchaser in the quality and quantity stated in the invoice and that the seller has received the whole of the invoice price?

Question 10:

If Question 1 is answered in the affirmative: Does not the first paragraph of Article 19 of the Agreement between the EEC and the Swiss Confederation of 22 July 1972, which prohibits any restrictions on payments relating to trade in goods and the transfer of such payments between the Member States of the European Community and Switzerland, thereby prohibit the competent authorities of a Member State from classifying as "unlawful transfers of capital" (offences prohibited by its exchange control rules) a transaction whereby a purchaser in a Member State of the European Community pays his Swiss supplier the amount of an invoice relating to a sale of goods, where it is not disputed that those goods have actually been delivered to the purchaser in the quality and quantity stated in the invoice and that the seller has received the whole of the invoice price?

Question 11:

Do Article 9 of Regulation No 803/68 of the Council and, for the imports to which they apply, Regulation No 375/69 of the Commission and the annex thereto allow the competent authorities of a Member State to apply to the invoice price, in order to determine the value for customs purposes, downward adjustments other than those which are listed under Nos 18 to 21 of the aforesaid annex and which are determined by items separate from the price of the goods but nevertheless included in the invoice price?"

The two orders referring the questions to the Court were received at the Court Registry on 18 April and 16 May 1979. Written observations were submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC on 12 July 1979 by the Commission of the European Communities, represented for the purpose by its Legal Adviser, Jean-Claude Séché, acting as Agent; on 25 July 1979 by the accused in the main proceedings, represented for the purpose by B. Baudelot, President of the Bar, and R. Saint-Esteben, both Advocates at the Cour de Paris; on 2 August 1979 by the Government of the Federal Republic of Germany, represented for the purpose by its Agent, Dr Seidel; on 3 August 1979 by the French Government, represented for the purpose by its Agent, Y. Cousin, Deputy Secretary General of the Inter-Ministerial Committee on European Economic Co-operation; on 13 August 1979 by the Government of the United Kingdom, represented for the purpose by its Agent, R. D. Munrow, Treasury Solicitor's Department.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

Observations of Mr Chatain, the accused in the main proceedings

Before commencing a discussion of the points of law and the various questions which have been raised, Mr Chatain considers that he should recapitulate the facts as viewed by him, as well as the history of the Sandoz companies and the basis of the relationship between Sandoz-Switzerland and Sandoz-France.

A — General

1. The facts

Sandoz recalls that the prices quoted by Sandoz-Switzerland in Swiss francs to Sandoz-France have not changed since 1967 and it considers that that must preclude any suggestion that they were of a speculative and fraudulent nature.

Sandoz France observes in addition that the general tendency of prices for active ingredients expressed in Swiss francs to decline should be noted.

Sandoz-France goes on to recall that in application of the rules concerning the valuation of goods for customs purposes the prices invoiced had already been subjected to sizeable increases. The principle on which these increases in the charges invoiced was based is to be found in a judgment of the Cour de Cassation terminating lengthy litigation which started in 1958 between Sandoz-France and the customs. Following that judgment an agreement was reached between the parties which extended the effect of the decision made by the Cour de Cassation to all imports made by Sandoz-France.

In reliance on that agreement, dated 13 October 1972, Sandoz-France believed that the valuation for customs purposes would no longer be subject to subsequent challenge.

The accused in the main proceedings claims, therefore, that the practice adopted by the French administration of making downward adjustments throws into relief "the uncertainty experienced by French subsidiaries of foreign pharmaceutical companies", especially since that uncertainty has been increased in this case by the fact that this practice of making downward adjustments results in calling in question, several years after the imports concerned, customs valuations which had however been the subject of agreed increases.

He concludes this point by stating that this serious accusation of fraud makes it essential to explain the commercial relationship which exists between Sandoz-France and Sandoz-Basel, and especially the reasons why Sandoz-France obtains its supplies of the products in question from Sandoz-Basel.

2. Background of the Sandoz group

Sandoz explains the background of the group at great length by showing, first, that the group was launched on the basis of important discoveries in the field of ergots of rye by one of its founders, Mr Stoll, and secondly, that its establishment in France, and particularly in Alsace, has

a very long history as it dates back to 1911.

On the subject of its establishment in France, Mr Chatain states that Sandoz-France employs 2 838 people and that Sandoz-Switzerland employs 1 832 frontier workers from Alsace at Basel.

Sandoz-Switzerland also invests in France, either by way of increasing its capital, by granting interest-free loans to its subsidiary Sandoz-France, or even indirectly by writing off its debts. Mr Chatain concludes this section by maintaining that such conduct is inconsistent with the accusation made by the customs administration.

3. Basis of the relationship between Sandoz-Switzerland and Sandoz-France

Mr Chatain recalls that Sandoz-Switzerland, and in particular one of its founders, Mr Stoll, were pioneers in the development of ergot of rye.

He claims that, being a pioneer in the field, Sandoz-Switzerland was able to perfect processes which enable it today to supply "active ingredients whose quality is such as fully to explain and justify the preference accorded by Sandoz-France to the products sold by its parent company, in which, however, the customs see ground for complaint".

In fact Sandoz-France is quite at liberty to purchase its active ingredients wherever it wishes but its choice of Sandoz-Switzerland is due to the intrinsic quality of the products sold, a quality which can be measured by both the bio-availability method and the stability method.

He claims on this point that "by means of research carried out internally or entrusted to outside scientific bodies, Sandoz-France has been able to establish that these characteristic features are of a higher level in Sandoz dihydroergotamine than in imitation products, as regards both bio-availability and stability".

Moreover, by obtaining its supplies from Sandoz-Switzerland, Sandoz-France ensures constant quality and regularity of supplies.

Mr Chatain considers that this refutes the argument put forward by the Customs on the basis of comparisons with prices from different suppliers.

He goes on to claim that the statement made by the customs that "Sandoz products are not consistent in quality or superior to the same products manufactured by other companies" is unfounded. The customs authorities are merely referring to a legal minimum which any manufacturer of proprietary medicinal products must meet.

The qualitative analyses carried out by Sandoz-Basel are far more elaborate than the minimum carried out by the customs and moreover the company provides Sandoz-France with permanent scientific assistance; this factor was overlooked by the Customs in its evaluation of the price comparison.

Consequently, Mr Chatain claims, the customs authorities are overlooking the very specific requirements for the conditions of supply of active ingredients by implying that a manufacturer of proprietary medicinal products should try to obtain supplies at the lowest price.

However, the investigations which such a manufacturer would have to carry out every time he changed his supplier in order to make sure of the quality of the products "would wipe out the supposed economic advantage of a lower-price for his active ingredients".

Mr Chatain also claims that the information on which the French customs

authorities have based their case "is not reliable and can in no way constitute a basis of comparison".

In conclusion Mr Chatain states that he is "convinced that his source of supply is the most rational, the most reliable and, in the end, the most economic one".

B — Consideration of the points of law raised in the questions submitted by the Examining Magistrate

First of all, Mr Chatain recalls the case-law of the Court of Justice "which seems perfectly clear" and which, he claims, makes it possible to state that the Court of Justice has jurisdiction to reply to all the questions raised, including Questions 9 and 10 concerning the agreement between the EEC and Switzerland, since the latter agreement is the act of one of the Community institutions and as such falls within the terms of Article 177.

Mr Chatain re-arranges the questions raised by the Examining Magistrate and suggests the following plan:

1. Principal question: The reduction of the price agreed upon and actually paid is incompatible with Community law and with the agreement between the EEC and Switzerland

(a) Incompatibility of the reduction with Community law

1. Illegality of the practice of reducing the value in principle (Question 1 and supplementary question, that is to say Question 11)

1.1. The practice of reducing the value is unlawful with regard to both the spirit of economy and the objective of the Community rules on valuation for customs purposes

1.1.1. The objective of Regulation No 803/68: fair and uniform charging of customs duties under the Common Customs Tariff

The accused in the main proceedings recalls that the objective of customs duties within the national context is both to protect the national economy and to obtain funds for the State.

That being so, the sole concern of the customs should be to trace the various frauds which result in failure to pay all or part of such duties. These two traditional functions of customs duties have in no way been modified subsequent to the application of the Common Customs Tariff.

This is borne out by the preamble to Regulation No 803/68 which expressly stipulates that "any deflection of customs receipts should be avoided and where appropriate eliminated".

That aim was confirmed by the Commission in its Recommendation No 70/112/EEC of 23 January 1970 on the organization of the central customs administration departments responsible for applying provisions on the valuation of goods for customs purposes (Official Journal, English Special Edition, 1965-1972 — Omissions from the First and Second Series — p. 28) which stipulates that the objective adopted by Regulation No 803/68 is to avoid "deflections of trade, activities and customs receipts".

That objective was also mentioned by the Court of Justice in Cases 27/70, *Edding* ([1970] ECR 1035) and 8/73, *Massey-Ferguson* ([1973] ECR 897).

Lastly, the preparatory work for Regulation No 803/68 shows likewise that the objective which the rules were designed to fulfil was to avoid non-payment and deflection of customs receipts.

The Commission declared before the European Parliament that the proposed rules were designed to avoid undervaluation and to "protect honest importers from unfair competition by means of under-valuation" (European Parliament Proceedings, Document No 162, 18 December 1967, No 57).

1.1.2. The Convention on the valuation of goods for customs purposes signed at Brussels on 15 December 1950, which entered into force on 28 July 1953 (hereinafter referred to as "the Brussels Convention")

Mr Chatain claims that cases in which the price is higher than competitive prices were at no time mentioned in the Brussels Convention. That is because in such cases there is no undesirable effect on the amount of duty charged. Therefore there would be no reason, on the basis of the objectives of the Convention, to compel the declarant to adjust the price downwards, or, *a fortiori,* to impose penalties on him.

