Bearing in mind the monetary situation at the time the disputed measures were adopted, and the fact that the common agricultural policy contained no adequate provision for the case which would enable the necessary measures to be taken in order to deal with such monetary situations, the Council was justified in making interim use of the powers conferred on it by Article 103 of the Treaty.

2. Article 103 does not preclude Community institutions from having powers to introduce, without prejudice to other procedures set out in the Treaty, any conjunctural measures which may appear to be necessary in order to safeguard the objectives of the Treaty. The Council shall in each instance select the form to be taken by the measure which it considers to be the most suitable.

3. Compensatory amounts, applied in trade between Member States, are Community measures which, while they do constitute a partitioning of the market, serve to compensate for variations in floating exchange rates and thus help to preserve the normal flow of trade in products under the exceptional conditions temporarily created by the monetary situation. These are not levies determined by Member States unilaterally, but Community measures which, bearing in mind the exceptional circumstances of the time, are permissible within the framework of the Commun agricultural policy.

4. Neither Articles 5 and 107 of the Treaty, (so long as the procedures set out in Article 3 (g) have not been applied), nor the Resolution adopted by the Council and government representatives of Member States on 22 March 1971 on the establishment by stages of an economic and monetary union, can be interpreted as, in themselves, imposing on Member States a prohibition against altering the exchange parity of their currencies otherwise than by establishing a new fixed parity, which might be invoked by interested parties in the national courts.

In Case 10/73

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht of Baden-Württemberg for a preliminary ruling in the action pending before that court between

REWE-ZENTRAL AG, 5 Cologne, Jakordenstraße 3,

and

HAUPTZOLLAMT KEHL,

on the interpretation and validity of Regulation No 974/71 of the Council of 12 May 1971 (OJ L 106 of 12 May 1971, p. 1) on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States as well as on the interpretation of Articles 5 and 107 of the Treaty instituting the European Economic Community and of the Resolution of the Council of 22 March 1971 (OJ C 28 of 27 March 1971, p. 1) concerning the establishment in stages of an economic and monetary union,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars (Rapporteur), P. Pescatore, H. Kutscher, C. Ó Dálaigh and A. J. Mackenzie Stuart, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

The system of organization of the agricultural markets and, in particular, the fixing of target, threshold and intervention prices, from which are derived the computations of levies and refunds is based upon fixed parities between the currencies of the various Member States relative to the unit of account.

During the course of the year 1971 the increasing influx of fugitive capital into certain Member States, particularly the Federal Republic and the Netherlands, led the Council in its Resolution of 9 May 1971 (OJ C 58 of 10 June 1971, p. 1) concerning the monetary position to indicate its understanding of the situation, 'so that, in certain cases these countries may, for a limited period, widen the margins of fluctuation of the rates of exchange of their currencies in relation to their present parities', an operation referred to as 'floating' the currencies.

As, in order to set and calculate the level of prices within the framework of the organization of the agricultural markets, the former parities were maintained, even in respect of the Deutsche Mark and the Guilder, the prices have remained in principle unchanged within the Community, at least in respect of products for which intervention prices are fixed and for products the price of which depends upon these. These prices, expressed in DM or in Guilders, have, however been subject to a reduction corresponding to the effect of the actual revaluation of the said currencies.

As this situation gave rise to expectations of distortion of competition to the detriment of German and Dutch agricultural producers and disturbance in the exchange of agricultural products, the Council, in its Resolution of 9 May 1971, decided to enact 'without delay, the appropriate measures as provided for in Article 103 of the Treaty'.

In implementation of this Resolution the Council by Regulation No 974/71 set up a system of compensatory amounts payable on imports and exports in

respect both of exchanges between Member States and of exchanges with third countries with the aim of neutralizing the effect of monetary measures on the prices of basic products in respect of which provision is made for intervention measures.

The detailed rules for the application of this Regulation were enacted by the Commission in its Regulation No 1013/71 of 17 May 1971 (OJ L 110 of 18 May 1971, p. 8) whilst the compensatory amounts themselves were laid down by various Regulations, particularly, as regards the importation which gave rise to the main action, by Regulation No 979/72 of the Commission of 12 May 1972 (OJ L 113 of 15 May 1972, p. 2) together with Regulation No 980/72 of the Commission of 12 May 1972 (OJ L 113 of 15 May 1972, p. 64).

On the occasion of the importation into the Federal Republic of Germany from France on 16 May 1972 of 19 200 kilogrammes of preseved peaches classified under tariff heading No 20.06, by the firm Rewe, plaintiff in the main action, the customs office at Kehl demanded from the latter by way of compensatory amount the sum of 61·44 DM, being 0·32 DM per 100 kilogrammes.

The plaintiff in the main action, disputing the validity of Regulation No 974/71, started an action before the Finanzgericht of Baden-Württemberg for the annulment of the demand in dispute, following which, that court, by an order of 8 November 1972 referred the following questions to the Court:

1. Is Regulation (EEC) No 974/77 of the Council of 12 May valid in so far as it provides for levying compensatory amounts within the Community (Article 1)?

