OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 24 October 1985 *

Mr President,
Members of the Court,

1. The Netherlands undertaking Vonk's Kaas Inkoop en Produktie Holland BV (hereinafter referred to as 'Vonk') processes cheese waste into processed cheese and cheese powder, some of it for export. It collects the cheese waste it needs for that purpose mainly in France and the Federal Republic of Germany. Some of those imports are directly re-exported, particularly to Denmark.

In the course of those various operations it was usual for monetary compensatory amounts to be applied. However, in operations carried out at the beginning of 1984, Vonk was *charged* monetary compensatory amounts at a higher rate for imports of cheese waste and yet *refused the grant* of monetary compensatory amounts for the re-exportation of similar waste to Denmark.

Those two measures were founded on Commission Regulation (EEC) No 3281/83 of 18 November 1983 amending previous regulations on this subject (Official Journal 1983, L 322, p. 36). Vonk took the view that the way in which that regulation had been applied to it by the Netherlands authorities was unfair. It sought the annulment of the two measures before the College van Beroep voor het Bedrijfsleven (hereinafter referred to as the 'College van Beroep') on the ground that the amending provisions of the regulation were invalid.

The College van Beroep noted that a further amendment in this field had been adopted in Commission Regulation (EEC) No 270/84 of 1 February 1984 (Official Journal 1984, L 31, p. 15) and has submitted the following question to this Court:

'In so far as Note (5) of Part 5 of Annex I to Regulation (EEC) No 1245/83, as successively amended by Regulations (EEC) No 3281/83 and No 270/84, provides that no monetary compensatory amount is to be paid on exports of the cheese of low value referred to in that note and that if a monetary compensatory amount is chargeable in respect of a consignment consisting of different types of cheese of low value the compensatory amount applicable is to be the amount referred to in the note, is Regulation (EEC) No 1245/83 invalid on any of the following grounds:

(a) breach of Article 12 taken together with Articles 38 to 46 of the EEC Treaty, or

(b) breach of Regulation (EEC) No 974/71 of the Council, or

(c) inadequate or invalid statement of the reasons on which Regulations (EEC) No 3281/83 and No 270/84, by which Note 5 was amended, are based, or

(d) breach of the principle of proportionality, or

(e) breach of the principle prohibiting discrimination?'

2. Monetary compensatory amounts were introduced by Regulation (EEC) No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken

* Translated from the French.

in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257). The last recital of the preamble to that regulation states that:

'the compensatory amounts should be limited to the amounts strictly necessary to compensate the incidence of the monetary measures on the prices of basic products covered by intervention arrangements and [that] . . . it is appropriate to apply them only in cases where this incidence would lead to difficulties'.

Until 1977 the monetary compensatory amounts applicable to each variety of cheese were also applicable to the respective cheese waste. By Commission Regulation (EEC) No 1824/77 of 4 August 1977 altering the monetary compensatory amounts applicable to milk and milk products (Official Journal 1977, L 203, p. 7), the Commission, taking the view that the monetary compensatory amount applied on that basis to 'cheese rinds and waste was not in correct proportion to the value of these products' (fifth recital in the preamble), set a lower compensatory amount for 'cheese rinds and waste' which was that applicable to products falling within subheading 04.04 E I (c) of the Common Customs Tariff. That regulation also defined cheese waste as products 'unfit as such for human consumption'.

That amendment was retained in Commission Regulation (EEC) No 1245/83 of 20 May 1983 fixing monetary compensatory amounts (Official Journal 1983, L 135, p. 3) in the form of Note 5 to Part 5 of Annex I.

By the first of the contested regulations, Regulation No 3281/83, which entered into force on 2 January 1984, the Commission amended Note 5 as follows:

(i) first, rinds and waste were now defined as cheese of 'low value', that is to say, 'where the free-at-frontier price . . . is less than 140 ECU per 100 kg' (hereinafter cheese of 'low value' will be referred to as 'cheese waste');

(ii) secondly, it is provided that 'no monetary compensatory amount shall be paid' on exports of cheese waste (Article 1), whereas 'any amount charged should be the full amount' (second recital in the preamble to the regulation).

