Since Regulation No 932/77 in no way modifies the conditions of competition between importers in the Community, it does not constitute a breach of the prohibition of discrimination contained in Article 40 of the Treaty.

# OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 2 May 1985 *

*Mr President,*
*Members of the Court,*

1. The Court has been asked to give a preliminary ruling on a question referred to it by the Hessisches Finanzgericht in the context of proceedings pending before that court between H. Spitta & Co. and the Principal Customs office, Frankfurt am Main-East, brought for the purpose of determining the levy applicable to the importation from Madagascar of a quantity of beef and veal falling under subheading 16.02 B III b 1 (aa) of the Common Customs Tariff. The national court has asked the Court of Justice to rule on the validity of Commission Regulation No 932/77 of 29 April 1977 fixing the amounts by which import charges on beef and veal originating in the African, Caribbean and Pacific States (hereinafter referred to as the 'ACP States') are to be reduced (Official Journal 1977, L 109, p. 16).

The plaintiff in the main proceedings, H. Spitta & Co., a company registered under German law, markets agricultural products and, in particular, imports into the Federal Republic prepared beef and veal originating in Madagascar. In 1976 it entered into contracts for the importation of 1 000 tonnes of prepared, boneless, frozen meat falling under subheading 16.02 B III b 1. However, as a result of delay in despatching the goods, the customs formalities did not take place until after 1 April 1977, the date on which Regulation No 425/77 entered into force. That regulation modified the aforesaid tariff heading and placed the product imported by Spitta under subheading 16.02 B III b 1 (aa), making it subject to a special levy of DM 147.94 per 100 kg, corrected by a factor of 0.925 and a monetary compensatory amount of DM 55.29 per 10 kg. Consequently, by a notice of assessment dated 27 June 1977 based on the rules in force at the time of customs entry (24 and 25 May 1977), the customs office imposed a levy the total amount of which was over DM 240 000.

After unsuccessfully lodging a complaint, Spitta brought proceedings before the Hessisches Finanzgericht in which it contested the validity of the provision which obliged it to pay that sum. By an order dated 25 April 1984, the Seventh Senate of that court stayed proceedings and referred the following question to the Court of Justice:

'Is the reduction fixed at 143.956 units of account by Article 1 of Commission Regulation (EEC) No 932/77 of 29 April 1977 for products falling under heading 16.02 B III b 1 (aa) of the Common Customs Tariff valid?'

2. In order to properly understand the scope of the question, it is necessary to

* Translated from the Italian.

mention the intricate rules which constitute the background to it. As the Court will be aware, Regulation No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187) provided that import duties and levies should be charged on importation from non-member countries of fresh, chilled, frozen, salted, dried and smoked beef and veal. However, it exempted from the levy the products covered by subheading 16.02 B III b 1 of the Common Customs Tariff, that is to say, 'other prepared or preserved meat or meat offals, not specified, containing bovine meat or offals other than those containing meat or offals of domestic swine'. The goods subject to the levy were mentioned at letter (a) in Article 1, while those which benefited from the exemption appeared at letter (b). It is worth adding that the system of monetary compensatory amounts applied to both categories.

Furthermore, the provisions concerning the relationship between the Community and the ACP States interact with those rules. According to Article 2 (2) (a) of the Convention signed at Lomé on 28 February 1975 (Regulation No 199/76), products originating in the ACP States, when they come under a common organization of the market or are subject to specific rules as a result of the implementation of the common agricultural policy, may be imported into the EEC on favourable terms. Consequently, Article 2 (2) and (3) of Regulation No 1599/75 of the Council of 24 June 1975 (Official Journal 1975, L 166, p. 67) provided that the duties on imports from ACP States of the products referred to in Article 1 (a) of Regulation No 805/68 were to be reduced by an amount to be fixed quarterly by the Commission and corresponding to 90% of their average during a reference period. However, the importer was required to prove that an export tax of an amount corresponding to the reduction had been paid to the ACP State.

In other words, the levy in respect of fresh, chilled, frozen, salted, dried or smoked beef and veal originating in the ACP States has been divided into two parts: 90% goes to those States, which collect it in advance, and 1% goes to the Community. That system, which had the effect of encouraging exports of meat from ACP States to the EEC, was extended by Regulation No 3328/75 of the Council of 18 December 1975 (Official Journal 1975, L 329, p. 4) without any major modification or, in any event, none that was of great duration. The quantitative limits introduced by that regulation for imports from Botswana, Madagascar, Kenya and Swaziland were in fact abolished by Commission Regulation No 1501/76 of 25 June 1976 (Official Journal 1976, L 167, p. 35).