1.1.3. The General Agreement on Tariffs and Trade (GATT)

An examination of the provisions adopted in accordance with GATT confirms the observations which have been made concerning Regulation No 803/68 and the Brussels Convention. In the first place the relationship between "valuation for customs purposes" and the customs duties charged is clearly emphasized, as Article 15.1 (a) of the Agreement on Implementation of Article VII of GATT stipulates that " 'customs value of imported goods' means the value of goods for the purposes of levying *ad valorem* duties of customs on imported goods."

It may likewise be noted that it is the possibility of under-valuation in the declaration which is consistently referred to by the agreement.

Lastly, Article 1.2 (b) of the above-mentioned agreement on GATT concerning the conditions in which the transaction value will be accepted as the basis of the customs valuation even though the sale has occurred between related persons has been interpreted as follows:

Where it is proved that the price is sufficient to cover all costs and to ensure a profit in proportion to the total profit made by the undertaking, it is proved that the price has not been influenced by the fact that the seller and the buyer are related.

The accused in the main proceedings concludes from this that the only instance of an unacceptable price between related persons is where the price is undervalued, that is to say, inadequate to cover the cost and the seller's normal margin.

Thus the agreement concerning GATT in April 1979 appears to echo the tenor of Regulation No 803/68 and the Brussels Convention: all these texts envisage upward adjustments in the invoice price only where it does not correspond to the normal price. Even if it were possible to make downward adjustments that could not, in any event, be for the purpose of reducing the price itself.

1.2. The text of Regulation No 803/68

None of the adjustments expressly provided for envisages a downward modification of the actual market price.

1.2.1. Upward adjustments

Article 9 of Regulation No 803/68 provides for upward adjustments in the following cases:

1. If reductions in price are granted only in favour of sole agents or concessionnaires;

2. In the case of abnormal rebates and any other reduction from the ordinary competitive price.

Thus the only adjustments provided for are increases. This interpretation is confirmed both by the regulation applying the Community rules: Regulation No 1581/74 of the Commission of 24 June 1974 (Official Journal L 168, 25 June 1974), and by the provisions of the Brussels Convention and the agreement concerning GATT.

1.2.2. Specific downward adjustments (extrinsic elements included in the price)

The accused in the main proceedings claims that Article 9 (2) of Regulation No 803/68 provides for downward adjustments only as regards transport costs, assembly costs and reproduction rights and it would appear, therefore, that the legal nature of such adjustments is fundamentally different from that of upward adjustments which, for their part, may and must be made when the price itself (the basic price) is abnormally low.

This interpretation is supported by the *ENKA* judgment of the Court of Justice (Case 38/77 [1977] ECR 2203). In that case the Court distinguished between, on the one hand, the price of the goods and, on the other hand, other elements which are included in the invoice, and thus confirmed the distinction between the price of the goods and elements extrinsic to that price. Mr Chatain concludes this point by stating that "this confirms the only and consistent preoccupation of the customs regulations, even with regard to downward adjustments", that is to say "the battle against declarations which under-value goods and which have the effect of evading customs duties".

Thus the interpretation of value for customs purposes put forward by the French customs runs counter not merely to the spirit and the objectives but also to the actual wording of Regulation No 803/68 and the Community customs rules.

1.3. The use of the Community concept of value for customs purposes to serve national policies is a misuse of the law which is contrary to the Community principles governing the customs union.

1.3.1. The customs authorities are ignoring the principle of the uniformity of Community rules

The unification of customs legislation is the fundamental objective of the customs union. This objective emerges directly from the Community rules as a whole and was acknowledged by the Court of Justice in its judgment in *Massey-Ferguson* (Case 8/73 [1973] ECR 897). The most significant consequence of the principle of uniformity is that it is not possible to apply a Community regulation for national ends, a point which emerges from the judgment of the Court of Justice in *Simmenthal* (Case 106/77 [1978] ECR 629). The accused in the main proceedings therefore claims that the interpretation "adopted by the French customs of value for customs purposes was not put forward in order to safeguard Community interests but solely

in order to promote purely national policies: monetary policy, fiscal policy and even the policy relating to the prices of drugs." Thus France is diverting the Community concept of value for customs purposes from its normal function, which is that of achieving customs union.

Acceptance of the French interpretation would deal a death blow to the principle of uniformity. The fact is, to apply a Community rule in order to satisfy the needs of national policy suffices to sow the seed of divergence, since downward adjustments of value for customs purposes must depend on various factors which necessarily differ from one Member State to another. It is therefore impossible to challenge the uniform application of Community law on the ground of national rules or purposes. The Court of Justice itself excluded the possibility in its judgment in *Balkan Import-Export* (Case 118/76 [1977] ECR 1177) on the question of monetary compensatory amounts.

To take account of the purposes of national policy would open the door to deflection of trade and to disparities in the conditions of competition, a fact to which the Court of Justice made reference in its judgment in the *Enka* case, mentioned above, when it declared in relation to a provision concerning the implementation of Regulation No 803/68 that "if it is not to cause distortions and deflections of trade, that provision must ... be given an identical application in all the Member States".

Confirmation of this vital uniformity of interpretation and application of the concept of value for customs purposes is likewise to be found in the agreement on the interpretation of Article VII of GATT of April 1979 which recalls the fundamental principle regarding the neutrality of this concept which, being an instrument of customs legislation, cannot be used outside this domain, particularly for national ends, however legitimate the latter may be.

Lastly, the accused in the main proceedings claims that even though it is not possible to employ the concept of value for customs purposes for national ends relating to fiscal and monetary controls, this does not prevent recourse to specific instruments which exist to protect the national interests in question.

In fact the tax authorities have at their disposal Article 57 of the Code Général des Impôts [General Tax Code] and Order No 45/1483 of 30 July 1945 on prices, two provisions which enable genuine fraudulent infringements of the price rules to be suppressed.

1.3.2. The customs authorities are undermining the principle of certainty and simplicity in Community law

Several principles underlie the definition of value for customs purposes adopted at Brussels in 1950; simplicity, ease of interpretation, fairness an legal certainty are the chief of these.

The French customs system "abounds in complexity and uncertainty for importers as to both its substantive and procedural rules".

In fact, in so far as the substantive rules are concerned, they exist only for upward adjustments, not for downward adjustments. Moreover, to accept the French interpretation would mean that doubt would constantly be cast on the price paid and the good faith of the importer. That suspicion would run counter to the development of international relations which is one of the

objectives of the Common Customs Tariff and of the Community.

Next, as to the procedural rules, the accused in the main proceedings recalls that the price declared, which was at first adjusted upwards, is to be subject, a number of years later, to downward adjustments. Quite apart from the fact that this method borders on the ridiculous, it deprives those concerned of "the legal certainty afforded by the rules concerning the procedure for adjustments."

The accused in the main proceedings also recalls that verification of the facts affecting valuation for customs purposes ought to be rapid and precise. In the present case, however, the imports in question, at least the first ones, go back to January 1971 but the complaint was not lodged until 1977. Thus the customs authorities allowed "a nine-year period" to elapse before questioning the declared value.

As a result, Mr Chatain requests the Court to rule, in reply to Question 1 and the supplementary question, that: "Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes, in particular Articles 1 to 10 thereof, and Regulation (EEC) No 1581/74 of the Commission of 24 June 1974 on the price reductions to be taken into account when determining value for customs purposes, do not permit the competent authorities of a Member State to attribute to goods imported from a non-member country a value for customs purposes lower than that declared by the importer or, in respect of imports subsequent to the entry into force of Regulation (EEC) No 375/69 of the Commission of 27 February 1969, lower than the value which results from the particulars concerning the value for customs purposes declared by the importer, save for any downward adjustments referred to in paragraphs 18 to 21 of the Annex to the last-mentioned regulation, which are determined by items which do not go to make up the price of the goods but which are included in the invoice price."

2. Illegality of the practice of making reductions as regards consequences for the importer (Question 8)

2.1. Breach of the principle of proportionality

The accused in the main proceedings commences with a lengthy recapitulation of the case-law of the Court of Justice concerning the principle of proportionality and concludes that the concept has been "clearly defined": a penalty imposed under national or Community law is contrary to the principle of proportionality if it exceeds "the degree necessary taking into account the aim and objectives of the obligation which has been disregarded and, consequently, the interests thus prejudiced". This principle is considered by the Court of Justice to be a general principle of Community law and, therefore, a source of positive Community law.

The French legislation, however, considers the declaration of an incorrect value to be equivalent to a false invoice, which is a delict subject to the same penalties as smuggling, not a mere contravention. Analysing the legislation, the accused in the main proceedings recalls, first, that where infringements of the customs rules are concerned, the French courts cannot discharge offenders on the ground of lack of intent, which means that *mens rea* is not required as a constituent factor in the infringement in question: thus the good faith of the importer is totally irrelevant.

The penalties for smuggling provided for in Article 414 of the Customs Code are extremely severe.

On the basis of a judgment delivered by the French Cour de Cassation on 10 November 1970 (the *Cetrane-Unilabo* case, Jurisclasseur Périodique 1971, p. 16714), the accused in the main proceedings claims that the penalty he is likely to incur for the two infringements amounts to a minimum of FF 400 000 000 and a maximum of FF 940 000 000.

The accused in the main proceedings claims that three anomalies are to be found in such a penalty. First, the amount means that infringement of the customs rules results in a penalty substantially higher than that provided for infringement of the exchange control rules and that suffices, in his opinion, to reveal the fundamental flaw in the system because in fact the sole objective of the administrative practice of reducing the agreed value is to trace infringements of the exchange control rules.

Secondly, the basis on which the monetary penalties are calculated is the value of the subject-matter of the fraud, which is a concept quite different from the value finally established for customs purposes. The accused in the main proceedings considers that the concept of the value for customs purposes is excluded because the lower the level at which this value is fixed — which makes the infringement more serious — the lower the penalty would be.

Thirdly, in French law it is well established that pecuniary penalties are compensatory in nature. In the present case, however, enormous penalties would be incurred without any damage having been caused to the public finances or to the Community budget, which is contrary to this aim of the repressive measures.