2. If question No 1 is answered in the affirmative:

   Was this authority for levying compensatory amounts within the Community no longer effective on 16 May 1972 by virtue of Article 8, (2), of this Regulation

   a) because the Member States were once again applying the international rules on margins of fluctuation of rates of exchange around official parities, or

   b) because it was established, at the latest, by the time of the Washington monetary conference on 18 December 1971 that the Member States would not return to the former parities?

3. In the event of an affirmative reply to the first question and a negative reply to the second:

   Were the Member States, on 16 May 1972 prohibited from freeing their exchange rates (floating their parities) by:

   a) Article 107 of the EEC Treaty

   b) The Council Resolution of 22 March 1971 on the gradual establishment of an economic and monetary union within the Community

   c) Article 5 of the EEC Treaty?

The Reference of 8 November 1972 was received at the Court registry on 19 February 1973.

Upon hearing the preliminary report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided that there was no need for any preparatory inquiry.

The plaintiff in the main action, the Government of the German Federal Republic, the Council and the Commission of the European Communities submitted written observations.

The oral observations of the plaintiff in the main action, represented by Mr Böcking of the Bonn Bar, of the Commission represented by its Agent Mr Gilsdorf, of the Council represented by its Agent Mr Lambers and of the German Government represented by Mr Seidel, Regierungsdirektor at the Federal

Ministry of Economic Affairs, were made at the hearing on 27 May 1973.

The Advocate-General presented his opinion at the hearing on 11 July 1973.

II — Observations submitted under Article 20 of the Statute of the Court

The observations of the parties may be summarized as follows:

A — Observations of the plaintiff in the main action

On the first question

According to the plaintiff in the main action, Regulation No 974/71 is unlawful for several reasons — primarily because there is no legal basis for it in Article 103 of the Treaty, as this provision provides only for the making of decisions and directives to the exclusion of Regulations. This can be deduced both from the wording of paragraphs 2 and 3 of Article 103, according to which the Council 'may decide' or 'shall issue any directives', — expressions which refer to the various categories mentioned in Article 189 — and from a comparison of Articles 103 and 3 (g).

According to the latter provision, the activities of the Community are to include the application of procedures by which the policies of the Member States can be co-ordinated and disequilibria in their balances of payments remedied. It follows that Article 103, which deals particularly with economic policy, permits only those co-ordinatory procedures which do not constitute an unwarrantable interference with the powers of the Member States. The characteristics of decisions and directives render them suitable for this type of measure, whereas Regulations should not be used, since their effect extends beyond the co-ordination referred to in Article 3 (g).

It should be admitted at the least that these considerations ought to command attention in respect of conjunctural policy, since according to the actual terms of Article 103, it is 'their' conjunctural policies which the Member States regard as a matter of common concern. Conjunctural policies are thus a matter for the States, and are subject only to the coordinatory function of the Community; this would preclude its institutions from enacting rules of substantive law in this sphere.

Regulation No 974/71 is, in the second place, unlawful, because the compensatory amounts constitute customs duties or charges having an equivalent effect, which have been prohibited in respect of intra-Community trade since the expiry of the transitional period. This prohibition extends also to agricultural produce as the Court of Justice held in its Judgment of 14 December 1962 (Cases 2 and 3/62, Commission v Grand Duchy of Luxembourg and Kingdom of Belgium, Rec. 1962).

Even if it is admitted that it remains possible, after the period of transition, to countenance exceptions from the prohibition of customs duties and charges having an equivalent effect in intra-Community trade, such exceptions cannot be based on Article 103, because this provision is not a safeguarding clause but only a clause conferring powers. However, the powers which it confers by no means include an authorization to enact protective measures. This follows both from the actual wording of Article 103, particularly as concerns the meaning of the words 'measures appropriate' in paragraph 2 and from the rule of construction according to which, words conferring a power should, in case of doubt, be restrictively interpreted where the possibility of derogation from other provisions of the Treaty is concerned. This is confirmed by a comparison

between Article 103 and Articles 37, 108, 109 and 226 of the Treaty because in each of these cases the possibility of derogation is spelt out clearly and unequivocally.

A comparison between Articles 40 (2) and 103 on the one hand, and Articles 38 (2) and 39 on the other, leads to the same conclusion and shows that only explicit phraseology could make it possible to derogate from the mandatory provisions of the Treaty by means of a Regulation and that such authority cannot be read into provisions such as Articles 103 and 40 (2), which confer general powers.

Lastly, an interpretation of Article 103 permitting customs duties or charges having an equivalent effect to be imposed anew in intra-Community trade, would, in view of the objects of the Treaty, be unacceptable as the Customs Union is a fundamental element of the Community. To partition the market would likewise be to act directly in oppostion to the actual objective of Article 103 which concerns a conjunctural policy for the whole Community.

On the other hand Regulation No 974/71 does not contain any provisions of a conjunctural nature. Its purpose is derived from the agricultural policy and is aimed at protecting the system of the organization of agricultural markets from disturbance. Such legislation even if it produces subsidiary consequences of a conjunctural nature ought to have been based on Article 43 of the Treaty and on Regulation No 653/68 of the Council on conditions for alterations to the value of the unit of account used for the Common Agricultural Policy (OJ L 123 of 31 May 1968, p. 4).

