Examination of the questions referred has not revealed any elements capable of affecting the validity of Regulation No 974/71 of the Council nor of Regulations Nos 1013/71, 1014/71 and 548/72 of the Commission, fixing the compensatory amounts applicable during the period indicated in the questions referred.

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

Delivered in open court in Luxembourg on 24 October 1973.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 26 JUNE 1973 [1]

Mr President,
Members of the Court,

By Order dated 19 January 1973 the Finanzgericht at Berlin submitted to the Court a series of questions bearing upon the validity of some Community Regulations (insofar as they have as their subject matter compensatory amounts on imports of milk products from Bulgaria). I shall not now read out the rather extensive list of questions; in this respect I would refer you to the Report for the hearing.

It will aid an understanding of the proceedings if I preface my opinion by the following preliminary remarks: — During the months of April and May 1971 some foreign currency markets within the Community had been disturbed by speculative movements and by the abnormal influx of short-term capital. Having regard to the resultant increase in the volume of money, which could have had dangerous inflationary effects, the Federal Republic of Germany and the Kingdom of the Netherlands on 9 May 1971 freed the rates of exchange of their currencies, i.e. they widened the fluctuational margins of these rates of exchange in relation to the official parity. Once the actual rate of exchange deviated beyond certain limits from the official parity, these measures were bound to cause difficulties for the functioning of the common market organizations, which are based upon units of account and official parities, for

1 — Translated from the German.

transactions might then take place according to the actual rate of exchange in the national currency at a price below the intervention prices or buying prices laid down by Community Regulations on the basis of official parities or buying-in prices.

For that reason the Council, showing understanding for the German and Dutch measure (e.g. Decision of 9 May 1971, OJ C 58, 1971, p. 1), on 12 May 1971 issued Regulation No 974/71 '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' (OJ L 106, 1971, p. 1).

Pursuant thereto, a Member State, which for the purposes of commercial transactions allows the exchange rate of its currency to fluctuate by a margin wider than that permitted by international rules, shall be authorized to charge on imports from Member States and third countries compensatory amounts for certain products and subject to certain conditions. Pursuant to Article 1 (2) of Regulation No 974/71 this applies to 'products covered by intervention arrangements under the common organization of agricultural markets' and in respect of products the price of which depends on the price of the products above referred to, which are governed by the common organization of the market or which are the subject of a specific provision under Article 235 of the Treaty. In Article 2 — we shall have occasion to return to this point — it is provided how compensatory amounts shall be computed. Finally, Article 6 states that detailed rules for the application of this Regulation 'which may include other derogations from the Regulations on the common agricultural policy', may be promulgated by the so-called Management Committee procedure.

In the first instance this happened by means of Regulations No 1013/71 (OJ L 110, 1971) and No 1014/71 (OJ L 110, 1971) of the Commission, both dated 17 May 1971. The first mentioned Regulation contains some technical directions, especially in relation to the calculation of the spot market rates of exchange as against the dollar. The Regulation of the Commission No 1014/71, in its annexes, enumerated the compensatory amounts in relation to the various relevant products. This Regulation was repeatedly amended *inter alia* by Regulation No 548/72 of the Commission of 16 March 1972 (OJ L 66, 1972). The last mentioned Regulation provided in Annex V, Part A under tariff No ex 04.04, that in respect of 'Cheese and curd, except Grano Padano and Parmigiano Reggiano', that is to say in respect of products which come under the common organization of the market for milk and milk products contained in Regulation No 804/68 (OJ L 148, 1968) of the Council, there shall be levied a basic amount per 100 kg net weight of DM 45·50 on imports from third countries. Here we thus come closer to the facts of the national proceedings.

This compensatory amount (apart from the levy payable and the import turnover tax) was in fact imposed when the firm Balkan-Import-Export, the plaintiffs in the national proceedings, on 24 March 1972 cleared through the customs Bulgarian cheese of sheep's milk which was being delivered on the basis of a contract, expressed in DM, concluded with the state trading organization Rodopaimpex on 3 November 1971.

Since Balkan-Import-Export did not consider this permissible, they filed a claim with the Finanzgericht Berlin and thus started the proceedings resulting in the present reference to this Court. As the basis of their claim they relied (apart from infringements against German law which are of no interest for the present purpose) on the fact that Regulation No 974/71 of the Council had wrongly been based upon Article 103 of the EEC Treaty, that is the provision concerning

measures of conjunctural policy. In the plaintiff's view the Regulation could at the most have been promulgated within the framework of the special provisions in the agricultural field and in this connexion the European Parliament should have been heard — which was not the case. The plaintiffs go on to say that if one considers Article 103 of the EEC Treaty to be applicable, then one has to have regard to the fact that Article 103 does not authorize the promulgation of *Regulations*. Likewise, it only authorizes measures of common concern, which is not the case with Regulation No 974 since it only provided an equalization measure in respect of certain agricultural products. It was further argued that Regulation No 974 disregards the principle of proportionality, since it only has regard to the revaluation effect in relation to the dollar but not in relation to the currencies of third countries and thus — on imports from Bulgaria — enabled excessive compensatory amounts to be assessed. Finally, the plaintiffs also took the point that — if one disregards the plaintiff's critical remark that it was not clear how the rate, applied to their imports, had come about — compensatory amounts were, at any rate as from 24 March 1972, no longer permissible since the Washington Monetary Conference of 18 December 1971 had decided upon the introduction of indicative rates and new margins of fluctuation.