Thus it is "clear that such sanctions bear no relation to the aims of the Community legislation in question and, thus, to the interests which the latter are designed to protect".

In fact the supposed over-valuation of the price does not involve any evasion of customs duties, and therefore no penalties should be incurred.

In the present case, without having damaged Community interests in any way, the manager of Sandoz-France risks imprisonment and a fine of between FF 400 million and FF 940 million. This is the measure of the "huge disproportion between the alleged infringement and the penalty".

2.2. Breach of the rules governing the customs union (EEC Treaty, Articles 12 to 29)

The accused in the main proceedings recalls that the objective of the Common Customs Tariff is in fact "the elimination, at a customs level, of any cause of unequal treatment or deflection of trade that may work to the detriment of traders operating in any one of the Member States" (communication from the Commission to the Council dated 13 June 1977 No COM (77) 210 def.).

The French interpretation of the value for customs purposes — which allows it to be reduced — leads to deflection of trade and distortion of competition contrary to that fundamental objective.

In conclusion the accused in the main proceedings requests the Court of Justice to rule in reply to Question 8 that:

"The practice of reducing the declared value as described in the reply to Question 1, above, and the great difficulties resulting therefrom for importers, are incompatible with the customs union established by Articles 12 to 29 of the EEC Treaty, regard being had in particular to the disproportionate nature of the penalties and the deflection

of trade and distortion of competition which they may involve".

(b) Incompatibility of the reduction with the agreement between the EEC and Switzerland

1. Incompatibility with the free movement of goods between the EEC and Switzerland (Question 9a)

1.1. The concept of measures having an effect equivalent to quantitative restrictions

The accused in the main proceedings starts with a review of the case-law of the Court of Justice leading to a definition of measures having an effect equivalent to a quantitative restriction under Article 30 of the Treaty. He considers that what applies in respect of Article 30 of the Treaty applies equally with regard to Article 13 of the agreement between the EEC and Switzerland.

In fact the aims of that agreement are the same as those of the EEC Treaty since it, too, is concerned with eliminating obstacles to trade.

1.2. The concept in application

On this point, the accused in the main proceedings refers to the observations submitted under the above paragraph (a) as a whole, and goes on to maintain that the prices applied by Sandoz-Switzerland are normal and in accordance with industrial and commercial practice and management concerning the products in question. He concludes by requesting the Court to rule in reply to Question 9 (a) that:

"The practice of reducing the declared value, as described in the reply to Question 1 above and the heavy penalties which it involves for importers are also incompatible with Article 13 of the Agreement between the EEC and the Swiss Confederation of 22 July 1972 (Regulation No 2840/72 of the Council of 19 December 1972) which prohibits all measures having an effect equivalent to quantitative restrictions on imports in trade between the Community and Switzerland."

2. Incompatibility with the free movement of capital between the EEC and Switzerland (Question 10)

The accused in the main proceedings maintains that the alleged unlawful transfer of capital which the customs authorities believe they can infer from the so-called over-valuation of the declared price disregards Article 19 of the agreement between the EEC and Switzerland which provides that: "Payments relating to trade in goods and the transfer of such payments to the Member State of the Community in which the creditor is resident or to Switzerland shall be free from any restrictions".

Article 19, the object of which is to permit the free performance of contracts of sale, cannot be set aside "on the ground that the agreed price which is invoiced and is actually to be paid is held to be excessive in relation to the theoretical standard which the value for customs purposes naturally constitutes for the calculation of customs duties". Thus the only factors relevant in applying Article 19 are the actual existence of the contract of sale and the reality of the price, and this is all the more so when the features characterizing a fraud are not present, since the price applied by Sandoz-Switzerland may perfectly well be explained having regard to the circumstances peculiar to the two parties and the contract in question.

The accused in the main proceedings goes on to point out that in difficult economic circumstances, and despite the fact that France has put into operation, even though subsequently, the saving provision in Article 108 of the EEC Treaty, France has not introduced any

restriction on the movement of funds between Member States of the Community in connexion with the payment of goods nor, in fact, has it asked for authorization to do so. Since relations between France and Switzerland are governed in the same manner as relations between Member States of the Community it would appear that by resorting to the method of reducing the value for customs purposes in order to accuse the author of these observations of supposed infringements of the exchange control regulations the customs authorities have failed to have regard to Article 19 of the Agreement between the EEC and Switzerland.

In conclusion the accused in the main proceedings requests the Court to declare in reply to Question 10 that:

"Article 19 (1) of the Agreement between the EEC and Switzerland, referred to above, which prohibits any restriction on payments relating to trade in goods and on the transfer of such payments between the Member States of the Community and Switzerland, prohibits the responsible authorities of a Member State of the EEC from characterizing as an unlawful transfer of capital — being an offence under its exchange control regulations — a transaction whereby a buyer situated in a Member State of the EEC pays his Swiss supplier the amount invoiced for goods sold, when it is not disputed that the goods have in fact been delivered to the buyer, being of the quality and in the quantity appearing on the invoice, and that the seller has charged the whole of the price invoiced".

Paragraph 2: subsidiary questions

(a) The purpose of and limitations on the obligations of the party making the declaration (Questions 7 and 9b)

1. Community law

1.1. Regulation No 375/69 of the Commission of 27 June 1969 (Official Journal, English Special Edition 1969 (I), p. 63)

This regulation defines the obligations of the person making the declaration for customs, and a Member State cannot, without contravening this provision, require anything other than what is there provided. According to the regulation the importer is not responsible for declaring the value itself but only certain particulars, expressly described, which enable it to be calculated. These particulars are furnished by the party making the declaration to the customs in the form of a questionnaire which appears in the annex to Regulation No 375/69 and the accused in the main proceedings maintains that he scrupulously complied with the obligations imposed on him by Regulation No 375/69 and that this has never been contested during the whole of the proceedings.

In consequence he considers that he "did not assume responsibility for calculating values for customs purposes which from that point onwards is a task for the Customs on the basis of the particulars supplied by the importer". In taking the view that the importer must always be answerable for the value itself the French Customs are setting at naught the purpose of the Community rules and re-establishing a discriminatory system to the detriment of imports into France and thus contravening both the rules of the customs union and Article 13 of the Agreement between the EEC and Switzerland.

1.2. The case-law of the Court of Justice

The accused in the main proceedings claims that in the judgments in *Donckerwolcke* (Case 41/76 [1976] ECR 1921) and *Cayrol* (Case 52/77 [1977] ECR 2261) the Court of Justice declared that a customs administration cannot in any event require the importer to declare something other than what he knows or

may reasonably be expected to know, for to require more would fall under the prohibition in Article 30 of the Treaty.

The accused in the main proceedings also maintains that it would not be reasonable to require importers of active ingredients such as that which is the subject-matter of the main proceedings to know the theoretical value which constitutes the value for customs purposes when they are not in a position to know the prices being offered or applied by other firms and especially when, as in the present case, it is necessary to take into account the special characteristics and the specific nature of the products.

2. French international law

According to the accused in the main proceedings Article 35 of the Customs Code, as interpreted by learned French writers on administrative law, supports his interpretation of Regulation No 375/69.

In fact, according to French academic writers, if the declaration of particulars relating to the value for customs purposes does not contain errors or omissions of fact and if no fault can be imputed to the party making the declaration, the importer is exempt from any penalty.

Consequently the Court is asked to rule in reply to Questions 7 and 9(b) that: "It is incompatible with Regulation No 375/69 and, in addition, in trade between the EEC and Switzerland, with Article 13 of the above-mentioned agreement between those parties, to charge an importer with making 'a false declaration of value for customs purposes', perpetrated by means of an invoice which is false, incomplete, inaccurate or inapplicable (an act which is equated by national law with 'importation of prohibited goods without declaration', an offence sanctioned by heavy fines and prison sentences), where the said importer has complied with Regulation No 375/69, mentioned above, by supplying precisely the particulars relating to the value for customs purposes which form the subject-matter of the questionnaire appearing in the annex to that regulation and where it is not contested that the goods have in fact been delivered to the buyer in the quantity and quality appearing on the invoice and the seller has charged the whole of the price invoiced".

(b) Method of calculating the "normal price" which constitutes the value for customs purposes, where the price actually agreed upon and paid has been subject to a reduction (Questions 2, 3, 4, 5 and 6)

1. The principle of comparison with a contract of sale relating to the same product (Question 2)

The accused in the main proceedings recalls, first, that the definition in the Brussels Convention of the value for customs purposes employs a theoretical concept. Thus the price of a different contract cannot be used as a point of reference unless, when that is itself compared with the theoretical norm, it appears to conform to it. The Explanatory Notes to the Brussels Convention, as well as "the views of learned writers which are particularly well supported", permit the conclusion that there is only one method of comparison, which is to apply the criterion of the probable selling price of the goods which have to be valued.

According to the accused in the main proceedings everything supports acceptance of the contractual price.

1.2. Characteristics of the reference products

1.2.1. The reference products and the principle of the theoretical norm

The characteristics of the product for comparison which affect the value must be the same as those of the product in question; if not, the comparison must be rejected.

1.2.2. The special problem of comparing active ingredients manufactured by different producers

The accused in the main proceedings recalls, first, the importance of the quality of the active ingredient and, secondly, the fact that this quality is not always taken into account in the minimum standards required by national law. He considers that is therefore unacceptable to compare, as have the French customs authorities, products which merely have certain characteristics in common with those of the products in dispute and the origin of which is unknown.

In consequence, he requests the Court to rule in reply to Question 2 that "the above-mentioned regulations allow the competent authorities of a Member State, when reducing the value declared by the importer or, when applying Regulation No 375/69, the value which results from the particulars supplied by that importer, to adopt as a basis a comparison between that value and one or more prices charged in other contracts of sale relating to products having the same characteristics as regards their nature, quality and therapeutic efficacy".