Even accepting the strictly monetary character of this Regulation, it should have had Article 107 as its legal basis but the requisite conditions for the application of the latter were absent.

The validity of Regulation No 974/71 is affected also because it does not amount to a measure of conjunctural Community policy, but of purely national policy and appears to be a means of circumventing the requirements of Article 107 of the Treaty. It is the latter provision to which it is necessary to have recourse in case of the alteration by a Member State of its rate of exchange.

The plaintiff ends by suggesting that a reply be sent to the national court to the affect that the validity of Regulation No 974/71 is adversely affected by reason of the fact that it permits the levying of compensatory amounts.

On the second question

The second question deals with the construction of Article 8 of Regulation No 974/71 according to which the Regulation 'shall cease to be applicable as soon as all the Member States concerned again apply the international rules on margins of exchange rate fluctuation around official parity'.

In the present case the question is whether this condition had not been fulfilled at the date of the importation in dispute (16 May 1972).

According to the plaintiff, this was certainly the case as from the time of the Washington agreements of 18 December 1971 (Smithsonian Agreement), under which there were made new rules — to which the Federal Republic has adhered — relating to the margins of fluctuation of rates of exchange.

The fixing of new rates of exchange on 18 December 1971 removed one of the essential conditions referred to in the Resolution of the Council of 9 May 1971 and consequently a portion of the essential foundations of Regulation No 974/71.

The plaintiff consequently suggests that the second question be answered in the sense that the authority to levy intra-Community compensatory amounts

had ceased to be effective at the date of the importation in question.

On the third question

The third question relates to the compatibility of the currency floating system of certain Member States with Articles 5 and 107 of the Treaty and with the Resolution of the Council of 22 March 1971 concerning the establishment in stages of an economic and monetary union.

The plaintiff in the main action, relying particularly on the judgment of the Court of Justice of 10 December 1969 (Cases 6 and 11/69, Commission v French Republic, Rec. 1969, p. 523) stated that Article 107 of the Treaty restricts the right of Member States to act unilaterally in monetary matters. This provision, made in accordance with the obligations which, at the time, the Member States took upon themselves within the framework of the International Monetary Fund, allows the alteration of parities but not the limitation or variation of the margins of fluctuation of exchange rates permitted by the international rules. It follows that floating is prohibited by Article 107.

An analysis of Regulation No 653/68 of the Council of 30 May 1968 on conditions for alterations to the value of the unit of account used for the common agricultural policy leads to the same conclusion. Although this Regulation provides for the possibility of changes in the currency parities of Member States, it makes no provision for the floating of currencies, from which it should be assured that having regard to the level of integration achieved in 1968, the floating of rates of exchange was regarded as being incompatible with the common agricultural policy. In addition the objective of Article 3 (f) (system of undistorted competition) as well as that of Article 3 (d) of the Treaty (common agricultural policy) is imperilled by a system of freeing of rates of exchange, the almost daily fluctuations of which lead to effects resembling the lowering or raising, as the case may be, of customs duties on imports or exports, and amount to a distortion of competition. For the same reasons the floating of currencies should be regarded as inconsistent with the obligations imposed on Member States by Article 5 of the Treaty.

Lastly, as regards the compatibility of a system of floating rates of exchange with the Resolution of the Council of 22 March 1971 concerning the establishment of an economic and monetary union, the plaintiff in the main action states that according to points 6 and 7 of heading III of this Resolution, the Community must not make use, in respect of rates of exchange between Member States, of any provisions which may allow, on an international basis, a relaxation of the international exchange system. It follows that, in respect of the parities used by Member States between themselves, the fixed margins of fluctuation should be respected in any case so that the floating of exchange rates is prohibited.

The plaintiff adds that if the measures proposed in heading I of the Resolution of 22 March 1971 amount to no more than a declaration of intent with regard to policy, it is otherwise in respect of the measures under heading III which the Council and the representatives of the Governments of the Member States decided to bring into force as from 1 January 1973.

The plaintiff suggests that a reply be sent to the third question put by the national court to the effect that the prohibition of freeing rates of exchange applied as between Member States at the latest as from 1 January 1970, the end of the transitional period, and that in addition the same prohibition is set out in points 6 and 7 of heading III of the Resolution of the Council of 22 March 1971 which is legally binding upon the Community and the Member States.

B — Observations of the German Government

On the first question

The German Government considers that Regulation No 974/71 is a measure of conjunctural policy and is rightly based on Article 103 of the Treaty. A conjunctural policy has as its aim the lessening of the fluctuations inherent in general economic development, by means of short term measures. This is precisely the object of Regulation No 974/71 which attempts to eliminate the disturbances, particularly in the sphere of prices and incomes, due to the freeing of the rates of exchange of certain Member States, with a view to promoting continuous economic development in the agricultural sector.

Since the specific powers provided for in the Treaty are intended, particularly in the agricultural domain, to meet structural needs above all, it cannot be assured that they exclude the use of Article 103. It is, on the contrary, a matter of concomitant powers.

Neither is the system of compensatory amounts payable at frontiers contradictory to the idea of 'common concern' referred to in Article 103 because it was not adopted in the interests of a class of traders but to protect the agricultural common market.