Having regard to these criticisms, which the Finanzgericht regarded as not devoid of substance, the national proceedings were stayed and the aforementioned questions in relation to the validity of Regulation No 974 as well as its implementing regulations were submitted for a preliminary ruling.

We shall now consider what replies might be given to these questions.

1. Let us start with the problem whether the Council had the power to make Regulation No 974/71 on the basis of Article 103 (2) of the EEC Treaty.

As has already been mentioned, the plaintiffs deny this emphatically, putting forward a number of arguments. Firstly they point to the fact that the measure of the Council had been intended for the purpose of obtaining an attenuation of the effects of freeing national exchange rates. Since such freeing was not however permissible under the Treaty, the Community measures which were promulgated 'parallel' thereto, likewise had to be regarded as inadmissible. At any rate, it was not right to assume that Article 103 of the EEC Treaty authorized measures of monetary policy. — Going on, the plaintiffs take the view that Regulation No. 974 did not contain measures of conjunctural policy but, aiming as it did at the maintenance of the intervention system within the field of agriculture, that it amounted to a measure of agricultural policy. In this connexion one would however have to fall back onto the special norms of competency in the agricultural field and pursuant to Article 43 of the Treaty, a hearing before the European Parliament was in this connexion indispensable. — The plaintiffs stress moreover that Article 103 of the EEC Treaty does not constitute a protective clause, which permits deviations from the principles and the jeopardizing of the objects of the Treaty. — They also point to the fact that Article 103 only permits measures in the common interest. These however were likewise lacking, if as in the case of Regulation No 974, all that was aimed at was the protection of interests of persons who manufacture or deal in products comprised within the Regulation. — Finally, the plaintiffs hold the view that pursuant to Article 103 of the EEC Treaty it is not under any circumstances possible to promulgate a Community *Regulation*.

Let us now examine these arguments in detail.

(a) Dealing first with the permissibility of the freeing of exchange rates, the

decisive point of reference of Regulation No 974, which accepts this freeing and which is designed to absorb its effects in the agricultural field. In this respect there is in my view no need for long discourses. If the plaintiffs in this context point out that Article 107 of the EEC Treaty presupposes a relationship of fixed currency parities of the Member States and that it also excludes a floating in relation to third countries, then we shall see quite soon that it is no easier to follow this thesis than that which claims that the freeing of exchange rates is directed against the common interest and against the aims of Article 104. Above all, it is in the present context necessary to recognize that monetary policy and accordingly the whole apparatus in that field have remained within the sphere of competence of Member States themselves. Looked at in this way, it certainly does seem approriate to excise one part, that is the freeing of rates of exchange, whilst leaving Member States with the political responsibility in this field. — As regards Article 107 of the EEC Treaty, that only contains an obligation on the part of Member States to regard policy with regard to rates of exchange as a matter of common concern; however as regards its contents this policy has not been laid down; certainly nothing has been said about excluding the freeing of rates of exchange. Whilst in Article 107 (2) there is only the question of an alteration of rates of exchange, one cannot point to this as a provision for achieving a limitation of the competence of Member States in the field of monetary policy. — If furthermore one bears in mind the nature of Article 104, then one cannot easily see how a freeing of rates of exchange could offend against the objects set out in this provision. — Likewise, as has been shown by the Commission, it would be difficult to say that fixed rates of exchange were laid down by the common agricultural policy created by Article 43 of the Treaty. Admittedly, on the promulgation of Regulation No. 129 'on the value of the unit of account and the rates of exchange to be applied in the context of the common agricultural policy' (OJ 1962, p. 2553) one proceeded from a system of fixed rates of exchange. That it was not the object of this system to bind the Community to such a system is shown not only by the fact that otherwise one would have adopted rather more comprehensive measures of monetary policy, but also from Regulation 129 itself, since Article 3 thereof provides that in the event of exceptional monetary practices (permitting variations in currency values within wider limits, fluctuating or multiple rates of exchange), measures deviating from this Regulation may be adopted. — Finally, the Commission has convincingly shown that the clinging to fixed rates of exchange cannot be accepted in the face of international agreements (that is to say the complicated rules of the agreement concerning the International Monetary Fund) and Article 234 of the EEC Treaty. It has also clearly shown that the theory that there had been a lack of common interest in favour of a freeing of rates of exchange, was not tenable. Indeed, in relation to this last mentioned point one only has to bear in mind the state of integration in order to recognize that the disturbance of the balance of payments and of price stability in one Member State as a result of unimpeded influx of foreign currency, can also have negative effects on other Member States. Appropriate measures of defence accordingly are very much in the common interest of Member States.

As regards the decisive point of departure of Regulation No 974, that of freeing the rates of exchange, one cannot therefore accept criticism which would tend to question the validity of a Community measure whose purpose is to counter the effects following from the freeing of rates of exchange.

(b) We now come to the crucial legal basis of the Regulation criticised before us, i.e. Article 103 of the EEC Treaty,

and let us see whether it has rightly been adduced.

Article 103, as we know, provides as follows:

'1. Member States shall regard their conjunctural policies as a matter of common concern . . .

2. Without prejudice to any other procedures provided for in this Treaty, the Council may, acting unanimously on a proposal from the Commission, decide upon the measures appropriate to the situation.

3. Acting by a qualified majority on a proposal from the Commission, the Council shall, where required, issue any directives needed to give effect to the measures decided upon under paragraph 2 . . .'

This quotation makes it clear that the concept of 'conjunctural policies' lies at the centre of this provision and that one also has to consider what is meant by the term 'without prejudice to any other procedures provided for in this Treaty'.