2. Essential characteristics of the contract of sale used as a reference

2.1. Origin and destination of the product, the subject-matter of the reference contract — location of the undertakings

2.1.1. Origin of the reference products

The accused in the main proceedings recalls that the Explanatory Notes to the Brussels Convention refer to "origin" in the characteristics which must be taken into account in determining a price properly adapted to the goods which have to be valued. He considers, as a result, that it is not possible in making the comparison to refer to the prices applied in respect of products manufactured or sold in the Federal Republic of Germany, which is, however, what the French customs have done.

Secondly, the accused in the main proceedings maintains that it is not for the administrative authorities to substitute themselves for a pharmacist, in the present case Sandoz-France, attempting to require it, supposedly on economic grounds, to buy active ingredients which may prejudice the qualities of efficacy, safety and stability required of a proprietary medicinal product.

Moreover, in order to be able to adopt as the point of reference a price of a different origin it would be necessary for all the conditions determining the cost of the production factors to be identical in both countries. But such similarity can, *ex hypothesi,* virtually never be found.

To conclude, if the comparison is to be a legitimate one the products ought to come from the same country. If that argument is not accepted by the Court of Justice, then it is in any event necessary to exclude from the possibility of comparison prices offered in countries having a State monopoly and prices for active ingredients originating in other countries in the Community.

The latter case has been excluded by the Commission itself, for when it submitted proposal for a regulation which was to become Regulation No 803/68, it declared that "in determining the value for customs purposes, prices applied within the Community for goods which

have not been imported may not be used".

2.1.2. Destination of the reference product

The accused in the main proceedings maintains, first, that as the Customs Co-operation Council stated in its Explanatory Notes: "The price on the internal markets in the exporting country cannot be taken as the basis for determining what is the normal price".

So logically, and in keeping with the principle that the price of goods originating in the Community cannot be taken into consideration, the price of a product destined for a country in the Community is a valid standard for comparison. But while the accused in the main proceedings admits that such a comparison is possible he claims that even within the Community account should be taken of the special circumstances surrounding the sales in question, which might explain a difference between their prices.

2.2. The level at which the transaction occurs

According to the accused in the main proceedings it is essential that the prices used for comparison should have been applied in a sale carried out at the same level of transaction as the sale in dispute. However, in this case, he claims that the customs have quoted as prices for comparison prices of both manufacturers of chemical products and of mere dealers, relating to both short-term transactions and long-standing commercial relationships, whereas only prices applied by manufacturers in the context of long-standing commercial relationships are comparable to the present case.

2.3. Imitation products (Question 4 b)

The accused in the main proceedings claims that this question touches on one of the essential points in the dispute because it affects the future of the European pharmaceutical industry. He claims that to require a uniform selling price for active ingredients form laboratories such as Sandoz-Basel and from mere imitators would put an end to research and strike a critical blow at the development of this industry, of which the European consumer will effectively be the first victim.

In fact Sandoz-Switzerland is taking on special responsibilities in the field of research and development. Such a burden can only be financed by means of its exports and that is an essential factor in determining what is commonly called, within a group of companies, the transfer price.

Sandoz-Switzerland is also taking on responsibilities in the technical and commercial fields in order to supply its customers and in this case, Sandoz-France, with products which are of a very high quality, almost "made to measure". That being so it is not possible to compare the prices quoted by Sandoz-Switzerland to Sandoz-France with prices offered by ordinary dealers.

To conclude, the Court is asked to rule in reply to Questions 3 and 4 that:

A. "The location of the exporter and the origin of the reference product

(a) In principle, the prices to be adopted as reference prices must have been applied by an exporter

established in the same country as the person carrying out the sale in dispute".

In the event of the Court's not accepting this principle, however, it is suggested that it should rule that:

(b) "In any event it is not permissible to adopt as a reference the price of a product from:

— A country whose external trade is subject to a State monopoly;

— A Member State of the EEC; or

— An imitator or an ordinary dealer."

B. The location of the importer and the destination of the reference product

A sale carried out in the conditions examined under A, above, may be taken into consideration even if it was not made to an importer situated in the same country as the importer to whom the sale in dispute was made, provided that the first importer is also established in the Community, and subject to consideration of the special circumstances of the sales in question, which may explain a difference between their prices".

3. Determination of the value for customs purposes in the absence of any reference price (Questions 5 and 6)

3.1. Unilateral recourse by a Member State to different methods

In adopting the system of the theoretical norm, Regulation No 803/68 provided a value which may always be used, since the value to be referred to is a theoretical price. Thus in this case, it is wrong to say that there is a lacuna in the rules. In the circumstances the accused in the main proceedings is of the opinion that a Member State may not decide unilaterally which method to employ as this would be to ignore Regulation No 803/68 and the principle of uniform interpretation and application.

In the circumstances it would appear that the procedure in Article 17 of Regulation No 803/68 alone must be followed in order to establish the criteria according to which the value for customs purposes is to be determined.

3.2. What criteria is it legitimate to use?

3.2.1. The criterion incompatible with the Community definition: calculation on the basis of the production cost ("cost plus").

This method cannot be used because Regulation No 803/68 stipulates that the normal price can only be established by means of a comparison. This comparative method excludes, therefore, the possibility of determining an intrinsic value, directly and otherwise than by comparison, on the basis of the manufacturing cost of the product.

3.2.2. Criteria which are compatible with the Community definition

The accused in the main proceedings notes that Question 6 borders on the paradoxical because if in theory there is no useful reference price either in fact or in law, one may wonder "by what right and on what basis it is possible to cast doubt on the price actually paid or

payable". He recalls in this context that Regulation No 375/69 makes the invoice price the principal factor in the declaration of values "irrespective of any relationship between the seller and the importer".

Finally, he considers that the authorities on the application of the Brussels definition, as well as learned writers, envisage only one method for comparing the invoice price with the normal price in order to establish the value for customs purposes: that is "a valuation based on the probable result of sale". Of course, this method raises some difficulty when goods are not in fact being resold. But even in that case the Customs Co-operation Council advocates its use.

Consequently, the Court is requested to rule in reply to Questions 5 and 6 that:

"Where no price is available for comparison the determination of the value for customs purposes should either be based on the price actually paid or payable, adjusted if necessary in accordance with the principles and rules set out in Article 1 *et seq.* of Regulation No 803/68 and, especially, Articles 3 and 9 thereof, or alternatively be calculated on the basis of the selling price of the proprietary medicinal product, provided that this selling price is not itself abnormally low, particularly as a result of administrative restrictions.

In any event all methods other than the comparative one, such a calculation of the value on the basis of the seller's production costs, must be excluded".

Observations of the French Government

The French Government states that this case has been submitted to the Court by common agreement between the Swiss and French authorities.

The French Government considers that the 11 questions which have been referred to the Court for a preliminary ruling focus on two points of law, "the first concerning the concept of value for customs purposes within the meaning of Regulation No 803/68, and the other dealing with the problem of penalties for infringing customs rules".

A — The concept of value for customs purposes within the meaning of Regulation No 803/68

The French Government recalls that international law in the economics sphere is dominated by the principle that the value for customs purposes must correspond to the normal price of the product forming the subject-matter of the transaction.

This definition is that of GATT and the Brussels Customs Convention of 15 December 1950, on which Regulation No 803/68 was directly based.

According to the French Government the theoretical concept of a "normal price" will be found on examination to represent an ideal, and is sufficient to justify the view that the declared value may be re-adjusted, a possibility which is in any case provided for in Article 9 (2) of Regulation No 803/68, and by Regulation No 1581/74 of the Commission of 24 June 1974 (Official Journal L 168 of 25 June 1974) on the price reductions to be taken into account when determining value for customs purposes.

Although the cases covered by these provisions concern upward adjustments, the French Government is of the opinion that these adjustments do not constitute an exhaustive list and that from the Community provisions as a whole it may

be seen that the aim paramount in the mind of the Community legislature as regards valuation for customs purposes was the attempt to establish the correct price. This point of view was confirmed by the Court of Justice in its judgment in Case 27/70 *Edding* (cited above).

The attempt to establish the correct price in open market conditions implies that the national customs authorities must be able to revise the value which is declared to the customs whether the revision increases or decreases the value. Otherwise abuses might occur which were harmful to the economy of the Member States and which it would not be possible to punish. Thus, in the present case, a modification in the price of the active ingredients sold by Sandoz-Switzerland would have considerable repercussions on the management of the French social security scheme, since the producer price for medicaments and the registration of such medicaments on the list of specialized products which will be reimbursed by the social security authorities are based on the declared cost of these active ingredients.

The French Government maintains, then, that in view of the absence of competition which characterizes the transaction in this case, it is permissible to re-adjust the value for customs purposes without taking into account the declared value.

In order to do so the customs administration must try to discover the true value of the product:

— "Either by attempting to establish the normal price for identical or similar goods, applied by other suppliers established in the exporting country in relation to independent buyers established in the importing country (Recommendations of 1 June 1965 and Report No 5/1979 of the Customs Co-operation Council);

— Or in the absence of any market competition, by taking into consideration the industrial production cost plus the other costs involved or any other factor corresponding to the concept of the nearest ascertainable equivalent referred to in Article VII (2) (c) of GATT, which should be relied on, according to the French Government, in the absence of any precise Community provisions."

These are the principles on the basis of which the Direction Nationale des Enquêtes Douanières [National Customs Inspection Office] conducted an inquiry in the course of which it established that the declared value amounted to twice the value corresponding to the normal price. The normal price was determined on the basis of the prices recorded in the case of purchases by French importers of the same product from different suppliers.

Thus ergotamine was sold in France by various German, British, Belgian, Swiss, Finnish and Czechoslovakian manufacturers or dealers at between FF 20.48 and FF 39.87 per gram instead of FF 84.50 and FF 95.50.

In the case of dihydroergotamine there are no other French importers, but a comparative technical study and German tariffs enabled the French customs to

establish that the product invoiced at approximately FF 120 should not have been sold for more than FF 54.