The exercise of powers in connexion with conjunctural policy also allows action to be taken in relation to the free movement of goods within the Community even after the expiration of the transitional period, because Article 103 is one of the provisions under which, pursuant to Article 8 (7) of the Treaty, derogations may be made.

The common agricultural policy in fact precedes a more advanced stage of integration in respect of economic policy as a whole, which will be achieved only gradually. In the meanwhile whenever the general economic rhythm of the Member States is abruptly altered in different directions, short-term measures limiting the free movement of agricultural products are permitted.

With regard to the fact that the conjunctural measures in question were cast in the form of a Regulation rather than in that of a directive, the German Government points out that the argument of the plaintiff in the main action rests on a purely literal construction of the German text of Article 103 alone and that this provision does not prevent the Council, acting unanimously, either from resorting to the making of Regulations, or from delegating the execution of its Regulations to the Commission in accordance with Article 155 of the Treaty.

On the second question

According to the German Government, the circumstances which warranted the introduction of a system of compensatory amounts in May 1971 had not, at the date of the importation in question (16 May 1972) changed to such a degree that Regulation No 974/71 had ceased to be applicable by virtue of Article 8 thereof.

Although, consequent upon the Washington agreements the fluctuations of rates of exchange had been reduced, the need to offset the effects of these fluctuations continued because agricultural prices expressed in units of account continued to be converted into the national currencies of the Member States on the basis of the previously established official parities.

On the other hand, the Washington agreements do not imply a fixing of parities within the meaning of the IMF rules. The rates allowed in Washington are no more than indicative rates, though they possess in addition expanded margins of fluctuation and thus allow the States affected 'to observe the purposes of the Fund to the maximum extent possible during the temporary period preceding the resumption of effective par values . . .' as

the Executive Board of the IMF emphasized in its Decision No 3463 of 18 December 1971 (Annual Report of the IMF, 1972, p. 85).

Lastly, the mere fact that it is clear that the Member States will not return to the former parities is not sufficient to fulfil the conditions required by Article 8, which is based on the assumption of a return to the official IMF parities.

On the third question

This question enquires whether Articles 5 and 107 of the Treaty and the Resolution of the Council of 22 March 1971 concerning the establishment in stages of an economic and monetary union are to be construed in such a manner as to prohibit Member States from freeing their rates of exchange.

According to the German Government the reply to these questions is in the negative.

Article 107 restricts the powers ordinarily possessed by Member States in that it requires them to treat their policies with regard to rates of exchange as a matter of common concern, but does not preclude them from altering their rates of exchange, as may be seen in particular from Article 107 (2) which provides, in the event of the abuse of this right, for the Commission to authorize the other Member States to take the necessary protective measures. Regulations Nos 129/62 and 653/68 also take this eventuality into account.

Furthermore floating is not incompatible with the International Monetary Fund's system under which floating has been authorized on several occasions in the past.

As to the Resolution of the Council of 22 March 1971, this document has no legal force, but expresses practical aims and it is not possible to read into it an obligation on the part of Member States to refrain from freeing their rates of exchange.

Finally such a prohibition could not be inferred from Article 5 of the Treaty either, because this provision could not have a more restrictive effect than Article 107.

In conclusion, in the opinion of the Government of the Federal Republic, there are grounds for replying affirmatively to the first question, and negatively to the second and fourth questions.

C — Observations of the Council

The Council refers to the explanations which it formulated in its observations in Case 5/73 (Balkan Import-Export v Hauptzollamt Berlin-Packhof) on a reference for a preliminary ruling from the Berlin Finanzgericht.

Although in Case 5/73, the question was one of compensatory amounts in trade with third countries, whereas the present proceedings arise from compensatory amounts within the Community, the reasoning put forward in support of the validity of the Regulation in dispute is equally valid in the present case.

This applies with even greater force in view of the fact that Regulation No 974/71 is to be considered as a comprehensive measure dealing with trade both within and outside the Community.

D — Observations of the Commission

On the first question

According to the Commission, Article 103 provides a sufficient legal basis for Regulation No 974/71 because the latter is essentially a conjunctural measure. It was in fact, conceived as a short-term measure with the aim of compensating for the effect of monetary measures which themselves lie within the sphere of conjunctural policy. It amounts to a device which is not derived as such from the agricultural policy, but which is intended to cover, as it were, the

agricultural aspect of a comprehensive conjunctural policy. Furthermore considered in itself, it also displays characteristics of a conjunctural nature.

With regard to the relationship between Article 103 and other provisions of the Treaty the Commission mentions first that Article 103 is not of a subsidiary order in comparison with Article 43. On the contrary, it confers a general power overlapping the powers conferred in the various sectors.

For the same reasons it is necessary to reject the proposition that Article 103 does not permit the enactment of measures which restrict the free movement of goods within the Community, since Article 103 takes precedence over Article 8 (7).

On the other hand, the ambit of Article 103 should not be mistaken for that of Article 226 which allows protective measures during the transitional period, because Article 103 relates to measures serving the common interest, which is precisely the case with Regulation No 974/71. The latter, in other respects, is confined to measures which are quite indispensable and the system introduced has a less restrictive effect on the free movement of goods than would have been the case if quantitative restrictions had been adopted.