As regards the term 'conjunctural policy', we have to realize that the Treaty itself does not define it further. One must therefore — as has been done unanimously by the Federal Government, Council and Commission — fall back on generally valid concepts and assume that they also apply to the Treaty. Accordingly — as the Commission assumes — one is able to think in terms of conjunctural policy when the whole course of the economic process is guided by reference to short-term goals (in which connexion one also has to consider goals of general economic policy — e.g. stable price levels, a high rate of employment, controlling the balance of payments, optimum economic growth). Included under this heading of conjunctural policy are governmental measures which are directed to the prevention or limitation of conjunctural variations. The definitions contributed by the Federal Government and by the Council in essence correspond to this, the Council having added that these are measures intended to avoid variations in long-term economic development, especially of prices and incomes.

It is further important to appreciate that conjunctural policy, precisely because it must be regarded as a constituent part of general economic policy, can encompass *all* economic fields and seen in this light there is, contrary to the plaintiffs' view, no cause for excluding from this field measures having the character of *monetary policy*.

Furthermore, proceeding from the knowledge that has been gained, one cannot deny that the Regulation of the Council which is before the Court has *purposes* in the field of conjunctural policy. One feels justified in saying this, because the governmental measure of freeing of rates of exchange certainly belongs to the sphere of conjunctural policy and because it is clearly the purpose of Regulation No 974 to this extent to extend lateral protection from the Community side, that is to work in the same direction. This can also be said because without the equalization measure set up by the Council, the agricultural markets of the Member States concerned would have been swamped with cheap imports and because the result of insufficient refunds would have placed an appreciable strain on the national market. This would not only have meant a substantial increase in intervention, combined with appreciable costs (or possibly even the collapse of intervention), it would also have resulted in a decline in prices and losses of income for the agricultural population which again, would have had negative results on the national economy as a whole.

However, the main goal of the measures that had been taken being in the agricultural field and since in Article 103 there is, introduced by the term 'without prejudice' a reference to 'any other measures provided for in this Treaty'

one must also consider, before the use of Article 103 in the present case can be justified, whether by means of these expressions it was intended to express, as the plaintiffs (calling in aid in particular Article 38 (2) of the EEC Treaty) seem to think, that Article 103 could only be considered for *subsidiary purposes;* that therefore in the field of agriculture in the first instance the special rules of procedure had to be observed.

In this context the Council and the Commission are certainly right in pointing out that the meaning of the term 'without prejudice' is not altogether clear. It certainly could also mean that Article 103 might even be used when there are other provisions in the Treaty that also provide a solution (that accordingly it does not point to a principle of 'subsidiary application' as the Commission called it, but to a principle of 'parallel application'). Furthermore, the bodies mentioned are right when in the light of this state of affairs they underline the necessity of undertaking a close examination as to the sense and purpose of the provision. For when this is done, one cannot avoid realizing that measures of conjunctural policy have a *comprehensive* character. That being the case, it appears unthinkable to interpret Article 103 in a way which would suggest that measures of conjunctural policy can only seldom be based upon this provision alone, but rather that other, additional procedural provisions (e.g. provisions in the field of agriculture which require the opinion of Parliament to be obtained) had to be observed. Indeed, such fragmentation of the procedure, rendering it considerably more difficult to apply, is not acceptable in the interests of speedy effectiveness of measures of conjunctural policy. In principle, one ought therefore to take the view that Article 103 can be used independent of other Treaty provisions and parallel to them, provided there is a goal in conjunctural policy to be aimed for.

Faced with this view, one cannot point to Article 38 (2) of the EEC Treaty, pursuant to which the rules laid down for the establishment of the common market shall apply to agricultural products, save as otherwise provided in Article 39 to 46. Understood correctly, this proviso does not apply to Article 103. It is a fact that this provision does not belong to the provisions 'for the establishment of the common market', rather is it a case of conjunctural policy reaching out beyond the establishment of a common market. Besides, the Commission has rightly observed that Articles 39 to 46 do not contain any provisions that would militate against the application of Article 103.

All this — to arrive at some interim conclusion — means that the failure to have regard to the agricultural rules of the common market does not affect the validity of Regulation No 974. At the same time, this makes it clear that the reference on the part of the plaintiffs to Article 19 of Regulation No 804/68, that is the provision which in their opinion should have been observed within the framework of the common organization of the market in milk upon the introduction of the compensatory scheme, is without significance, quite apart from the fact that the Council under that provision could also have adopted a measure without obtaining the opinion of the Parliament thereon. It is equally clear from this interim conclusion that the reference to 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, 1968) is irrelevant. Indeed, — apart from all the other considerations already put forward — it cannot be of significance, if only because the protective clauses in the field of monetary policy in the Regulation mentioned, could plainly not overcome — the Commission has shown that — the problems attaching to the freeing of the rates of exchange.

(c) That does not, however, as yet conclude the examination of Article 103 in the light of the plaintiffs' criticism thereof. We still have to examine whether — as is required by Article 103 — one is entitled to say that Council Regulation No 974 had been promulgated in the *common concern*. One will further have to consider whether in this way one is entitled to deviate from the general Treaty provisions, whether Article 103 can be used as a substitute protective clause and one will have to ascertain whether it envisages the promulgation of Community *Regulations*.

On these problems one will, in my opinion, have to comment as follows.