The French Government considers that this disparity is not justified by standards of quality peculiar to the Sandoz-Switzerland supplies, or by ignorance on the part of Sandoz-France as to current prices in the sector, as a simple perusal of the suppliers' directory would have shown them these prices.

B — Penalties for infringement of customs legislation

On the basis of the foregoing observations, the French Government considers that the fact that "a trader submits an erroneous declaration may, in certain cases, constitute a particularly serious breach for which penalties may be prescribed."

As a result it considers that it is important to realize, as a matter of principle, that a fraudulent action, once its existence has been established by the court or courts dealing with the facts, may involve penal sanctions, irrespective of whether an administrative penalty has been imposed on the ground of a simple mistake, and this possibility was not excluded by the Cout in the judgment in Cases 41/76 and 52/77 *Donckerwolcke* and *Cayrol,* cited above, and Case 179/78, *Rivoira,* of 28 March 1979 [1979] ECR 1147, provided that it satisfies the principle of proportionality.

The French Government adds, however, that in this case there is very good reason to suspect fraud on the part of the Manager of Sandoz-France because the valuation which appeared on the invoice produced differed considerably from the normal price current on the open market and that such a "distortion may be considered as false and inapplicable, a factor which aggravates the seriousness of the infringement".

Observations of the Government of the Federal Republic of Germany

A — Questions of customs law

1. First question on the possibility of reducing the value for customs purposes

The Federal Government commences its observations by pointing out that Community customs law cannot be interpreted independently of the Brussels Convention. The value for customs purposes has been defined in Article 1 of Regulation No 803/68 of the Council as being the normal price.

Article 9 of the same regulation shows that the price actually agreed upon may be accepted as the value for customs purposes if that price corresponds to the normal price.

In the opinion of the German Government the specific purpose of the customs valuation — which is to enable duties to be levied — implies that the selling price actually paid constitutes, as a rule, for the customs authorities, the lower limit of the value for customs purposes and it is only possible to reduce this value for customs purposes if the selling price differs manifestly from the market price and if the authorities are able to prove such a difference.

In consequence the Federal Government proposes that the reply to the first question should be as follows:

"Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes, especially the first ten articles thereof, and Regu-

lation (EEC) No 1581/74 of the Commission of 24 June 1974 on the price reductions to be taken into account when determining the value for customs purposes, authorize the competent authorities of a Member State to attribute to goods imported from a non-member country a value for customs purposes lower than the value declared by the importer, or — in respect of imports subsequent to the entry into force of Regulation (EEC) No 375/69 of the Commission of 27 February 1969 — lower than the value based on the particulars concerning the value for customs purposes declared by the importer, even though the exercise of this power may be envisaged only in certain exceptional cases".

2. Second question concerning the possibility of reducing the value for customs purposes on the basis of a reference price

The German Government recalls that this procedure is only possible if there is clearly a substantial difference in relation to the invoice price and this difference has been proved by the customs administration. If those requirements are met it is possible to rely on reference prices.

In doing so the customs authorities of the Member States must act in concord with the Community institutions in accordance with the principles laid down by the Customs Cooperation Council in a Recommendation of 1 June 1965.

The German Government is of the opinion that a "comparison with the price of identical goods cannot, however, affect the customs valuation unless the economic context (origin of the goods, commercial level of the transaction, quantity, circumstances surrounding the contract) is also comparable".

3. Third question concerning the criteria to be used in establishing the reference price

As to Question 3 (a), the Federal Government is of the opinion that the answer should be "no", since it considers that in the absence of any such reference price (between an exporter and an importer established in the same countries as those involved in the disputed sale) it would be permissible to rely on different reference prices, but subject to restrictions.

The German Government considers that even a considerable price difference does not justify any divergence from the invoice price if the differences are due to special factors.

As to Question 3 (b), the German Government replies that the deliveries used as a reference must have been carried out on the same market as that of the country for which the goods to be valued are destined, but that on the other hand it is possible to compare prices concerning deliveries originating in countries other than that from which the goods to be valued have come. But, here too, the special circumstances which may exist in those other countries should be taken into account.

4. Fourth question concerning the possibility of taking into consideration as reference prices the prices in force in countries with a State trading monopoly or prices for imitation products

As regards prices in force in countries with a State monopoly the German Government considers that the requirements which must be met before these prices may be used as a reference are such that resourse to a price applied by a country having a State monopoly "is not necessary". As to imitation products the German Government considers that the prices of these products are necessarily to be excluded as the reference price.

5. Fifth question, on whether Member States may have unilateral recourse to other methods

The Federal Government is of the opinion that this question should be answered in the negative because the uniformity of Community law would be prejudiced. In consequence it claims that "unilateral action on the part of a Member State such as that described in the question is not permissible".

6. Sixth question, on the criteria to be applied in establishing the value for customs purposes in this case

This, in the opinion of the German Government, is the crux of the problem. It observes that it is only possible to use criteria other than the invoice price if the latter was obviously not the price based on conditions of competition and if the administration proves that fact.

If claims, moreover, that the mere existence of a relationship between the supplier and the buyer does not justify the presumption that the invoice price is different from the normal price.

If there are serious reasons for doubting the invoice price, however, the Federal Government is of the opinion that only the deductive method may be used and in applying that method account must in addition be taken of all the research costs including those which are not directly connected which the product. Similarly, allowance should be made for possible additional sums representing services rendered outside the sale itself and representing a supplementary factor in the calculation. Finally, allowance must be made for a suitable profit.

7. Additional question, No 11, on downward adjustments other than those referred to in paragraphs 18 to 21 of the annex to Regulation No 375/69

According to the German Government it is not possible to make any additional adjustments; in particular any reduction on the basis of factors which do not appear in Article 1 (2) (b) and (c) cannot be envisaged.

The customs authorities may use reference prices or estimates only in accordance with the replies to Questions 2 to 6, above.

8. Seventh question, on whether a Member State may penalize an importer even where he has accurately supplied the particulars required by the questionnaire used uniformly throughout the Community when the customs declaration is being made

The Federal Government considers that it is impossible to give a clear reply to this question since the hypothetical situation referred to in the question does not make it clear whether or not the customs authorities have required the importer to supply additional information as referred to in Article 1 (2) of Regulation No 375/69. Although it is true that Community law does not exclude the application of national criminal law relating to customs, the application of such laws is limited to cases in which the importer has failed to fulfil the obligations incumbent on him under Community customs rules.

In the circumstances the Federal Government is of the opinion that "if, in an actual case, the customs authorities have not requested supplementary information at the outset, or if they cannot prove the inaccuracy of the particulars supplied, a penalty is totally excluded in the conditions described in the question".

However, Article 30 of the EEC Treaty does not apply to the Community's external trade relations. If the EEC agreed to a prohibition corresponding to that of Article 30 of the EEC Treaty in the context of an international agreement it was acting in the exercise of its powers relating to commercial policy and not, for instance, on the basis of an

obligation imposed on it by the EEC Treaty.

In those circumstances "the rules in the field of external commercial relations which are under consideration here do not restrict the Member States in any way as regards customs law imposing sanctions going beyond what has been described" above.

9. Eighth question, concerning the compatibility of criminal sanctions with the principles of the customs union

The Federal Government notes that the provisions of the EEC Treaty, and thus also Articles 12 to 29 on the creation of the customs union, do not include any prohibition in respect of the Community's external trade against measures having equivalent effect, such as that imposed in respect of trade within the Community.

Of course in those circumstances to fix the value for customs purposes at a lower level might bring about deflection of trade, and hence distortion in competition, but this would be the result of the lack of harmonization in the field of the law concerning sanctions for infringement of customs rules.

The Federal Government also observes that a reduction of this kind can only be envisaged in exceptional cases which are strictly limited and clear, as it has already pointed out in its reply to Question 1.

10. Ninth question, on the compatibility of reducing the declared value and, in particular, of the penalty, with the Agreement between the EEC and Switzerland

The Federal Government expresses that opinion, first, that the definition given by the Court of Justice of measures having equivalent effect for intra-Community trade is not applicable to external trade relations.

As a result, it claims that the reply to Question 9 (a) can only depend on the interpretation of Articles 13 and 20 of the Agreement between the EEC and Switzerland, according to which a Member State may indeed ignore the particulars supplied for the purpose of fixing the value for customs purposes when goods are imported from Switzerland, but only on condition that "the purpose to be achieved by the national rules concerned does not itself constitute an infringement of Community law or of the commercial agreement, and the process of determining the value must not be abused to the point where it must be considered as constituting arbitrary discrimination or a disguised restriction on trade."

In those circumstances, in the opinion of the Federal Government, Question 9 (a) must be answered in the affirmative.

As to Question 9 (b) the Federal Government considers that the reply to it should be in the negative. In fact, it says, in order to justify a penalty there must have been disregard of an obligation under customs law provided for at the Community level and the criminal sanction applicable must not be disproportionate.

In this case, however, the Federal Government says that the penalty is in the first place unlawful because the importer has fulfilled his obligations, and in the second place incompatible with Community law because it is disproportionate inasmuch as the penalty laid down is the same as that for palpable fraud such as the production of false invoices.

B — Restrictions on the free movement of goods in order to ensure the application of restrictions on the free movement of capital (tenth question)

According to the Federal Government Article 19 of the Agreement between the EEC and Switzerland does in fact contain a prohibition against restrictions on the freedom of payments relating to trade in goods; but on the other hand it

does not contain any corresponding guarantee as to the freedom of payments relating to a transaction involving the movement of capital.

However, just like Article 30 of the EEC Treaty, Article 13 of the Agreement between the EEC and Switzerland must be interpreted as meaning that State intervention in the field of freedom of payments relating to trade in goods is authorized in so far as it is limited to what is indispensable and where its content and scope are foreseeable by individuals, that is to say, expressly regulated and delimited in fact.

In consequence Article 19 of the Agreement between the EEC and Switzerland should be interpreted as meaning "that a penalty for unlawful transfer of capital is under no circumstances compatible with the agreement, and in particular with Article 13 thereof, unless the conditions under which part of the payment intended to cover a sale price may be considered as an infringement of a prohibition with regard to exchange control in the field of the movement of capital have been fixed in advance, in detail and in a manner recognized by the parties concerned.