The compensatory amounts only reflect reality inasmuch as by introducing a common agricultural policy based on a price system linked to a common unit of account, the Community institutions anticipated the creation of the economic and monetary union.

The Commission makes the same reply to the argument according to which the compensatory amounts cannot have Article 103, as their legal basis, because it is not possible to derogate from the rules of the Treaty in agricultural matters except to the extent provided for in Articles 39 to 46. The general nature of the powers provided for in Article 103 precludes such an interpretation.

With regard to the fact that the system of compensatory amounts was cast in the form of a Regulation, the Commission points out that the use of the word 'decide' in Article 103 (2) is not a reference to the legal concept of 'decision' within the meaning of Article 189. The measures for which provision is made in Article 103 (2) may be enacted in what is considered to be the most appropriate form. The fact that in the case of a simplified decision-making procedure — by qualified majority — reference is made in paragraph 3 of the same Article to the simpler process of the directive, does not have the effect of depriving the Council of the powers which it has, under Article 155 of the Treaty, of delegation to the Commission the necessary powers for applying the rules which the Council makes.

On the second question

According to the Commission the circumstances prescribed by Article 8 of Regulation No 974/71 for ending the system of compensatory amounts had not come about by 16 May 1972, the date of the importation in question. The Member States did not 'again apply the international rules on margins of exchange rate fluctuation around official parity' [Article 8 (2)] either after the Washington Conference of 18 December 1971 or after the first devaluation of the dollar on 9 May 1972, since the 'central rate' adopted for the DM, the Guilder, and the Belgian Franc was fixed straight away beyond the margin of fluctuation permitted by the international rules (in this case the Bretton Woods Agreements). Moreover a margin of fluctuation of 4·5 % was permitted at Washington, whilst the above Agreements allowed a margin of only 2 %.

As to part (b) of the second question, this also calls for a negative reply. The question is whether the fact that after the Washington Conference in December 1971 it was certain that there would be no return to the former parities

previously declared to the International Monetary Fund, was such as to fulfil the condition referred to in Article 8 of Regulation No 974/71 for the ending of the system of compensatory amounts. Such is not the case. Although Article 8 does not necessarily envisage a return to the parties in use prior to May 1971, it nevertheless envisages at least, a return to fixed parities. The precarious nature of the Washington agreements makes it impossible to consider the margins allowed at that Conference as fulfilling this condition.

On the third question

The Commission proposes that a reply be given in the negative to the question asked by the national Court, namely whether the floating of the DM ought to be regarded as both a breach of Article 107 of the Treaty and of the Resolution of the Council and the representatives of the Governments of the Member States of 22 March 1971 concerning the establishment of an economic and monetary union. Article 107 does not impose obligations in respect of the content of the exchange policy pursued by the Member States. If floating exchange rates are, in the long run clearly irreconcilable with the monetary concepts on which the Treaty is based this would not, nevertheless, involve an absolute prohibition preventing the Member States from resorting in exceptional circumstances to this monetary technique. It is the same if the problem is considered from the point of view of the international obligations entered into under the Bretton Woods Agreements, since the Community as such, as long as it has no monetary policy, is not bound by those Agreements. In addition the Bretton Woods Agreements do not, *a priori*, preclude the possibility of floating exchange rates.

The same conclusion is unavoidable in respect of the compatibility of the floating of the DM with the Resolution of 22 March 1971. This Resolution amounts to a political commitment but could not be regarded as an act having binding legal effect. Furthermore it is necessary to observe that a narrowing of the margins of fluctuation would have pre-supposed concerted action in relation to the dollar as provided for in point III/7 of the Resolution. The conditions for such action had still not come about in May 1972.

The Commission suggests that a reply be sent to the Finanzgericht of Baden-Württemberg to the effect that

1. the questions put by that Court do not reveal anything calculated to affect the validity of Regulation No 974/71;
2. that the conditions imposed by Article 8 of this provision for the ending of the system which it sets up had not been met by 16 May 1972; and
3. that neither Articles 5 and 107 of the Treaty nor the Resolution of the Council of 22 March 1971, prohibited the Member States at the time in question from freeing the rates of exchange of their currencies.

Grounds of judgment

1 By order dated 8 November 1972, lodged at the Registry on 19 February 1973, the Baden-Württemberg Finanzgericht referred to the Court for a preliminary ruling the question of the interpretation and validity of various provisions contained in Regulation No 974/71 of the Council of 12 May 1971, concerning certain measures of conjunctural policy to be taken in

agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (OJ L 106 of 12 May 1971, p. 1), and on the interpretation of Articles 5 and 107 of the EEC Treaty and the Resolution adopted by the Council and government representatives of the Member States of 22 March 1971 on the establishment in stages of an economic and monetary union within the Community (OJ C 28 of 27 March 1971, p. 1).

2 On 16 May 1972 the plaintiff in the main action imported 19 200 kg of peach preserves from France into the Federal Republic of Germany, and was charged, under Regulation No 974/71, compensatory amounts at the rate of 0·32 DM per 100 kg, a sum calculated, for products from France under tariff heading 20.06, by reference to the Annexes to Regulation No 979/72 of 12 May 1972 (OJ L 113 of 15. 5. 1972, p. 2) in conjunction with Regulation No 980/72 of the Commission (OJ L 113 of 15. 5. 1972, p. 64).