As regards the common concern, I think I have made it clear in the course of previous remarks of mine, that I consider such common concern to apply in relation to the promulgation of Regulation No 974. Admittedly it is a fact that this Regulation created a levy system in favour of agricultural products, and not even in respect of all agricultural products at that. Apart from the fact that a common concern within the meaning of Article 103 exists not only where the whole economy is concerned, one must not disregard the effects on other sectors of the economy at which this measure aims. Besides — and this is of equal importance in the current context — there was assuredly an interest on the part of Member States other than those immediately concerned, in having the measures promulgated and in preventing the harmful effects resulting from the freeing of rates of exchange upon their economy. To this extent one only has to consider that without the compensation provisions we would have had an increased outflow of goods — I am thinking of France and Italy — which these would have led to a corresponding, undesirable increase in prices.

Coming then to the plaintiffs' theory that the compensatory charges upon imports from third countries had to be regarded as charges having an effect equivalent to customs duties and as such prohibited, pursuant to Article 19 of Regulation No 804/68, it probably suffices to go along with the Commission in pointing out, that this Regulation constituted *secondary* Community law, based on Article 43 of the Treaty. After what has been said as regards the relationship between Article 103 and the agriculture regulations of the Treaty, it seems clear, that one cannot attribute to such a provision greater force than to measures of conjunctural policy of a similar secondary level, based upon Article 103. Besides, there is also the general realization that the promulgation of measures of conjunctural policy may indeed, having regard to their objectives, necessitate certain deviations from the provisions of Community law, such as — admittedly these are not immediately in point having regard to the general context of the measures but nevertheless of some importance — certain adverse effects upon and reductions in the trade in agricultural products within the Community. (This point will have to be dealt with later on in greater detail.)

As regards the connexion between Article 103 and Article 226 of the EEC Treaty (the general protective clause which since the end of the transitional period is no longer in force), one must furthermore observe that it is certainly out of the question to use Article 103 as a substitute for Article 226. There can be no question of this in the present case since clearly the special conditions of application provided for in Article 103 and different from Article 226 (measures of common concern arising from conjunctural policy) have been observed. Accordingly, even if in respect of certain economic circles there results some protective effect, one cannot regard this as an impermissible transformation of Article 103 into a protective clause replacing Article 226.

Thus there remains only one objection still to be dealt with in the present context, i.e. that Article 103 of the EEC

Treaty provides in relation to conjunctural policy at Community level only a coordination; that on the other hand it was not under any circumstances possible to promulgate a Community *Regulation* on the basis of this provision.

In relation to these arguments on must first of all concede that under Article 103 (1) conjunctural policy is doubtless a matter for the Member States, precisely because it imposes certain duties of co-ordination on Member States. Just as clearly does it follow from Article 103 (2) that apart from this, there exists besides a legislative competence of the Community.

As regards the *method* of exercising this Community competence, one must admittedly not overlook the fact that the German text uses the words 'entscheiden' and 'Entscheidungen'. However, as has already been shown by the examples of Article 28, this term need not necessarily be understood in the technical sense of Article 189 of the EEC Treaty. That this is likewise so in the case of Article 103 is proved not only by the terminology used in the other languages, which generally talk of 'measures' ('misure', 'maatregelen', 'measures') and thus include all kinds of legal acts under Community law. In this connexion, one might also point at the comprehensive aims of Article 103 and the necessity of giving an interpretation which is attuned to the current state of integration and which ensures efficiency. Finally, — and contrary to the views of the plaintiffs — one cannot in this context extract a valid argument from Article 103 (3), i.e. from the fact that there is here only talk of *directives* for carrying into effect the decisions arrived at pursuant to paragraph 2. One must not in fact overlook that for the issuing of these directives there applies a simplified form of decision-making (the qualified majority). Surely, this must be understood in such a way, that, apart from this, it does not exclude regulations, unanimously decided upon. Furthermore one must draw attention to the words 'where required' from which the Federal Government rightly concludes that the issue of directives is only indicated under certain circumstances but that in addition in case of necessity, and providing the requirements of paragraph 2 are observed, the making of implementing regulations is not excluded. — Accordingly one cannot really object to the fact that the Council as regards the measures now before the Court, chose to act by way of *Regulation*. Since besides — as has been demonstrated — it could also have promulgated implementing regulations, one cannot criticize it on account of the fact that on the basis of the general Treaty provision of Article 155, within the framework of the levy system created by it, it authorized the Commission to promulgate implementing regulations.

All this permits the conclusion in regard to the first series of problems raised by the reference, that the validity of Regulation No 974/71 and of the Commission's Regulations implementing them, cannot be attacked on the grounds that the Community bodies were wrong in bringing Article 103 of the Treaty into play.

2. Let us now turn to the question whether the validity of the system might be doubted on account of it being of general application, i.e. independent of the country of origin of the product and of the basis of the contract and accordingly even in the case of imports from Bulgaria based upon the relationship between the DM and the dollar.

In this connexion we might first of all remind ourselves of Article 2 of Regulation No 974, which states:

'The compensatory amounts for the products covered by intervention arrangements shall be equal to the amounts obtained by applying to the prices the percentage difference between:

— the parity of the currency of the Member State concerned declared to and recognized by the International Monetary Fund, on the one hand, and

— the arithmetic mean of the spot market rates of this currency against the US dollar during a period to be determined.'

As regards products the price of which depends on the price of the products for which, within the framework of the common market in agriculture, intervention measures are provided, it is furthermore laid down in Article 2 (2) that 'the compensatory amounts shall be equal to the incidence, on the prices of the product concerned, of the application of the compensatory amounts to the prices of the products referred to in paragraph 1, on which they depend'.