However, changes of a very different character were on the horizon. As it had noticed that the exemption of certain preparations from the levy lent itself to abuse, the Council decided to take measures to correct that situation. The result was Regulation No 425/77 of 14 February 1977, which amended various provisions of Regulation No 805/68. In particular, in Article 1 of Regulation No 805/68, subheading 16.02 B III b 1 was divided into two subheadings: 16.02 B III b 1 (aa) ('other prepared or preserved meat or meat offal containing bovine meat or offal, uncooked'), which is today contained in paragraph 1 (a), and 16.02 B III b 1 (bb) ('other prepared or preserved meat or meat offal, containing bovine meat or offal, other'), which is now letter (b) of the same paragraph. It was further provided in Article 9 that the products listed in paragraph 1 (a) of Article 1, namely uncooked bovine meat preparations, were to be subject to the levy.

3. Let us now turn our attention to the application of those provisions. Article 2 (4) of Regulation No 1599/75 provides that the necessary arrangements are to be adopted in accordance with the management committee procedure laid down in Article 27 of Regulation No 805/68. Article 3 of Regulation No 3328/75 also provides that such arrangements (particularly, the basis for calculation, the reference period, the rules for determining the tax to be charged by the exporting country, the issue of import licences, the admissible proof, etc.) are to be defined by the management committee.

In the fourth and fifth recitals in the preamble to Regulation No 3376/75 of 23 December 1975, which laid down detailed rules for the application of Regulation No 3328/75, (Official Journal 1975, L 333, p. 44), the Commission recognized that import charges varied from one Member State to another according to the levy applicable and that that difference was compounded by the application of different accession and monetary compensatory amounts. In order to avoid complex administrative problems, the Commission therefore considered it appropriate: (a) to make provision for a standard method of calculating the said charges, on the one hand, in the Member States which still applied accession compensatory amounts (the United Kingdom and Ireland), and on the other, in the remaining Member States; (b) to adopt for each of those 'regions' the compensatory amounts applicable in the State which absorbed most of the meat imports.

Article 4 of the regulation under consideration (as amended by Commission Regulation No 3136/76 of 22 December 1976, Official Journal 1976, L 353, p. 40) therefore fixed, in paragraph (1), the amount provided for in Article 1 (1) of Regulation No 3328/75 for products intended for importation into Ireland or the United Kingdom and, in paragraph (2), the amount in respect of importations into the other Member States. With regard to the latter, the reduction was to be equal to 90% of the levy, adjusted, where appropriate, by the compensatory amount applicable for France 'during the week preceding that in which commences the quarter for which the amount of the reduction is calculated'. Article 1 of Commission Regulation No 931/77 of 29 April 1977 (Official Journal 1977, L 109, p. 15) introduced a derogation from that provision: the reduction for the period beginning on 2 May 1977 was calculated on the basis of the levies and compensatory amounts, both accession and monetary, applicable from that date.

It now remains to examine the provisions which are the subject of the Finanzgericht's question. Article 1 of Commission Regulation No 932/77 of 29 April 1977 (Official Journal 1977, L 109, p. 16), and the annex thereto, lay down the amount of the reduction in respect of importations from ACP States in the period from 2 May to 30 June 1977. Applying the criteria laid down in Regulation No 3376/75 the annex distinguishes the 'regions' into which the Community is divided. With regard to products covered by subheading 16.02 B III b 1 (aa), which are the kind imported by Spitta, the reduction for Member States other than Ireland and the United Kingdom was fixed at 143 956 units of account per 100 kg. That figure represents 90% of the levy adjusted by the monetary compensatory amount valid for France.

We have thus reached the last stage of the long and laborious series of provisions dealing with import levies. Let me make clear that this stage is subsequent to the

facts of the case. However, it is useful to refer to it because of the light that it throws on the earlier rules.

By Regulation No 622/78 of 30 March 1978 (Official Journal 1978, L 84, p. 15), the Commission modified the rules (Regulation No 3376/75) on the basis of which the reductions had been calculated up to then. Thenceforth the amount by which the charges were reduced was to be equal to 90% of the levy adjusted, where necessary, by the monetary compensatory amount valid in the importing Member State. The Commission thus abandoned the system which consisted of dividing the Community into two 'regions' and of basing the reductions for one of those regions on the situation prevailing in France. The Commission also decided to express the amount in question not in units of account but in the currency of each Member State.

4. During the procedure before this Court written observations were submitted by Spitta and by the Commission. Spitta contends that in calculating the amount by which the import charges were to be reduced the Commission failed to take account of the principles laid down in Article 1 of Regulation No 3328/75 of the Council, thus exceeding its powers. That provision requires it to have regard to the average levy applicable to imports, and the word 'average' excludes, by implication, reference to *one* Member State. That interpretation is all the more reasonable because the coefficients and the compensatory amounts which enter into the calculation of the average of the charges are expressed in national currencies. In other words, they are different for each State. When they are multiplied by a reduction of a fixed amount, as the contested regulation does, they have different values depending on the monetary situation of each State.