The plaintiff brought an action in the Finanzgericht disputing the amounts charged, claiming that the system of compensatory amounts introduced by Regulation No 974/71 was incompatible with the Treaty.

Analysis of the compensatory amounts system

3 As a result of the increasing influx of foreign currency and short-term speculative capital in the early months of 1971 and the effects produced by this in some Member States, especially the Federal Republic of Germany and the Netherlands, the Council indicated in a Resolution of 9 May 1971 (OJ C 58 of 10. 6. 1971, p. 1) that it was prepared to envisage 'that, in certain cases, these countries might, for a limited period, widen the margins of fluctuation for the exchange rates of their currencies in relation to their (present) parities'.

In the same Resolution, the Council emphasized that under normal circumstances a system of floating currencies such as this would not be compatible with the proper functioning of the common market, and 'so as to avoid resort to unilateral measures', decided that it was desirable for it to adopt 'immediately, in accordance with Article 103 of the Treaty . . .' appropriate measures in the agricultural sector.

4 The organization of agricultural markets is designed, *inter alia*, to ensure a fair standard of living for the agricultural community and to stabilize

markets, in particular by means of a stable price system whereby target prices, threshold prices and intervention prices are determined on the basis of fixed parities for the currencies of the various Member States by reference to a single unit of account.

Since it was not possible fo fix new parities while the DM and the guilder were floating, the price levels considered to be appropriate continued to be determined and calculated, for products with fixed intervention prices and for products whose price depends on the price of the first-mentioned products, on the basis of the parities previously declared to the IMF, even for the Netherlands and the Federal Republic.

But while these prices thus remained unaltered in theory, they were in fact reduced — particularly when they were expressed in DM — in proportion to the effects of the *de facto* revaluation of this currency, causing disturbances in agricultural trade detrimental to producers and capable of disrupting the intervention system established by Community legislation.

5 As a result, the Council decided that the measures to be taken immediately should consist in the introduction of a system of compensatory amounts which these Member States would be authorized to charge on imports and grant on exports in their trade both with other Member States and with third countries, with a view to offsetting the effects of the monetary measures on the price of basic products for which intervention prices have been imposed, and for agricultural products whose price depends on the price of those products.

6 Under Article 2 of Regulation No 974/71, the compensatory amounts are obtained by applying to the prices of agricultural products covered by intervention arrangements the percentage difference between the official parity and the true parity of the national currency in relation to the US dollar.

For the other products covered by Regulation No 974/71, the compensatory amounts are equal to the incidence, on the price of the products concerned, of the application of the compensatory amount to the price of the product on which they depend.

Moreover, according to the last sentence of Article 1 of the Regulation, compensatory amounts can be charged only where the monetary measures would lead to disturbances in trade in the agricultural products mentioned.

It is for the Commission, after obtaining an opinion from the management committees, to decide whether or not such a situation exists.

Finally, Article 8 of the above Regulation states that the latter shall cease to be applicable as soon as all the Member States concerned again apply the international rules on margins of exchange rate fluctuation around official parity.

7 Owing to the deterioration of the monetary situation, particularly the suspension of the convertibility of the dollar on 15 August 1971 and the subsequent floating of Belgo-Luxembourg Economic Union currencies from 23 August 1971, the system of compensatory amounts was extended to a wider range of products and to the exports and imports of those Member States.

At the Washington Conference on 18 December 1971 the rates of exchange were closely re-defined in relation to the dollar in the form of central rates, the margins of fluctuation remaining, however, wider than those authorized under the Bretton Woods Agreements.

Nevertheless, since no official change of parities followed these decisions, and the monetary system was still in disarray, the compensatory amounts scheme was extended to France and Italy and to all the agricultural products mentioned in Article 1 of Regulation No 974/71.

8 Subsequently to the facts giving rise to the action the Council, by Regulation No 2746/72 of December 1972, made the compensatory amounts scheme compulsory and 'incorporated' it into the framework of the common agricultural policy, giving Articles 28, 43 and 235 of the Treaty as its basis.

9 The circumstances outlined above and their continuing development must be borne in mind in considering the intervention made by the Council and the Commission.

I — Question one

10 The first question asks whether Regulation No 974/71 is valid insofar as it authorizes the charging of compensatory amounts in trade between Member States.

(a) The legal basis of Regulation No 974/71

11 This question concerns, first, whether the validity of the above Regulation could be affected by the fact that it is based on Article 103 of the Treaty, which does not touch on the common agricultural policy, the latter being governed by the specific provisions of Articles 38 to 47 of the Treaty, and that in any case, the said Article 103 authorizes only the adoption of conjunctural measures, which the disputed measures are not.

12 Article 40 of the Treaty states that Member States shall bring the common agricultural policy into force by the end of the transitional period at the latest and that, in order to attain the objectives set out in Article 39 a common organization of agricultural markets is to be established.

The same Article provides that this common organization may include any measures required and in particular regulation of prices, aids for production and marketing, storage and carry-over arrangements and common machinery for stabilizing imports and exports.