Lastly it must be stated that two further amendments have been made to the Note.

The other contested regulation, Regulation No 270/84, provides that with effect from 6 February 1984 the monetary compensatory amount chargeable in respect of consignments consisting of different types of cheese is that for products falling within subheading ex 04.04 E I (b) 2 of the Common Customs Tariff. In concrete terms the amounts chargeable are lower because they are set at a standard rate (fifth recital in the preamble). That regulation also retains the provision under which compensatory amounts are not to be granted for cheese waste.

Commission Regulation (EEC) No 635/84 of 12 March 1984 (Official Journal 1984, L 70, p. 6) restored the grant of monetary compensatory amounts on exports of certain types of cheese falling within subheading 04.04 E I (c) of the Common Customs Tariff even where their value was less than 140 ECU per 100 kg.

3. The withdrawal of the *grant* and the reintroduction of the *levy* at the full rate of monetary compensatory amounts are the amendments whose validity under Community law is being challenged by the *plaintiff in the main proceedings.* Vonk's contention that those measures are invalid rests basically on four grounds.

First, it claims that the mechanism introduced by Regulation No 3281/83 does not comply with the conditions laid down in the basic regulation, No 974/71. Its view is that the Commission has prejudiced both the system of monetary compensatory amounts and the detailed rules for its application.

It states that the monetary compensatory amounts were introduced in order to correct the effects of exchange rate variations on trade in and prices of agricultural products. It argues that Regulation No 3281/83 is inconsistent with that objective because it interferes with trade. By introducing what amounts to a customs duty, that regulation infringes Articles 12 and Articles 38 to 46 of the EEC Treaty.

Vonk further contends that the Commission has arbitrarily fixed the monetary compensatory amounts applicable to the different types of cheese, which is a breach of the principle laid down by Regulation No 974/71 requiring the monetary compensatory amounts for derived products to be equal to the incidence on their price of the application of monetary compensatory amount to the basic products. The increase in the monetary compensatory amounts charged on cheese waste is contrary to another principle contained in the regulation, which is that the compensatory amounts must be based on the price representing the market value of the products concerned. Yet, it argues, that rule is not being observed because the same monetary compensatory amounts are applicable to cheese and to cheese waste.

Secondly, Vonk complains that the Commission has not given adequate reasons for the amendments introduced by Regulation No 3281/83. The only justification provided is that there have been artificial trade flows. However, the Commission does not explain in what way that makes the contested measures necessary. In fact only the charging of monetary compensatory amounts can serve the regulation's stated purpose whereas abolishing the grant of the amount has no such effect. Vonk takes the view that Regulation No 270/84 is also insufficiently reasoned because the Commission has not explained its choice of the tariff subheading applicable to mixtures.

Thirdly, Vonk maintains that the new mechanism introduced by the Commission contains a twofold breach of the principle of proportionality.

On the one hand, the abolition of the grant of monetary compensatory amounts, which Vonk has shown to be ill-adapted as a means of combatting artificial trade flows, operates as an obstacle to trade, in particular for undertakings such as Vonk which have to obtain their supplies on other markets. The Commission has itself admitted as much by restoring the grant of compensatory amounts for certain kinds of cheese waste in Regulation No 635/84.

On the other, it is disproportionate in view of the aim of the regulation to charge monetary compensatory amounts on cheese waste at the rate applicable to the cheese from which it derives, thereby failing to take into account the low value of the waste.

Less drastic measures might have been considered, such as a system based on the value of the cheese or making it compulsory to declare in the customs documents the use to which the imported cheese waste was to be put.

Fourthly and lastly, Vonk complains that the Commission has failed to comply with the principle of non-discrimination as laid down in Article 40 (3) of the Treaty.