Spitta continues by stating that the reduction for meat imported into the Federal Republic, which the Commission calculated on the basis of the French situation, does not correspond to the average of the charges. The calculations contained in the order for reference prove in fact that the levies on imports into Germany are several times higher than those imposed in respect of the same quantity of meat imported into France. It follows that the method adopted by the Commission gives rise to discrimination prohibited by Article 40 of the EEC Treaty, inasmuch as it favours French importers and concentrates imports in the direction of France.

The Commission of course defends the validity of its rules and contends that the Council gave it a considerable margin of discretion as regards the adoption of the system of calculation. Moreover, if it had not opted for a standard method of calculation, 'the precise application of those amounts would result in complex administrative problems and would oblige the [ACP] countries . . . to levy different amounts according to the destination within the Community' (fifth recital in the preamble to Regulation No 3376/75). Nor can it be said that it was unreasonable to express the reduction in units of account. In fact, the ACP States used the unit of account to express the export tax. Moreover, the necessity of converting the unit of account into the currency of the importing Member State at the representative rate and into the currency of the ACP country at the rate valid on the day of export would have created considerable accounting difficulties for those countries.

Finally, the Commission contends that there can be no question of any breach of Article 40. On the contrary, since the contracts for the importation of the meat were concluded before April 1977, Spitta was not subject to 90% of the levy in Madagascar. It did not therefore suffer a disadvantage as a result of the application of the reduction in the Community; on the contrary, it benefited from the rules in force at the time of importation into the Federal Republic of Germany.

5. To reply to the Finanzgericht's question, it is therefore necessary to decide whether the standard method of calculation adopted by the Commission in Regulation No 932/77 in application of the criteria which it itself laid down in Regulation No 3376/75 respects the guiding principles laid down in Regulation No 3328/75 of the Council and the prohibition of discrimination between importers within the Community. I will say at once that the reply must be negative: that method exceeds the limits within which the Council intended to contain the power of the Commission and is therefore unlawful.

With regard to the first point, it is sufficient to re-read Article 1 of Regulation No 3328/75, which provides as follows: 'The charges on imports ... shall be reduced ... by an amount ... corresponding to 90% of [their] average'. However, 'corresponding to' is synonymous with 'equal to'. I do not see how a standard method of calculation can be used to determine an amount corresponding to a particular percentage. Use of such a method makes it impossible to obtain precise results. Moreover, the Commission conceded as much when it stated in the fifth recital in the preamble to Regulation No 3376/75 that it had fixed amounts which were 'close to' (thus not 'corresponding to' or 'equal to') the average of the compensatory amounts applicable for each of the Member States and therefore the average of the import charges.

Let us now turn our attention to the second point. As the Court will be aware, the use of a standard method of calculation is accepted when it is necessary to evaluate amounts which are difficult to quantify or when the necessities of efficient administration require simplified forms of calculation. In this case, the amounts under consideration, mainly the compensatory amounts, are clearly defined, and the administrative requirements seem to be anything but imperative. As we have seen, the Commission emphasized the serious difficulties with which the ACP States would have been presented by the adoption of a different method of calculation and, particularly, by a decision to express the reductions in national currencies. However, it did not say that only two years later it abandoned both of those options because of their tendency, referred to in the preamble to Regulation No 622/78, to 'create problems, especially for the exporting country'.

Use of a standard method of calculation, based on the French monetary situation, is thus without justification and provokes a disparity of treatment between Community importers which is surely prohibited by Article 40 of the Treaty. In the context of these proceedings, the arguments advanced on this point by the Commission can have no weight.

6. To declare the contested provision invalid, as I would propose, raises two questions: What will be the effects of such a declaration? And which institution will have the task of determining the the new reductions? However, it is not difficult to resolve those questions in the light of the

principles which the Court has frequently and consistently upheld over the years.

With regard to the second question therefore, I will merely refer to the judgments given in the gritz and quellmehl cases (Joined Cases 117/76 and 16/77 *Ruckdeschel* v *Hauptzollamt Hamburg-St Annen* [1977] ECR 1753; Joined Cases 124/76 and 20/77 *Moulins de Pont-à-Mousson* v *Office interprofessionnel des céréales* [1977] ECR 1795), in which the provisions of certain regulations were declared void. In both judgments (but see in particular paragraph 29 of the second) the Court declared that it was for the 'institutions responsible for the common agricultural policy' to assess the economic and political considerations on the basis of which the amount was fixed. With regard to the first question, obvious requirements of legal certainty suggest that the best course is to place a time-limit on the effects which flow from the declaration of invalidity. That was the view taken by the Court in its judgment of 27 February 1985 in Case 112/83 (*Société des produits de maïs SA* v *Administration des douanes et droits indirects* [1985] ECR 732).

7. For all of the foregoing reasons, I propose that the Court should reply as follows to the question referred to it by the Seventh Senate of the Hessisches Finanzgericht by order of 25 April 1984 in proceedings between H. Spitta & Co. and Hauptzollamt Frankfurt am Main-Ost:

The amount by which import charges on beef and veal originating in the ACP States were to be reduced, fixed by Article 1 of Commission Regulation No 932/77, is not valid.