Consequently the question which has been referred to the Court may be answered in the affirmative, subject to certain restrictions.

Written observations of the United Kingdom of Great Britain

A — Questions 1 to 6 and supplementary questions

1. First question on whether a Member State may reduce the declared value

In the opinion of the United Kingdom Government this question should be answered in the affirmative, provided that the definition in Article 1 of Regulation No 803/68 is respected. However the introduction of Regulation No 1581/74 appears to have no bearing on the issue as it gives no scope for allowing the competent authorities of a Member State to impose administratively a value lower than the declared value.

2. Second question, on whether a Member State may compare the declared value with one or more prices charged in other contracts of sale concerning the same product

According to the United Kingdom Government H. M. Customs and Excise would not reduce the declared value simply because of the existence of lower prices charged in other contracts involving the same product. As a result it claims that the price actually charged on a sale in the open market is the nearest to the normal price.

3. Third and fourth questions, on the reference prices which may be adopted by a Member State

The United Kingdom Government emphasizes that the use of comparative prices for identical or similar goods may lead to considerable difficulties and it considers that "whether such evidence would usually be used by the competent authorities to substitute a lower value is ... extremely doubtful, particularly where imitation, patented or State monopoly products are concerned".

4. Fifth and sixth questions, on the methods which the French administration may use to determine the value for customs purposes

The United Kingdom Government observes that there is nothing to prevent the competent authorities from using whatever methods may help them to determine the value required under Article 1 of Regulation No 803/68. In this respect it points out that one method

commonly used is that known as the deductive method. Lastly, it observes that the draft Agreement on the Implementation of Article VII of GATT also provides for valuation methods to be applied in a strict order of precedence.

5. Supplementary question (eleventh question) on downward adjustments in the declared value other than those listed in paragraphs 18 to 21 of the Annex to Regulation No 375/69

The United Kingdom Government considers that the list of adjustments in Article 9, whether upwards or downwards, is not, and does not purport to be, exhaustive. Therefore the reply to the question should be in the affirmative.

B — Questions 7 to 10

1. Seventh question, on whether a Member State may impose customs penalties when it appears that the importer has satisfied the Community import rules and requirements

In the opinion of the United Kingdom Government "there is ... no scope for a charge of false declaration of value for customs purposes if the importer has met the requirements of Regulation (EEC) No 375/69, whether in filling out the questionnaire, or in supplying the additional information which may be called for."

In addition, in the absence of bad faith, negligence or recklessness in filling out the questionnaire it is difficult to see how a charge of making a false declaration could arise; and the United Kingdom Government maintains that in intra-Community trade "any arbitrary downward adjustment of a declaration of value would be contrary to Article 30 at least in so far as it was coupled with penalties for making a false declaration". However, the case-law of the Court of Justice on measures having equivalent effect does not apply to external trade. Nevertheless, there are general principles of Community law which may be relevant to trade with non-member countries and among these are the principles of legal certainty and proportionality.

Thus the principle of legal certainty clearly requires that an importer should know in advance how goods are going to be valued for customs purposes.

As a result the United Kingdom Government considers that Question 7 should be answered in the negative: "Member States are not entitled to charge an importer with 'false declaration of value for customs purposes' where the terms of the regulation have been complied with" and where the use by a Member State of the customs value for exchange control purposes would impair the application of Regulations Nos 803/68 and 375/69.

2. Eighth question, on whether the practice of reducing the declared value is compatible with the customs union established by Articles 12 to 29 of the EEC Treaty

According to the United Kingdom Government, the reply to this question, which relates to a specific aspect of the preceding question, should be the same as that to Question 7. However, as customs enforcement has not yet been harmonized, Articles 12 to 29 of the Treaty do not apply to reductions of customs value and attendant penalties.

The United Kingdom Government emphasizes moreover that "this question is tendentious in so far as it suggests that a reduction of declared value of itself leads to deflections of trade and distortions of competition".

It also recalls that H. M. Customs and Excise do not use their powers to effect downward valuations. However, for the purposes of direct taxation the Inland Revenue may substitute a different price for the invoice price for imports in calculating taxable profits.

The British Government adds that the use of artificial transfer prices between associated persons is a serious problem which is being studied in the OECD and the EEC.

3. Question 9 (a) on the interpretation of Article 13 of the Agreement between the EEC and Switzerland

In view of numerous decisions made by the Court of Justice, the United Kingdom Government considers that the agreement between the EEC and Switzerland, being an agreement under international law, is subject to interpretation in accordance with the rules of that law even though the Court of Justice has jurisdiction to rule on the interpretation of the agreement. However, it maintains that Article 13 of the Agreement does not have the same content as Article 30 of the EEC Treaty.

As a result the Government of the United Kingdom proposes that the reply to Question 9 (a) should be:

"There is nothing in Article 13 of the EEC/Switzerland Agreement which prohibits a Member State from reducing the declared value or the value resulting from the particulars furnished by the importers provided this does not represent a means of arbitrary discrimination or a disguised restriction on trade, contrary to Articles 13 to 20 of the EEC/Switzerland Agreement. While the conditions of intra-Community trade are not sufficiently similar to admit of direct application of the jurisprudence of the Court on Article 30 *et seq.* of the Treaty to trade with Switzerland, the principles are nevertheless similar having regard to the rules of international law on the interpretation of Treaties."

4. Question 9 (b) on whether a Member State may inflict heavy penalties on an importer of a Member State of the EEC who has duly fulfilled his obligations

The Government of the United Kingdom is of the opinion that "penalties imposed although Regulation (EEC) No 375/69 has been complied with would appear to be contrary to Article 13 of the EEC/Switzerland Agreement except in so far as the penalties are directed to remedying some other problem, compatibly with Community law" that is to say, observing the principles of legal certainty and proportionality.

5. Tenth question, on capital transfers

The United Kingdom Government maintains that there is nothing in Article 19 to prevent Member States controlling capital movements provided that the use of the relevant powers is not designed to "circumvent that provision", that is to say, in this case, Articles 13 and 20.

According to the United Kingdom Government "there can therefore be no question of Community rules precluding national action. Nevertheless, the same principles relating to legal certainty and proportionality apply".

Written observations of the Commission

A — General

First, as regards the procedure, the Commission considers that the function

of the examining magistrate is a judicial one and that he therefore has jurisdiction to refer matters to the Court of Justice.

Secondly, as regards the sphere of application of the Community regulations concerning valuation for customs purposes, this Community concept of value for customs purposes need be followed only to the extent to which it is being applied for the purposes of Regulation Nos 803/68, 1736/75 of 24 June 1975 (Official Journal L 183/1 of 14 July 1975) and the Sixth Directive, No 77/388/EEC of 17 May 1977 on the harmonization of the legislations of Member States concerning turnover tax (Official Journal L 145 of 13 June 1977, page 1).

It is therefore permissible for Member States to use different concepts of value for other purposes. Member States may even, in this regard, take as their reference the Community concept of value for customs purposes. But if they do so that concept "must be interpreted in the light of the specific objectives of its own rules and without prejudice to compliance with the provisions of Community law which apply in the field under consideration".

Thirdly as to the questions submitted, the Commission has found it convenient to re-group them to a certain extent.

B — Questions 1 and 11, whether the value for customs purposes may be reduced and to what extent

1. The concept of the normal price

The Commission is of the opinion that the definition of the value for customs purposes which follows from Articles 1 and 2 of Regulation No 803/68 and which refers principally to the concept of the normal price, implies that the competent authorities may establish the value for customs purposes not only at a higher level but also at a lower level.

The Commission explains its views by maintaining that the principal aim of the valuation for customs purposes is to attempt to establish the accuracy of prices and not to levy the maximum amount of customs duty.

2. The methods which may be used in order to establish the accuracy of the price

The Commission claims that no method need be excluded which enables the accurate price to be established, even though Regulation No 803/68 only mentions two. It also maintains that according to Article 9 of that regulation the adjustments may relate to both intrinsic and extrinsic features of the price.

That applies particularly in the case of a transaction between associated undertakings. This conclusion is confirmed by the recommendation made by the Customs Co-operation Council on the application of the value for customs purposes of 1 June 1965, which the Commission attaches to its observations.

C — Questions 2, 3 and 4, methods of reducing the value by reference to other known selling prices

The Commission considers that it is appropriate to refer to other selling prices on condition that the transactions are as similar as possible to those involving the goods which have to be valued, bearing in mind the principles established by the recommendation mentioned above.

However, it considers that it is preferable to use as a means of comparison the price of a transaction which is parallel to the disputed transaction.

Therefore, in reply to Question 3 (b) it submits that:

1. The price charged by exporters from other Member States cannot, in principle, be adopted as a reference;

2. Sales made by importers established in other member countries may be taken into consideration;

3. Sales concluded by exporters established in non-member countries may be taken into consideration;

4. Sales made to importers established in non-member countries or which take place between a supplier and a buyer who are both established in a non-member country may not be taken into consideration.

In reply to Question 4 it maintains that:

1. Sales from countries whose external trade constitutes a State monopoly may not be taken into consideration;

2. Sales of imitation products may be taken into account provided that it is established that the two products are identical or comparable.

The Commission adds on this point that the argument put forward by Sandoz-France that the inclusion of the research costs borne by the parent company in the price of the product paid by its subsidiaries precludes the possibility of any reference to another price is not convincing because "the whole point is to discover whether the parent company includes the same costs when it sells its products to another buyer".

D — Questions 5 and 6, the use of other methods where there is no reference price

In the opinion of the Commission if there is no selling price available for reference the responsible authorities may use other methods of comparison, in particular the deductive method, without having to undertake prior consultation with the other Member States.

E — Questions 7 and 8, the question of penalties

First, the Commission claims that it is not clear that penalties may be applied under the French rules. Even if it were possible, that is to say, if the penalties provided for in Article 426 of the Customs Code were applicable, it would also be necessary for them to be compatible with Community law and in particular with the principle of proportionality.