It points out that the purpose of the monetary compensatory amounts is to offset fluctuations in currency parities in order to avoid distortion in the conditions of competition. Yet, it argues, the effect of ending the grant of monetary compensatory amounts is precisely to reintroduce such distortion because exporters of cheese waste from a Member State with an exchange rate above the green rate are put at a disadvantage. Vonk states further that the charging of higher monetary compensatory amounts on cheese waste at the rate charged for the cheese from which it is derived also constitutes a breach of the principle of non-discrimination because it amounts to applying the same monetary compensatory amounts to products whose value is not comparable.

4. The *Netherlands Government* and the *Commission* emphasize that the rules introduced in 1977, whereby a lower monetary compensatory amount was applied to cheese waste, gave rise to artificial trade flows. Certain traders took advantage of the divergent interpretations of the term 'cheese waste' in different Member States and also the difference between the monetary compensatory amount for cheese waste and that for cheese so as to carry out the following transactions:

(a) Cheese was exported from a Member State with positive monetary compensatory amounts (for example the Netherlands) to a Member State where the amounts were negative (for example France), an operation giving rise to the grant of the *high monetary compensatory amounts applicable to cheese*;

(b) The same cheese was then cut up and re-exported to the Member State of origin in the form of waste, an operation which this time gave rise to the charging of the *lower monetary compensatory amounts applicable to cheese waste*;

(c) The pieces could then be reconverted into whole cheese (by melting or grating), which made it possible to *re-export the cheese and collect a further monetary compensatory amount.*

That circular traffic known as 'roundabouts' not only caused distortion of cheese production and trade but also entailed economically unjustified Community expenditure. The purpose of the contested regulation was precisely to put an end to such artificial trade patterns.

(a) The Netherlands Government's view is that the Commission is competent to vary the monetary compensatory amounts which it has introduced if they themselves have the effect of distorting trade. The present system is justified because if the monetary compensatory amounts had continued to be granted for cheese waste, at a rate which has since been increased, this would have given rise to further artificial trade flows.

(b) The Commission's analysis is that before 1977 the fact that the monetary compensatory amounts applicable to cheese and cheese waste were the same caused competition between the two categories of products to be distorted, and it was therefore necessary to apply a reduced monetary compensatory amount to cheese waste. That amendment in turn had the effects described above and so made it necessary to adopt the amending regulation challenged before the College van Beroep.

The Commission states that its competence in regard to monetary compensatory amounts must be seen in the light of the

basic regulation, No 974/71, which shows in particular that monetary compensatory amounts are not to be introduced automatically but depend on disturbances in trade caused by fluctuations in currency parities. In that context its task is not only to correct the possible effect of those fluctuations on intra-Community trade but also to ensure that the monetary compensatory amounts do not themselves disrupt trade. The contested provisions were specifically designed to fulfil that aim.

The Commission argues that although the definition of cheese waste was more objective since it was based on value, it could not by itself prevent the emergence of artificial trade flows. That is why the Commission instituted the system at issue.

The purpose of aligning the monetary compensatory amounts chargeable for cheese waste on those applicable to cheese is to deprive traders of an improper advantage. All the Commission has in fact done as far as the trade referred to above is concerned is to return to the system which was in force until 1977.

On the other hand, the Commission has stated in reply to one of the questions put to it by the Court that the abolition of the grant of monetary compensatory amounts for low-value cheese was a response *to another practice.* Besides cheese waste suitable for processing, there is also unusable waste which cannot economically be processed and would normally have to be destroyed. It is the wish to prevent the artificial trade flow of exporting such waste from a Member State with positive monetary compensatory amounts to a Member State with negative compensatory amounts *for the sole purpose of obtaining the reduced compensatory amounts granted hitherto* which explains the Commission's decision to abolish them altogether.

In view of the distortions caused by those bogus transactions, the Commission decided to protect the financial interests of the Community by avoiding unjustified payments of monetary compensatory amounts. It considers that, having regard to the considerations set out above, the contested regulation complies with the terms of the basic regulation, Regulation No 974/71, and Article 12 and Articles 38 to 46 of the Treaty.