By virtue of the third paragraph of Article 43 (2), the Council shall, on a proposal from the Commission and after consulting the Assembly, acting, after the end of the second stage of the transitional period, by a qualified majority, make regulations, issue directives, or take decisions in this sphere.

It is evident from these provisions that the powers conferred for implementing the common agricultural policy do not relate merely to possible structural measures but extend equally to any immediate short-term economic intervention required in this area of production, and that the Council is empowered to resort to them in accordance with the decision-making procedures there set out.

13 On the other hand, Article 103 refers to Member States' conjunctural policies, which they must regard as a matter of common concern.

Consequently it does not relate to those areas already subject to common rules, as is the organization of agricultural markets.

The real object envisaged by Article 103 is the coordination of Member States' conjunctural policies, and, according to the terms of paragraph 2 of that Article, the adoption of common measures appropriate to the situation.

14 The floating of the exchange rates for the German and Dutch currencies, deemed essential if the wave of speculative capital into the Federal Republic and the Netherlands was to be checked, imperilled the unity of the common market and made measures designed to safeguard the machinery and objectives of the common agricultural policy imperative.

The introduction of compensatory amounts was not intended to provide extra protection, but to maintain uniform prices, the foundation of the present organization of the markets, despite the temporary departure from fixed parities, thus preventing the collapse of the intervention price system and preserving the normal flow of trade in agricultural products both within the Community and with third countries.

These measures, intended to compensate temporarily for the harmful effects of national monetary measures, so that the process of economic integration may meanwhile continue its progress, are of an essentially transitory nature, and would normally have had to be adopted by virtue of the powers conferred on the Council by Articles 40 and 43 and in accordance with the procedures set out therein, in particular after consulting the Assembly.

15 However, owing to the time needed to give effect to the procedures laid down in Articles 40 and 43, a certain amount of trade might then have passed free of the regulations, and this could jeopardise the relevant common organizations of the market.

There being no adequate provision in the common agricultural policy for adoption of the urgent measures necessary to counteract the monetary situation described above, it is reasonable to suppose that the Council was justified in making interim use of the powers conferred on it by Article 103 of the Treaty.

Consequently, while the suddenness of the events with which the Council was faced, the urgency of the measures to be adopted, the seriousness of the situation and the fact that these measures were adopted in an area intimately connected with the monetary policies of Member States, the effects of which they had partially to offset, all prompted the Council to have recourse to Article 103, Regulation No 2746/72 shows that this state of affairs was only a temporary one, since the legal basis for the measure was eventually found in other provisions of the Treaty.

(b) The form in which the disputed measure was adopted

16 The next question is whether Regulation No 974/71 is invalid on the ground that Article 103 of the Treaty, notably in paragraph 3, authorizes the adoption of measures only in the form of a directive or decision, not in the form of a regulation.

It is alleged that such an interpretation is borne out by the wording of Article 103 and is justified in view of the fact that in the realm of conjunctural policy no more than a coordinating role has been given to the institutions.

17 Although by Article 103 (1) Member States are bound to regard their conjunctural policies as a matter of common concern, the wording does not preclude Community institutions from having power to lay down themselves, without prejudice to other procedures set out in the Treaty, conjunctural measures on matters within the spheres of their competence.

On the contrary, Article 103 (2), by declaring that the Council may, 'acting unanimously . . . decide upon the measures appropriate to the situation,' confers on that body — subject to the condition referred to above — the powers necessary to adopt, in principle, any conjunctural measures which may appear to be needed in order to safeguard the objectives of the Treaty.

Without some such faculty, the natural concomitant of any kind of economic administration, the institutions of the Community would find it impossible to accomplish the tasks entrusted to them in this field.

18 The phrase 'measures appropriate to the situation' in Article 103 (2) means that, as regards form, too, the Council may choose whichever seems best suited to the case in hand.

Subject to the requirement of a unanimous decision, Article 103 (2) refers to the general procedures whereby the Council may exercise its powers, described in Articles 145, 155 and 189, including, therefore, its right to delegate to the Commission the implementation of regulations it has laid down.

Article 103 (3) differs from Article 103 (2) in that, as the use of the phrase 'where required' shows, it envisages the possibility that the Council might not

be able to reach the unanimity required to carry into effect the rules for the application of the conjunctural measures decided on.

In that circumstance only, these rules would be binding on Member States so far as they concerned the result to be obtained, but would have to leave to the national authorities the choice of form and method.

(c) Whether the application of compensatory amounts within the Community is compatible with Articles 8, 9, 12 and 13 of the Treaty

19 Next, it is asked whether the disputed Regulation can be reconciled with the prohibition, at the end of the transitional period, against all customs duties or charges having equivalent effect on imports and exports in trade between Member States, under Articles 8, 9, 12 and 13 of the Treaty.

20 Although the compensatory amounts do constitute a partitioning of the market, here they have a corrective influence on the variations in fluctuating exchange rates which, in a system of market organization for agricultural products based on uniform prices, might cause disturbances in trade in these products.

Diversion of trade caused solely by the monetary situation can be considered more damaging to the common interest, bearing in mind the aims of the common agricultural policy, than the disadvantages of the measures in dispute.