F — Question 9, the special case of Switzerland

The Commission observes that the agreement between the EEC and Switzerland does not create a Common Market comparable to that which exists between the Member States. Subject to that reservation, it considers that nevertheless the case of *Donckerwolcke* is applicable, especially as in this case there would be no harmful consequences for the treasury since there has been no evasion of customs duties and thus the conditions of Article 426 of the Customs Code are not fulfilled.

Therefore the application of that article would constitute a measure having equivalent effect on the basis of the case-law in *Donckerwolcke,* quoted above.

G — Question 10, capital transfers

According to the Commission, Article 19 of the agreement between the EEC and Switzerland admittedly compels the importing State to grant the exchange authorizations required for the amount of the price of the goods which are imported. But Member States may reduce that price by following the methods used for establishing the value for customs purposes provided that adjustments are not accompanied by unreasonable penalties.

In conclusion the Commission considers that the questions which have been submitted should be answered as follows:

1. "The Community concept of value for customs purposes may be used for purposes other than those of the customs. In that case it must be applied in accordance with the objectives for which it is being used, and with the provisions of Community law which apply in the sector concerned.

2. The declared value for customs purposes may be adjusted downwards if it does not correspond to the normal price for the goods.

3. In order to establish the accuracy of prices the responsible authorities may use any method of comparison, alone or in combination with each other, in particular those which depend on reference to other prices. They must give preference to comparative criteria which make it possible to arrive as nearly as possible at the normal price.

4. Adjustment of the value for customs purposes may not give rise to the application of disproportionate penalties, especially if the trader has fulfilled his obligations with regard to the declaration. Any such penalties must be considered as measures having equivalent effect to a quantitative restriction.

   The same principles apply as far as the application of Article 13 of the Agreement between the European Economic Community and the Swiss Confederation is concerned.

5. Article 19 of that agreement requires the competent authorities of the importing State to grant to importers the necessary exchange authorizations for an amount corresponding to the price of the goods which are imported.

   For that purpose, they may make a downward adjustment of price, using, for example, methods such as those used to establish the value for customs purposes.

   However, they may not accompany such adjustments with disproportionate penalties.

III — Oral procedure

At the sitting on 16 January the accused in the main proceedings, represented for the purposes of the oral procedure by B. Baudelot and R. Saint Esteben, both of the Paris Bar; the French Government, represented for those purposes by its Agent, Mr Degoutte; the Government of the Federal Republic of Germany, represented for those purposes by Dr Seidel, and the Commission, represented for those purposes by its Legal Adviser, Jean-Claude Séché, submitted oral argument.

On four points the *Government of the Federal Republic of Germany* added further detail to its written observations:

1. As regards the first question, the German Government is of the opinion that the possibility of reducing the value for customs purposes might entail distortion of competition. It therefore submits "that such powers of reduction should be limited solely to cases of abuse; that only in very special cases may a customs administration proceed to exercise them and that it is for the customs administration — upon whom the onus of proof rests — to demonstrate that the agreed price is not correct and does not correspond to the competitive price and the market price".

2. In regard to Questions 2 to 5, which are concerned with the possibility of having recourse to "comparable or comparative prices", the German Government submits that "great care must be taken to see that comparable deliveries are indeed understood to be deliveries from research undertakings", that is, to see that "it is truly supplies coming from equivalent undertakings which are involved".

3. In regard to Question 11 on the method by which any reduction may be carried out, the Federal Government considers that transfer of capital does not fall within the "other items" referred to in heads of 18 to 21 of the Annex to Regulation No 375/69 on the ground that, in the case referred to by those provisions, all that is involved is the "correction" of invoiced prices and not the "absolute rejection of the invoice price in its entirety". It adds, moreover, that Member States do not enjoy an independent power of interpreting legislation on customs matters.

4. In regard to Question 10 dealing with illegal transfers of capital, the Federal Government recalls that there exists "a guarantee of the free movement of goods and, simultaneously, of the freedom of payments relating to the movement of the goods". Although it is true that restrictions on the free movement of capital sometimes turn out to be necessary in the context of national monetary policies, in such an event the practice of the Federal Government requires that traders be consulted and that "the distinctive features of a prohibition ... must be drawn up in such a manner that traders and commercial circles may truly know where they stand and be prepared for such prohibitions". Thus a mere reference to value for customs purposes would be unheard of in the Federal Republic of Germany, all the more so since such a procedure would be difficult to introduce having regard to the guarantees contained in the Basic Law.

The *Commission* supplemented its written observations with details on four points:

1. First, it considers that, although all the questions (other than the 10th) concern value for customs purposes, the main proceedings are concerned above all with "a question of the liberalization of current payments". On that point it is open to France to prevent "the export of capital to Switzerland from exceeding that which is necessary for payments relating to trade in goods". In order to exercise that power France could effect a reduction of the price provided that "the general principles of Community law concerning legal certainty or proportionality are observed".

   Such a practice is very rare but lawful and the Court should answer the various questions by giving "the replies which it would give in a case falling strictly within the field of customs law". Accordingly, contrary to the view of the French Government, it would not be warranted to inquire into the normal price "on grounds of social reasons connected with the prices of pharmaceutical products within the concern of social security".

2. In regard to the concept of an identical or comparable product, the

Commission submits that a price comparison must refer to the same product and that the making of such a finding would be difficult in regard to pharmaceutical products "where chemical identity is perhaps not enough".

3. In regard to Question 5 on whether it is open to a Member State unilaterally to employ other methods of comparison, the Commission seems to express an opinion contrary to that expressed in its written observations by stressing that "another interpretation seems possible" whereby "it might be said that a national authority may not employ other methods without first having carried out an exchange of information with the importer".

4. Finally, in regard to Question 9 (b) on penalties, the Commission states in supplement to its written observations that Community customs law "is in some respects unsuitable for use otherwise than for customs purposes, in particular as regards the control of currency movements". Thus a right to make reductions does not automatically carry with it the right to impose penalties. In order to impose penalties Member States would have to "make specific rules which must themselves ... observe the fundamental principles of Community law".

The Advocate General delivered his opinion at the sitting on 13 February 1980.

Decision

1 By orders dated 7 March and 14 May 1979, which were received at the Court on 18 April and 16 May 1979, the Examining Magistrate at the Tribunal de Grande Instance, Nanterre, submitted to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty certain questions on the interpretation of Regulations Nos 803/68 of 27 June 1968 (Official Journal, English Special Edition 1968 (I), p. 170), 375/69 of 27 February 1969 (Official Journal, English Special Edition 1969 (I), p. 63) and 1581/74 of 24 June 1974 (Official Journal L 168, p. 15) and of certain provisions of the agreement between the EEC and the Swiss Confederation concluded pursuant to Regulation No 2840/72 of the Council of 19 December 1972 (Official Journal, L 300, English Special Edition 1972, (31 December) p. 3).

2 Those questions have arisen in the context of a criminal investigation instituted against the manager of Laboratoires Sandoz, a limited liability company, (hereinafter referred to as "Sandoz-France"), who is accused of having made a customs declaration in respect of goods bought from the parent company, Sandoz A.G., established in Switzerland (hereinafter referred to as "Sandoz-Switzerland") at a higher value than the normal

price. Those purchases are spread over the period from 4 January 1971 to 9 November 1973 and amount to a total of FF 89 929 024 whereas the value recognized by the customs authorities was only FF 53 142 943. The customs authorities inferred from their assessment that the declared price was increased by comparison with the normal price in order to allow Sandoz-France irregularly to transfer capital to the parent company in Switzerland.

3 On the basis of those facts, the Examining Magistrate charged the manager responsible with making illegal transfers of capital abroad and with importing prohibited goods without declaration, being an offence punishable under Article 414 of the French Customs Code by imprisonment not exceeding three months and a fine equal to twice the value of the goods involved in the fraud. The accused in the main proceedings disputed the prices held by the French customs to be normal, both in regard to the principles applied and in regard to the amount actually assessed. Having regard to the fact that the matter is governed by Regulations Nos 803/78 and 375/79 as well as by the Agreement between the EEC and the Swiss Confederation, the magistrate considered an interpretation of those provisions to be necessary and submitted 11 questions, the first of which raises a point of principle. The question is framed as follows:

"Do Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes, in particular Articles 1 to 10 of that regulation, and Regulation (EEC) No 1581/74 of the Commission of 24 June 1974 on the price reductions to be taken into account when determining value for customs purposes, allow the competent authorities of a Member State to attribute to goods imported from a non-member State a value for customs purposes less than the value declared by the importer or, for imports subsequent to the entry into force of Regulation (EEC) No 375/69 of the Commission of 27 February 1969, less than the value which results from, the particulars relating to value for customs purposes declared by the importer?"

4 The Examining Magistrate submitted an 11th question which is complementary to the first and of which the wording is as follows:

"Do Article 9 of Regulation No 803/68 of the Council and, for the imports to which they apply, Regulation No 375/69 of the Commission and the annex thereto allow the competent authorities of a Member State to apply to

the invoice price, in order to determine the value for customs purposes, downward adjustments other than those which are listed under Nos 18 to 21 of the aforesaid annex and which are determined by items separate from the price of the goods but nevertheless included in the invoice price?"

5 Those two questions, the answers to which govern those to be given to the others, namely, Questions 2 to 8 inclusive and 10, raise the issue whether a Member State may reduce the value for customs purposes declared by the importer. This problem must be resolved in the light of the objectives, the structure and the wording of those regulations.

6 According to its preamble, Regulation No 803/68 on the valuation of goods for customs purposes, which is part of the framework of the provisions of the Treaty relating to the customs union, pursues a double aim of an economic and a fiscal nature.