In the case of a currency like the Bulgarian Lewa, which apparently did not follow the dollar but of which the rate of exchange *vis-a-vis* the DM remained essentially stable, this evidently led to excessively high compensatory rates, i.e. to compensatory amounts which exceeded the incidence of the currency measure. In the plaintiffs' view this amounted to an infringement of the principle of proportionality, to which reference was made in the preamble to Regulation No 974 itself. Furthermore, one might also treat this as a disregard of Article 39 (1) (e) (i.e. ensuring that supplies reach consumers at reasonable prices), as a disregard of the prohibition of discrimination contained in Article 40 of the EEC Treaty and as an infringement of Article 110 of the Treaty, which lays down a liberal trading policy. On the other hand, in the plaintiffs' opinion these infringements would not have occurred, if one had attempted to achieve a separate equalization *vis-a-vis* all important trading partners, if following the example of the levy system (that is of paying attention to the most favourable possibilities of purchasing on the world market) one had thought in terms of what are basically the countries of origin of certain products or if at any rate one had proceeded by calculating the mean of all third country currencies to be calculated according to trading volume and its relationship to the DM.

Accordingly we are obliged in the present context to ask ourselves, whether such possibilities of solution could have been implemented without considerable difficulties and whether to have disregarded them must therefore be termed an erroneous exercise of discretion.

In undertaking this rather delicate examination, one is, I suppose, bound to agree with the Commission when they point out that keeping track of the currency situation and of its different development in a large number of states had brought considerable difficulties in its wake and that it could have created appreciable complications of the compensation system if correspondingly differentiated compensatory amounts had to be ascertained in respect of a multitude of basic products and manufactured end-products. In fact, even the existing system had resulted in an extraordinarily extensive catalogue of levies and, looked at in this way, it is understandable when the Commission considers that applying the method which the plaintiffs consider appropriate would have resulted in an overloading of the administration. Added to this is the fact that the resulting difficulty of surveying and the changeable nature of the compensatory scheme would have rendered trade more difficult. One must also not forget that the differential scheme desired by the plaintiffs might have produced a danger of circumventing deals and fraudulent manœuvres. One could only have countered this by way of certificates of origin and by controls of import contracts as well as movement of goods, which again would have resulted not only in a considerable administrative effort — this time at national level — but also impediments and delays to trade. In my view, such factors cannot be disregarded when one is evaluating complicated measures of protection in the field of monetary policy, measures which at the time of

their promulgation were in any event designed for only a limited period of time and in connexion with which the legislator is obviously entitled to a large margin of discretion.

Similar considerations which allow us to doubt the usefulness of the plaintiffs' theory, also apply in regard to the other solution, i.e. on the question whether for the purpose of the compensatory provisions one ought not to have taken into account the mean of variations in the rates of exchange of all third country currencies. In fact the inquiries necessary in this connexion, whilst having due regard to the significance of movements of trade in different products and their variations, would surely have proved somewhat difficult and long-winded. There is also the not unimportant factor that levies calculated in this way would result in an insufficient protection against imports based on dollars and in many cases would have led to insufficient refunds — the corollary of compensatory levies. If one further bears in mind that on the introduction of the scheme most deals in agricultural products were concluded on a dollar basis, that at that time the dollar was the pivot of the international monetary system which was as a rule followed by the other freely convertible currencies, then, having regard to the fact that the relevant information supplied by the Commission was only disputed by the plaintiffs in an unsubstantiated manner, one has difficulty in holding that the system created by Article 2 of Regulation No 974 had to be treated as invalid by reason of infringement of the principle of proportionality.

I must say here and now, that similar considerations also apply in regard to the plaintiffs' references to Articles 40, 39 and 110 of the EEC Treaty.

As regards Article 40, i.e. the prohibition against discrimination, one cannot from the outset avoid the impression that the plaintiffs started out on the basis of a false comparison, that is one between the position of the producers and that of the importers. However, insofar as the plaintiffs might have thought that individual products due to excessive loading with compensatory levies had been discriminated against, one can rightly counter this by saying that for the purpose of assessing the compensatory amount, there applied uniform criteria and that the authority granted by Regulation No 974 was also — as might have been foreseen at the time of its promulgation — applied by all relevant Member States. Accordingly one can hardly speak of a disregard of Article 40 of the EEC Treaty.

Insofar as the plaintiffs pointed to the aims of Article 39 and argued that the compensatory provision had disregarded the instruction to ensure that supplies reach consumers at reasonable prices and had on the other hand concentrated excessively on the protection of agriculture, not least by failing to bear in mind the advantages flowing from the revaluation of the DM, one can say this. Advantages accruing to agriculture from revaluation did no doubt exist in regard to investment goods. However, as the Commission rightly thinks, they ought not to be exaggerated. It was also probably difficult to measure them and to attribute a due proportion to the individual products. Accordingly, one cannot object to the fact that within the framework of the compensatory provisions they were not taken into account. Besides, as has already been demonstrated, since one could not differentiate within the framework of the compensatory provisions in relation to the different countries of origin, since a sufficient protection could only be ensured when one had due regard to the main currency, the dollar, and since Article 39 does not refer to the lowest prices but only to *reasonable* consumer prices, i.e. since it does not lay down solely the need for having regard to the interests of the consumer, therefore, having regard also to the different objectives enumerated in Article 39 of which pursuant thereto account shall be

taken and which leave a wide room for discretion, one cannot really conclude that the system is invalid.