Consequently these compensatory amounts are conducive to the maintenance of a normal flow of trade under the exceptional circumstances created temporarily by the monetary situation.

They are also intended to prevent the disruption in the Member State concerned of the intervention system set up under Community regulations.

Furthermore, these are not levies introduced by some Member States unilaterally, but Community measures which, bearing in mind the exceptional circumstances of the time, are permissible within the framework of the common agricultural policy.

21 Thus the Council, by adopting them, did not contravene the provisions referred to by the national court.

II — Question two

22 The second question asks whether the authorization to charge compensatory amounts was no longer valid on 16 May 1972 — the date of the importation in question — by virtue of Article 8 (2) of Regulation No 974/71.

The point raised by this question is whether or not the conditions imposed by Article 8 of Regulation No 974/71 for its ceasing to be applicable had been met on that date by reason of the fact that, after the Washington Agreement of 18 December 1971, Member States had decided not to float their currencies, while accepting a margin of fluctuation for exchange around a rate, known as a central rate, greater than that permitted by the Bretton Woods Agreements.

23 Article 8 of Regulation No 974/71 provides that it shall cease to be applicable as soon as all the Member States concerned again apply the international rules on margins of exchange rate fluctuation around official parity.

This provision envisages the abolition of compensatory amounts as soon as all the Member States have decided to observe again the original parities, or new parities declared to the IMF.

24 The agreement of 18 December 1971 did not meet these requirements.

Far from restoring fixed parities, the countries concerned merely agreed that they would maintain, as far as possible, central rates, which were subject to alteration; the agreement also allowed margins of fluctuation around these rates of 2·25% above and below, sometimes equalling the very fluctuations which had prompted the introduction of compensatory amounts.

Moreover, even after the agreement mentioned, the trend towards the revaluation of certain currencies in the Community continued within the scope of the widened margins of fluctuation; at the time of the disputed imports, the difference between the DM and its old official parity had reached 13%, where it remained until the devaluation of the dollar on 8 May 1972.

Finally, the fact that it was certain that the Member States concerned would not go back to the old parities against the dollar was not relevant, since the international rules mentioned in Article 8 do not provide for one set parity but for a system of fixed parities.

III — Question three

25 The third question asks whether Articles 5 and 107 of the Treaty, and the Resolution adopted by the Council and government representatives of the Member States of 22 March 1971 on the establishment by stages of an economic and monetary union should be interpreted as prohibiting Member States, at the time of the importation in dispute, from 'freeing their rates of exchange', that is, from floating their currencies.

26 One of the cardinal aims of the Treaty is to create a single economic region, free from internal restrictions, in which economic and customs union may be progressively achieved.

This requires the parities between the currencies of the various Member States to remain fixed; as soon as this requirement ceases to be met, the process of integration envisaged by the Treaty will be retarded or prejudiced.

It is therefore the duty of the Community institutions and of Member States to cooperate in and to ensure the creation and maintenance of these conditions.

To that end, Article 3 (g) provides for the procedures to be followed in order to coordinate the economic policies of Member States and to remedy any disequilibria in their balances of payments.

But until the procedures envisaged by this provision have been put into operation, Articles 5 and 107 allow Member States, despite the duty imposed on each of them to regard its policy on rates of exchange as a matter of common concern, such freedom of decision that the obligation contained in these Articles 5 and 107 cannot confer on interested parties rights which the national courts would be bound to protect.

27 Moreover, the Council Resolution of 22 March 1971, which is primarily an expression of the policy favoured by the Council and government representatives of the Member States concerning the establishment of an economic and monetary union within the next ten years following 1 January 1971, cannot for its part, either, by reason of its content, create legal consequences of which parties might avail themselves in court.

Costs

28 The costs incurred by the Government of the Federal Republic of Germany, the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable, and as these proceedings are, insofar as the parties to the main action are concerned, in the nature of a step in the action pending before a national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the plaintiff in the main action, the Government of the Federal Republic of Germany, the Council and the Commission;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 3, 5, 8, 9, 12, 13, 38 to 47, 103, 107 and 177;
Having regard to Regulations of the Council Nos 974/71 of 12 May 1971 and 2746/72 of 19 December 1972;
Having regard to Regulations of the Commission Nos 1013/71 and 1014/71 of 18 May 1971, 979 and 980/72 of 12 May 1972;
Having regard to the Council Resolution of 9 May 1971;
Having regard the Resolution adopted by the Council and government representatives of the Member States of 22 March 1971;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Finanzgericht of Baden-Württemberg by an order of that court dated 8 November 1972, hereby rules:

1. **Examination of the questions referred has not revealed any elements capable of affecting the validity of Regulation No 974/71 of the**

Council nor that of Regulations Nos 979/72 and 980/72 of the Commission fixing the compensatory amounts applicable during the period indicated in the questions referred.

2. Neither Articles 5 and 107 of the Treaty, nor the Resolution adopted by the Council and government representatives of the Member States of 22 March 1971 on the establishment in stages of an economic and monetary union, can be interpreted as in themselves imposing on Member States a prohibition against altering the parity of the rates of exchange for their currency otherwise than by establishing a new fixed parity, which might be invoked by interested parties in the national courts.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 23 October 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER

(see Case 9/73, p. 1163)