In answer to the submission complaining of a breach of the principle of proportionality, the Commission adds that even if exports have become less financially attractive they are still possible. Furthermore, none of the alternative solutions suggested was appropriate. The Commission states that there was no breach of the principle of non-discrimination because the new regulation only withdrew a part of the financial advantage which Vonk had enjoyed before 1984.

5. The issue raised before the Court relates to the legality of regulations by which the Commission enacted the abolition of the monetary compensatory amounts previously granted in respect of exports of cheese waste and increased the monetary compensatory amounts charged for cheese waste to bring them into line with those applicable to the kinds of cheese from which they are derived. In such matters the scope of the Court's power of review is restricted by the margin of discretion which is enjoyed, as the Court has recognized, by the institutions and the Commission in particular.

The last subparagraph of Article 1 of the basic regulation, Regulation No 974/71, provides that the grant and the charging of monetary compensatory amounts is subject to the condition that exchange rate variations caused by movements against currency parities provoke 'disturbances in trade in agricultural products'. The fulfillment of that condition is a matter to be assessed by the Commission: 'Under Article 6 of the regulation it is for the Commission . . . to decide as to the existence of a risk of disturbance' (Case 55/75 *Balkan*

v *Hauptzollamt Berlin-Packhof* [1976] ECR 19, at paragraph 7 of the decision; Case 136/77 *Racke* v *Hauptzollamt Mainz* [1978] ECR 1245, at paragraph 3 of the decision).

The Court has consistently held that:

'as the evaluation of a complex economic situation is involved, the Commission . . . enjoy[s], in this respect, a wide measure of discretion' (Case 29/77 *Roquette* v *Administration des Douanes* [1977] ECR 1835, at paragraph 19 of the decision)

relating to the necessity of fixing monetary compensatory amounts having regard to the state of the market as well as the monetary factors in the case (*Roquette*, cited above, at paragraph 24 of the decision).

According to the Court, the effect of that discretion is as follows:

'In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion' (Case 55/75 *Balkan*, cited above, paragraph 8; Case 29/77 *Roquette*, cited above, paragraph 20; Case 136/77 *Racke*, cited above, paragraph 4; Case 98/78 *Racke* v *Hauptzollamt Mainz* [1979] ECR 69, at paragraph 5).

As Advocate General Capotorti has said, this means that the Court is 'called upon to consider whether or not there has been an infringement of the limits imposed by the rules in the Treaty or general principles upon the exercise of the discretionary powers conferred on these Community institutions' (Case 114/76 *Bela-Mühle* v *Greys-Farm* [1977] ECR 1211, at p. 1226).

In the light of those statements of principle it must be recognized that the Commission's powers under the basic regulation, Regulation No 974/71, and within the limits set by the regulation enable it not only to *introduce* monetary compensatory amounts but also to *adjust* them or even *abolish* them in the light of the changing circumstances as regards both the monetary factors disturbing trade and market conditions (see in particular Article 3 of Regulation No 974/71; Case 74/74 *CNTA* v *Commission* [1975] ECR 533, at paragraphs 17 *et seq.* of the decision; Joined Cases 67 to 85/75 *Lesieur* v *Commission* [1976] ECR 391, at paragraphs 24 to 28 of the decision).

The task of managing the system of compensatory amounts was entrusted to the Commission, which must of necessity also take into consideration the effect of the monetary compensatory amounts *themselves* on market conditions. The purpose of the compensatory amounts is to preserve market unity and at the same time guarantee free movement of agricultural products despite exchange rate variations (Joined Cases 80 and 81/77 *Ramel* v *Receveur des Douanes* [1978] ECR 927, at paragraphs 35 to 37 of the decision; Case 4/79 *Providence Agricole* v *ONIC* [1980] ECR 2823, at paragraph 20 of the decision; Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, at paragraph 22 of the decision). If, however, the introduction of monetary compensatory amounts has the effect of distorting intra-Community trade, they will fail in their purpose. In such a case it is for the Commission to correct the unwanted effects of monetary compensatory amounts which it has introduced or indeed make sure that monetary compensatory amounts under consideration do not have such effects.