The same finally also applies to the assessment of the disputed Regulation from the point of view of Article 110 of the EEC Treaty. Admittedly, the object of liberalizing trade is anchored within that Article. The provision does not however contain precise criteria, rather does it in every case permit a wide room for discretion. One can hardly assume that it was not properly applied, when one bears in mind what has been said in relation to the impossibility in practice of differentiating the compensatory scheme and also if one bears in mind that not only did there have to be an alignment with the objects of Article 39, but likewise that quantitative import restrictions were called for.

Consideration of the second range of problems accordingly does not lead us to conclude, that Regulation No 974/71 was invalid, on account of the fact that it was geared to the relationship DM/dollar.

3. A further question by the Finanzgericht Berlin asks whether it is permissible in Community law that compensatory levies upon imports from third countries were still levied on 24 March 1972, i.e. at a point of time when the imports took place, that are dealt with in the national proceedings.

That too is denied by the plaintiffs. In this connexion they point to the fact that the Washington Conference of 18 December 1971 had decided upon a reform of exchange rates and a new system of parities with official interventions within a prescribed margin had been introduced. The evidently consider that the conditions of Article 8 in Regulation No 974 were thus complied with, that is the provision which states 'it (i.e. Regulation No 974) shall cease to be applicable as soon as all the Member States concerned again apply the international rules on margins of exchange-rate flutuation around official parity'.

If one asks oneself whether this assessment of the situation is correct, then one first has to remember that the compensatory provision has to take account of the fact that on 15 August 1971 the convertibility of the dollar into gold was suspended by the United States and that on 23 August 1971 there was a decision to free the rate of exchange of the currency of the Belgo-Luxembourg economic union. One must also point out what was the subject matter of the Washington Conference. — As we have heard in the course of the proceedings, it was decided in Washington on 18 December 1971, to introduce new fixed rates of exchange in the shape of indicative rates as against the dollar. In this connexion there was *inter alia* decided upon an indicative rate for the DM which lay higher than the margins of fluctuation laid down by the international agreement. Likewise, in deviation from the international provision there was decided upon a rate of fluctuation *vis-à-vis* the dollar which on both sides of the indicative rate amounted to 2·25 %. These decisions were arrived at informally and only announced in a press communique following the meeting of ministers of the ten nations. A notification subsequent to the agreement concerning the International Monetary Fund, with appropriate legal effects, did not take place. Only on 8 May 1972 did the official devaluation of the dollar take place, i.e. the announcement of the new dollar rate as the official parity.

On the other hand one has to bear in mind, that the official parities deviating from the indicative rate and the more limited margin of fluctuation of the international agreement retained their importance within the price system of the agricultural market, that the prices of agricultural products were expressed in units of account and that the whole currency agreement constructed on Regulation No 129/62 was based upon

official parities. The existence of official parities was therefore a condition for the smooth functioning of the common market in agriculture. Looked at in this way and since Article 1 of Regulation No 974 also lays down expressly as a condition for its application, that a Member State should in commercial transactions allow the exchange rate of its currency to fluctuate by a margin wider than the one permitted by the international rules, it can certainly not be said that as a result of the Washington Conference the conditions of Article 8 of Regulation No 974 had been complied with. Besides, since as was shown by the developments from December 1972 onwards, the currency situation continued to be uncertain and there was an expectation that new parities might soon be fixed, one cannot reproach the Community authorities for not having considered altering the whole system of regulations in relation to the organizations of the market in agriculture on the basis of the data laid down in Washington, and for preferring to keep for the time being the compensatory system in its original form until the notification of the dollar devaluation.

Accordingly, as was suggested by the Commission, the Federal Government and the Council who agreed with one another, one can only reply to question 2 of the Finanzgericht Berlin that the validity of Regulation No 974 was not affected either by the expiration of time or by events that after their promulgation recurred in the field of monetary policy.

4. The next question to which we shall then turn, deals as we know in its first part with the question as to what are the factors on the basis of which the compensatory amounts to be levied on importation of cheese of sheep's milk under Article 2 (2) of Regulation No 974, are to be calculated.

In this connexion one first has to recall the text of the provision. In paragraph 1 it states: 'The compensatory amount for the products covered by intervention arrangements shall be equal to the amount obtained by applying to the prices the percentage difference between:

— the parity of the currency of the Member State concerned declared and recognized by the International Monetary Fund, on the one hand, and

— the arithmetic mean of the spot market rates of this currency against the US dollar during a period to be determinated. In paragraph 2 it is further provided 'for the other products referred to in Article 1 (i.e. the products the price of which depends on the price of the products for which within the framework of the common organization of the market in agriculture intervention arrangements are provided) the compensatory amount shall be equal to the incidence, on the prices of the product concerned of the application of the compensatory amount to the prices referred to in paragraph 1 on which they depend'. — Already this quotation makes it clear that we are dealing with a norm requiring further amplification and that in connexion with this amplification technical judgment doubtless comes into play. Accordingly, it is clearly not for this Court to lay down details of application but this is a function of the Commission pursuant to Article 6 of Regulation No 974. In its literal sense therefore, question No 3 of the Finanzgericht Berlin would, as the Commission has rightly stated, have to be considered inadmissible.

In fact however, as we know from the totality of the proceedings, it really has another function. By means of it, it was intended to induce the Commission to disclose the criteria employed by it and thereafter — and that was above all the purpose of the third constituent part of the question — it was to be examined whether the specific rate applied by the plaintiffs upon importation accorded

with the principles of application of the system. Seen in this light, there can surely be no objection to dealing with this question by means of a reference. Thus it also becomes clear that the first part of the third question does not now require separate examination but only that we will have to return to it in the context of the third part of the question.