7 According to the 6th recital in the preamble, "the value for customs purposes must be determined in a uniform manner in Member States, so that the level of the protection given by the Common Customs Tariff is the same throughout the Community and any deflection of trade and activities and any distortion of competition which might arise from differences between national provisions is thereby prevented". According to the 7th recital in the preamble, "any deflection of customs receipts should be avoided and where appropriate eliminated".

8 When both those objectives are taken into consideration it may be recognized that the regulation is directed essentially to preventing the undervaluation of goods in connexion with the application of the Common Customs Tariff, which applies almost exclusively *ad valorem* customs duties. That conclusion is clear in regard to safeguarding the collection in full of customs revenue. It may also be inferred from the recitals in the preamble which relate to deflection of trade and activities and distortion of competition since those economic effects may be the result only of a lowering in the relative level of customs protection in certain Member States by reason of differing criteria for assessing the value for customs purposes of imported goods.

9 It is in the light of those objectives that the relevant provisions of Regulation No 803/68 should be considered, including therewith those of Regulation No 375/69 of the Commission which, on the basis of the first regulation, lay down the rules relating to the declaration of the particulars going to make up value for customs purposes.

10 In terms of Article 1 (1) of Regulation No 803/68 value for customs purposes is determined "for the purpose of applying the Common Customs Tariff". It is therefore with a view to that specific function that the definition of the "value for customs purposes" and the provisions which serve to determine it must be understood.

11 According to the same provision, the value for customs purposes of imported goods is "the normal price, that is to say, the price which they would fetch ... on a sale in the open market between a buyer and a seller independent of each other". According to Article 9, the price actually paid or payable may be regarded as being the basis to be used in determining the normal price.

12 The regulation provides for a number of adjustments which may be made to the price as thus defined. All such adjustments are specified in such a way as to prevent the declared prices being undervalued by reason of economic relations existing between the seller and the purchaser or from being reduced by the deduction of costs or charges other than those allowed by the regulation.

13 The detailed rules for the application of Regulation No 803/68 were laid down, in accordance with the procedure provided for in Article 17 thereof, by Regulation No 375/69 of the Commission. The purpose of the latter regulation is to specify the duties of importers in this regard as well as the powers of the customs administration. Under Article 1, the declarants are to furnish "the particulars relating to the value for customs purposes" as required by the form of questionnaire set out in the annex to the regulation. According to the paragraph (2) of that article, more detailed information must be furnished only at the request of the customs authorities, in particular where importation is effected pursuant to a transaction between a buyer and a seller who are not independent of each other. It follows from those provisions that the importer is bound to declare, in good faith, to the customs administration the particulars which may serve to determine the value for customs purposes, further checks being a matter for action by the administration.

14 The form of questionnaire referred to in Article 1 of Regulation No 375/69 specifies the particulars to be furnished by the importers:

A. The invoice price, as a basis of calculation;

B. Items which go to make up the value for customs purposes but are not included in the invoice price and which are to be borne by the seller;

C. Items which do not go to make up the value for customs purposes but are included in the invoice price and which are to be borne by the importer;

D. A rate of adjustment which applies only to the price and is provided for only in the form of an increase.

It appears from these particulars that, in order to calculate the value for customs purposes, the customs administration starts with the invoice price (A) — possibly adjusted, but only by way of an upward adjustment (D) — and thereafter checks the particulars extrinsic to the price — which it may increase or reduce — by adding them to the invoice price where costs to be borne by the seller are involved (B) or by subtracting them from the invoice price where costs to be borne by the importer are involved (C). Consequently, the value for customs purposes is made up essentially of the invoice price, which is only capable of being adjusted upwards, and the extrinsic items capable of upward or downward adjustment, which the customs authorities may add to or subtract from the invoice price.

15 It is be noted, finally, that Regulation No 1581/74, referred to in the first question from the national court, is not relevant in this case since it is subsequent in date to the facts of the case and moreover does not give rise in any way to a possibility of making a reduction.

16 Taking into consideration both the objectives of the system and the practical machinery of the two regulations which apply thus demonstrates that the detailed methods of determining value for customs purposes have been conceived with a view to fulfilling a specific function within the framework of the customs union. It follows therefrom that — except for a possible exception resulting from either the very structure of the Common Customs Tariff or Community rules pursuing special objectives other than those contemplated by the Common Customs Tariff — the adjustments to the value for customs purposes which are referred to in the regulations which have been cited are upward adjustments designed both to prevent deflection

of trade or activities and distortion of competition which would be the consequence of an undervaluation of imported goods and also to ensure for the Community the full collection of customs duties. It follows also from the specific nature of the provisions in question that the determination of the value for customs purposes in accordance with the rules of Regulations No 803/68 and No 375/69 cannot have the effect of requiring the fiscal and financial authorities of the Member States to accept that valuation for purposes other than the application of the Common Customs Tariff.

17 If it were established that an undertaking which forms part of a company or a group of companies of which the centre of management is outside the Member State concerned adopts, in its relations with that centre of management or with other undertakings belonging to the same group, prices, the application of which might imply an illegal transfer of capital or profits, it would be for the Member State concerned to take appropriate measures, with a view to proving, and where necessary suppressing, such activities, under its own financial or fiscal legislation and not by applying Community rules relating to valuation for customs purposes.

18 The answer to Questions 1 and 11 should therefore be that Regulation No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes, in particular Articles 1 to 10 of that regulation, and Regulation No 375/69 of 27 February 1969 must be interpreted as meaning that the reduction by the competent authorities of a Member State of the invoice price of goods imported from a non-member country does not accord with the aims of the rules relating to the determination of the value of the goods for customs purposes.

19 It follows from the answer to Questions 1 and 11 that Question 2 to 8 inclusive and 10, which were submitted only in case the answer to Questions 1 and 11 should be in the affirmative, have no longer any purpose.

20 It remains to answer Question 9 which is framed as follows:

"(a) Does not Article 13 of the Agreement between the EEC and the Swiss Confederation of 22 July 1972 (Regulation (EEC) No 2840/72 of the Council of 19 December 1972), which prohibits any measures having an effect equivalent to quantitative restrictions on imports in trade between

the Community and Switzerland, thereby prohibit the competent authorities of a Member State from reducing the declared value or the value resulting from the particulars furnished by the importer?

(b) In particular does Article 13 allow heavy fines and prison sentences to be imposed upon an importer of a Member State of the EEC who has duly fulfilled his obligations by correctly and completely giving the competent national authorities the information required by Regulation No 375/69 of the Commission of 27 February 1969, where it is not disputed that the goods have actually been delivered to the purchaser in the quality and quantity stated in the invoice and that the seller has received the whole of the invoice price?"

21 Question 9 (a) asks whether a reduction by the competent authority of a Member State of the declared value or of the value resulting from the particulars furnished by the importer, does or does not amount to a measure having an effect equivalent to a quantitative restriction, which is a measure prohibited by the Agreement between the EEC and the Swiss Confederation. It must be noted that, under Article 13 (2) of that agreement, measures having an effect equivalent to quantitative restrictions are abolished, and therefore prohibited, only as from 1 January 1975 at the latest. It is consequently for the national court to decide whether the facts alleged against the accused — which are spread over the period from 4 January 1971 to 9 November 1973 — are governed by the agreement in question.

22 In regard to the substance of Question 9 (a), it should be observed that the question envisages a case comparable to that raised by Questions 1 and 11. Consequently, in accordance with the answer given to those questions and the reasons in support of it, this question must receive the same answer in the context of the agreement between the EEC and the Swiss Confederation.

23 The issue presented by Question 9 (b) is whether, pursuant to Article 13 of the Agreement between the EEC and the Swiss Confederation, a Member State may penalize by heavy fines and imprisonment an importer who has duly fulfilled his obligations by accurately and completely furnishing the information required by Regulation No 375/69.

24 From the considerations advanced in answer to Question 1 and 11 it is apparent that where an importer has accurately and fully completed the form of questionnaire annexed to Regulation No 375/69 and it is not disputed that the goods have actually been delivered to the purchaser in the quality and quantity stated in the invoice and the seller has received the whole of the invoice price and it is not alleged against him that he has not answered more detailed inquiries which the customs authorities may have put to him, he has not failed to fulfil any of the duties imposed on him by the Community rules on the valuation of goods for customs purposes or by the Agreement between the EEC and the Swiss Confederation. On the other hand, the consequences in other respects — such as those relating to the financial or fiscal laws other than customs laws — which are not governed by Community institutions are a matter for the legal order of the Member State concerned.

Costs

25 The costs incurred by the French, German and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Examining Magistrate at the Tribunal de Grande Instance, Nanterre, by orders of 7 March 1979 and 14 May 1979, received at the Court Registry on 18 April 1979 and 16 May 1979 respectively, hereby rules:

1. Regulation No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes, in particular Articles 1 to 10 of that regulation, and Regulation No 375/69 of 27 February 1969

must be interpreted as meaning that the reduction by the competent authorities of a Member State of the invoice price of goods imported from a non-member country does not accord with the aims of the rules relating to the determination of the value of goods for customs purposes. However, the determination of the value for customs purposes in accordance with those regulations cannot have the effect of requiring the fiscal and financial authorities of the Member States to accept that valuation for purposes other than the application of the Common Customs Tariff.

2. The same answer applies as regards Article 13 of the Agreement between the EEC and the Swiss Confederation of 22 July 1972.

3. Where an importer has accurately and fully completed the form of questionnaire annexed to Regulation No 375/69 and it is not disputed that the goods have actually been delivered to the purchaser in the quality and quantity stated in the invoice and the seller has received the whole of the invoice price and it is not alleged against him that he has not answered more detailed inquiries which the customs authorities may have put to him, he has not failed to fulfil any duties imposed on him by the Community rules on the valuation of goods for customs purposes or by Article 13 of the Agreement between the EEC and the Swiss Confederation. On the other hand, the consequences in other respects — such as those relating to the financial or fiscal laws other than customs laws — which are not governed by the Community institutions are a matter for the legal order of the Member State concerned.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 24 April 1980.

A. Van Houtte
Registrar

H. Kutscher
President

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