It is therefore undeniable that the Commission was entitled to take action with

regard to the monetary compensatory amounts applicable to cheese waste having regard to the artificial trade flows that would otherwise have persisted.

In these proceedings it was contended that Regulations Nos 3281/83 and 270/84 were invalid under three heads, namely the insufficiency of the statement of reasons, failure to comply with certain provisions of the basic regulation, Regulation No 974/71, and infringement of the principles of proportionality and non-discrimination. I propose to examine first the submission that the statement of reasons was inadequate. The other submissions are intended to establish whether, after weighing up the balance of advantages and disadvantages, the Commission was entitled to decide to discontinue the grant of monetary compensatory amounts while still charging compensatory amounts at an increased rate or whether this was outside the bounds of its discretion. The question to be determined is therefore whether the Commission's appraisal in the exercise of its discretionary powers was manifestly wrong.

6. Statement of reasons

By virtue of Article 190 of the EEC Treaty the Commission is required to state the reasons on which its regulations are based. The purpose of that rule is to make it possible for the validity of a regulation to be assessed both by interested parties and by the Court of Justice, in particular within the context of a reference for a preliminary ruling on the validity of the regulation. Nevertheless, in view of the wide margin of discretion enjoyed by the Commission, the content of the obligation to state reasons depends on the nature of the measures adopted. The Court has accordingly held that for the purposes of *instituting* monetary compensatory amounts, the Commission may confine itself to finding that there has been an appreciable fall in the rate of exchange of a currency and that it satisfies the requirement regarding a distortion of trade by merely referring to the provisions in Regulation No 974/71 containing the requirement (*Roquette* case, cited above, at paragraph 5 *et seq.*). Specific justification, however, is needed for *adjusting* and *a fortiori* for *abolishing* monetary compensatory amounts where the monetary situation in response to which they were introduced remains unchanged.

In this instance it appears that the Commission has fulfilled that requirement. In Regulation No 3281/83, the Commission states:

'the difference between the compensatory amounts for fresh cheeses and for cheese rinds and wastes has created artificial trade flows between Member States',

and that it is therefore laying down the mechanism at issue 'to discourage such trade' (second recital in the preamble). That statement of reasons identifies the particular circumstances which the Commission took into account when it adopted the contested measures. Vonk takes the view that the Commission should have expounded on the appropriateness of the methods chosen. Such a submission is irrelevant to the obligation to state reasons and its merits could be examined only in the course of an inquiry into the substance of the disputed measure.

As regards Regulation No 270/84, the Commission has indicated in reply to questions put to it by the Court that the new arrangements made for consignments consisting of different types of cheese constituted a concession made to traders. Instead of applying to such mixed consignments, pursuant to Article 30 (2) of Commission Regulation No 1371/81, the monetary compensatory amount applicable to the ingredient which involves the highest rate and which represents at least 10% by weight of the mixture, the regulation laid down a flat-rate amount in view of the fact

that it was impossible to determine the proportion by weight of each kind of cheese waste contained in a mixed consignment. It cannot be denied, in my view, that the choice of a single tariff heading for mixtures of cheese waste was specifically calculated to avoid compensatory amounts being set at 'too high' a rate, by ensuring that 'a standard monetary compensatory amount' was 'applied' (penultimate recital in the preamble). In view of the explanations furnished by the Commission, that statement of reasons seems to me to satisfy the requirement laid down by Article 190 of the EEC Treaty.

7. Manifest error

At this point it is necessary to distinguish the two components of the system applicable to cheese waste since 1984: the fact that monetary compensatory amounts are charged at the full rate and the decision to discontinue the grant of monetary compensatory amounts for exports.