5. The second part of the third question to which we shall now turn, aims at clarifying the problem whether Article 2 of Regulation No 974 constitutes a sufficiently defined basis of calculation. Once again it is therefore a question of validity.

It harks back to a criticism expressed by the plaintiffs in the national proceedings, who are in this context thinking of principles in German constitutional law (Article 80 of the Basic Law), i.e. principles according to which the legislator must, in granting a power, express this clearly and precisely, especially so when it is a matter of raising taxes.

In this context one might first ask whether the maxim in German law to which reference has been made and which constitutes an emanation of the principle of separation of power, has a parallel in the legal systems of the other Member States and can thus be recognized as a principle in Community law. To this extent I can see a justification for expressing some scepticism; at any rate, the plaintiffs did not come forward with relevant authorities.

Furthermore one must not forget that the Community, particularly in the field of interest in these proceedings, has its own structure which justifies special yardsticks as regards the formulation of empowering norms. Thus one ought not to overlook that the implementing provisions required in relation to Regulation No 974 had to be promulgated in the course of the so-called Management Committee procedure, i.e. with the representation of representatives of the Member States. Indeed, the influence of Member States on the Council is in this way, if you like, indirectly assured and therefore it seems reasonable in this context not to require the same precision in relation to enabling provisions as might be appropriate if only the Commission is called upon to complete the Community law.

Finally, the Commission has also convincingly shown that despite the vague text of Article 2 (2) of Regulation No 974 — which in its German version is difficult to understand — the expert ought not to find the interpretation of 'incidence' within the meaning of this provision too hard a task. One can say this because such derivations constitute a common phenomenon in the field of agriculture. This is shown by, for instance, Regulation No 823/68 (OJ L 151, 1968) with its principles of derivations applicable to levies on milk products (pursuant to which it depends upon the quantity of milk basic products required in manufacture). One can also point to other regulations arising from the change in parity of the French currency and the resultant necessity for a system of compensation (e.g. Regulation No 1586/69 (OJ L 202, 1969) with its implementing Regulations.

I therefore do not think that Regulation No 974 can be criticized for lack of precision in its enabling provision. Going further, I also do not think that the lack of relevant details in the implementing Regulations of the Commission — a fact that could be considered to amount to an *inadequate statement of reasons* — could have any importance in the light of what we are able to ascertain in relation to the legality of the subject matter or in the light of what in the Case law (Case 16/65, Rec. 1965) applies as a test for the justification of such legal acts in relation to innumerable products.

6. Finally we come to the last part of the third question of the Finanzgericht

Berlin. As we know, this deals with the question whether a rate of DM 45·50 per 100 kg of Bulgarian cheese of sheep's milk complied on 24 March 1972 with the principles which were relevant for the calculation of compensatory amounts. In reality — as the Commission has shown in reference to the criticism put forward in the national proceedings — there lurk behind this some other problems which also require to be considered.

(a) First of all one must in this context recall on what basis the Commission made its calculations.

Proceeding from the fact that intervention prices only exist in respect of butter and skimmed-milk powder — disregarding some kinds of cheese not of interest for the present purpose — then compensatory amounts in respects of imports of the last mentioned products from third countries are calculated by applying the percentage of the revaluation effect of the DM in relation to the dollar upon the import prices of the products mentioned. Proceeding from the fact that prices in respect of other milk products depend upon the prices of butter and skimmed-milk-powder (to some extent Regulations Nos 804/68 and 823/68 proceed from this fact) they continued to ascertain the effect on prices upon cheese arising from the compensatory amounts levied on the basic products. In this connexion the Commission based itself upon one kind of cheese (Gouda). In the knowledge that the manufacture of 100 kg cheese requires a certain quantity of fresh milk containing a certain percentage of fat content, since one is able to extract from the compensatory amounts in respect of butter and skimmed-milk powder on the basis of the fat content of butter and of the quantity of fluid milk necessary in the production of skimmed-milk powder the compensatory amounts in respect of fat contents and skimmed milk, one could thus by adding up these amounts ascertain the compensatory amounts in respect of cheese. How this was done in individual cases is described in the Commission's pleading. It is a fact — and for details I would refer to the observations of the Commission — that at the time when the imports in question took place, there resulted a compensatory amount of DM 45·50.

(b) As regards the method of the calculation, I have stressed already that the formulation of Article 2 of Regulation No 974 leaves some technical room for discretion. The question which arises immediately is whether this discretion was correctly exercised by the Commission. That question can hardly be denied after what we have heard in the course of the proceedings, not least having regard to the fact that the Council, who are in possession of the details, raised no objections.

Admittedly it clearly amounted to a simple and very much rule-of-thumb method. But it must be said that it certainly was not possible in this case to copy the more refined levy system that had grown up over the years. One only has to remember that the compensatory system also had to be applied in the case of trade within the Community, where levies did not exist; one should also bear in mind the considerable administrative difficulties connected with any refinement of the system, difficulties which in the case of a system of only temporary application were not acceptable without any more ado.

Furthermore, one also cannot go along with the plaintiffs when in this connexion they claim that prices for cheese are not dependent upon intervention prices in respect of butter and skimmed-milk powder but that they only arise on the basis of the quality at the point of marketing. For even if there is no close connexion between the price of cheese and the intervention prices mentioned, yet one cannot accept that there is no connexion at all. Indeed the intervention prices in respect of butter and skimmed-milk powder could at least guarantee minimum price levels for

cheeses and thus not only justify the inclusion of cheese in the compensatory measure but also the calculation of the relevant compensatory amounts by reference to those applicable to butter and skimmed-milk powder.