The *charging* of monetary compensatory amounts on cheese waste at the rate applicable to each kind of cheese from which it is derived is intended to put a stop to the circular traffic described above. Some traders have undeniably taken advantage of the difference between the reduced monetary compensatory amounts charged for cheese waste and the amounts granted at the full rate on the export of the processed cheese derived from the cheese waste. Such operations had a purely speculative purpose and were due to the 'monetary compensatory amount differential' existing at the time. The Commission's abolition of that differential is a suitable measure for the type of operation involved because it ensures that in future it will no longer be possible to draw on Community funds by carrying out bogus processing operations. It is therefore clear that by deciding to apply monetary compensatory amounts at the same rate to cheese and cheese waste, the Commission has not exceeded the limits of the discretion conferred upon it in this field.

As the Commission has stated in reply to one of the Court's questions, the decision *to discontinue the grant* of monetary compensatory amounts on exports of cheese waste does not affect *processed* waste but only waste exported or re-exported *as waste*.

With regard to the latter there has been a departure from the symmetrical treatment which is usual in the field of monetary compensatory amounts. The rule now is that exchange rate variations are no longer offset where cheese waste is exported from a Member State with positive monetary compensatory amounts to a Member State with negative compensatory amounts. Such an approach is not unlawful as such but it must always remain an exception since, as the Commission itself has observed, it marks a departure from the underlying monetary rationale of monetary compensatory amounts.

As I have already pointed out, the Commission's assessment must take account of *market conditions* as well as purely monetary factors. Such conditions can in fact justify a degree of asymmetry between the compensatory amounts which are granted and those which are charged. The correspondence between the grant and the charge of monetary compensatory amounts is not therefore absolute. None the less, where the complete abolition of monetary compensatory amounts granted hitherto is not justified by the disappearance of the monetary factors which prompted their introduction, the justification must be that market conditions would be more seriously affected if the monetary compensatory amounts were retained than if they were abolished. That is the comparison which must normally direct the Commission's choice.

Furthermore, it is necessary that the exceptional choice of measure should be suitable as a means for securing the desired aim. As I have already stated, that aim, which is set out in the second recital of the preamble to Regulation No 3281/83, is to put an end to 'artificial trade flows' provoked by the *differential* in monetary compensatory amounts. However it is manifest that the two components of the mechanism laid down by that regulation cannot have the same effect in this respect. Although the increase of the monetary compensatory amounts so as to eliminate the differential is undoubtedly an appropriate means for the end in view, the same certainly cannot be said of discontinuing the grant of monetary compensatory amounts.

It is true that the Commission has sought to justify that measure in the course of the procedure on the ground that it was concerned to prevent another kind of artificial trade flow involving cheese waste that has deteriorated and is therefore unsuitable for processing. Without going into Vonk's objection that the grant of monetary compensatory amounts was restored in part by Regulation No 635/84, suffice it to point out that a justification supplied after the event cannot be accepted, particularly when it relates to a measure which is foreign to the declared purpose of the contested regulation.

The absence of any link between discontinuing the grant of monetary compensatory amounts and the elimination of the artificial trade flows described above is sufficient evidence of a manifest error on the part of the Commission and therefore leads me to conclude that the Court should declare Regulation No 3281/83 invalid in that regard and for that reason.

The regulation must be declared void in its entirety since there is no evidence before the Court to indicate that the effects of its invalidity should, by way of exception, be limited. If the Court so decides, it will be for the Commission, in accordance with its obligation under the first paragraph of Article 176 of the EEC Treaty, to take the necessary measures as regards both Regulation No 3281/83 and Article 1 (2) (a) of Regulation No 270/84.

8. On that ground, without there being any need to examine the merits of the other submissions relied upon by the plaintiff in the main proceedings, I propose that the Court should declare that:

(1) Regulation No 3281/83 is invalid in so far as it abolishes the grant of monetary compensatory amounts on exports of 'cheese of low value';

(2) It is for the Commission to take the necessary measures to comply with the Court's judgment with regard to Regulation Nos 3281/83 and 270/84.