One therefore can hardly object to the definite laying down of the rate of compensation in respect of cheese.

(c) Two further problems which in this contect play a rôle were admittedly not expressly raised before the Finanzgericht. But since the plaintiffs in the national proceedings consider them of importance and since the Commission in the interest of completeness of examination of the facts has dealt with them, we ought also to deal with them.

The first problem results from the theory that pursuant to Article 1 (2), last sentence, of Regulation No 974, one ought only to have used the possibility of a compensatory scheme, to the extent that application of the currency measures mentioned in Article 1 (1) would lead to disturbances of the trade in agricultural products. In the view of the plaintiffs this did not apply to Bulgarian cheese of sheep's milk and for that reason the compensatory scheme ought, in the plantiffs' opinion, not to have been brought into play. — The other problem is based upon the plaintiffs' complaint that the compensatory scheme had a discriminatory effect since, whilst including Bulgarian cheese of sheep's milk it did not include certain Italian cheeses.

Let us therefore finally consider whether the legality of a levy of compensatory amounts upon Bulgarian cheese of sheep's milk in March 1972 can be attacked under these headings.

(aa) Dealing first with the disturbance clause contained in Article 1 of Regulation No 974. In the plaintiffs' view there are two relevant points to be considered in this context: on the one hand, the fact that no revaluation effect worth mentioning had occurred in the relationship DM/Bulgarian Lewa and on the other hand, the realization that in the absence of a competitive situation, there was no danger for Community-produced cheese from Bulgarian sheep's cheese.

As regards the first point of view, it seems to me very much open to question whether the Commission, contrary to the provision of Article 2 of Regulation No 974, which considered the relationship to the dollar to be crucial, would in *applying* the compensatory measure have been able to pay attention to the development of the individual currencies in the light of the disturbance clause in Article 1. Assuming however that there had been such a possibility, as regards the question whether paying such attention was *necessary,* that its omission therefore constituted a wrongful exercise of discretion, one can hardly follow the plaintiffs' view in this respect. Indeed, all the considerations which have already been adduced in justification of Article 2 of Regulation No 974 also apply here; e.g. the necessity not to overload the administration by too strong a differentiation, and objections arising from the danger of circumvention as well as the necessity of checking the origin and the contractual basis. I do not therefore think it right to reintroduce an idea at the level of the implementation of a compensatory scheme, which in relation to the laying down of basic principles has rightly already been excluded. Accordingly I would say that one cannot exclude a danger of disturbance within the meaning of Article 1 of Regulation No 974, by basing oneself upon the development of the currency of a particular exporting country.

As regards the second point of view, the lack of a competitive relationship between Bulgarian sheep's cheese and cheese produced within the Community, there emerges in my view quite a different picture, when one looks at the remarks of the Commission, than the picture depicted by the plaintiffs. In fact the existence of a danger of disturbance — or putting it differently, of the need

for protection — cannot be denied if one only looks at Italian sheep's cheese and goats' cheese produced within the Community. Likewise, one cannot exclude a certain interchangeability with other cheeses and it must be appreciated that considerable fluctuations in the price of imported cheese constitute at any rate a danger for domestic production. Apart from this it seems questionable whether exceptions for individual products, that is special tests for particular products which in their nature constitute a considerable burden upon the administration, can be considered by the Commission. One would hardly consider this at the time of the promulgation of the measure, when a correct exercise of discretion required no more than a summary prognosis of the future development of a number of products. It could possibily be considered in the case of a special individual application, coupled with precise grounds; this is however hardly the case here. Accordingly there is really no reason to consider the levy on Bulgarian sheep's cheese as contrary to law, having regard to the conditions contained in Article 1 of Regulation No 974.

(bb) The reproach of discrimination finally, which has been raised in relation to the freeing of some kinds of Italian cheese, can be dealt with quite quickly. Indeed to deal with this point, it is sufficient to bear in mind that there is no real comparison. Evidently the cheeses referred to have a special kind of use and are exceptionally expensive. To exempt them from the compensatory provisions constitutes no danger whatever for the local production. Added to this, there is the concept of Community preference which will if necessary justify the granting of relief to products of a Member State in preference to products from third countries even within the framework of a compensatory scheme.

Accordingly this point of view too does not entitle me to regard the levy upon Bulgarian sheep's cheese as contrary to law.

7. Summarizing my views, I would therefore suggest replying as follows to the questions of the Finanzgericht Berlin:

(a) No grounds became apparent in the course of the proceedings from which there might have resulted the invalidity of the Regulation No 974/71 of the Council and of Regulations No 1013/71, No 1014/71 and No 548/72 of the Commission in relation thereto, insofar as they authorize the raising of compensatory amounts upon imports of milk products from Bulgaria. In particular one has to assume that the Council was entitled to make Regulation No 974/71 on the basis of Article 130 (2) of the EEC Treaty and generally in relation to the levy of compensatory amounts to base itself on the relationship DM/US dollar.

(b) The raising of compensatory amounts under Regulation No 974/71 upon imports from third countries was still permissible from the point of view of Community law on 24 March 1972.

(c) The provisions of Article 2 (2) of Regulation No 974/71 provide a sufficiently definite basis for the assessment of compensatory amounts to be undertaken by the Commission.

(d) No grounds are apparent for considering the levy of a compensatory amount of DM 45·50 per 100 kg Bulgarian cheese of sheep's milk on 24 March 1972 to be illegal.