# OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 29 SEPTEMBER 1981 [1]

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

1. These preliminary proceedings concern the interpretation of a provision of Regulation (EEC) No 269/73 of the Commission of 31 January 1973 laying down detailed conditions for application of the system of "accession" compensatory amounts (Official Journal 1973, L 30, p. 73) amended by Regulation No 1466/73 of 30 May 1973 (Official Journal 1973, L 146, p. 13). As is known, the compensatory amounts of the type in question were introduced by the Act concerning the Conditions of Accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom. Articles 51 and 52 of that Act made provision for the prices of agricultural products in the new Member States during the transitional period to be fixed by the Community authorities at levels different from those of the common prices. By virtue of Article 55 (1) of the Act, those differences were to be offset by means of a system of compensatory amounts which, in trade between the new Member States and between them and the Community as originally constituted, would be levied by the importing State or granted by the exporting State.

Those amounts were then progressively reduced during the five-year transitional period at the same time as the annual alignment of the agricultural prices fixed for the new Member States with the common prices determined at the beginning of each agricultural year.

The preamble to Regulation No 229/73 of the Council of 31 January 1973 (Official Journal 1973, L 27, p. 25) which laid down the general rules for the system of "accession" compensatory amounts in the cereals sector stated *inter alia* that the aim of the rules was to permit the satisfactory circulation of products between two Member States with different price levels. For that purpose, the regulation provided that an exporter of cereals from a Member State where the prices were higher would be entitled to receive a compensatory amount and the importer of cereals from a Member State where the price level was lower would be obliged to pay a compensatory amount. As I pointed out in my opinion in Case 6/78, *Union Française de Céréales* ([1978] ECR 1686), in the case of exports from the original Member States to the new Member States (where the prices of cereals were lower) the function of the system of "accession" compensatory amounts was in substance identical to that of refunds on exports to non-member countries. In both cases it was intended to overcome, through the grant of aids to exporters, the obstacle to exports constituted by the higher level of prices in the Community area compared with non-member countries, or in the old Community area compared with the new Member States. The same function was of course served by the compensatory amounts paid to exporters in relation to trade between

1 — Translated from the Italian.

two new Member States by reason of the fact that the price levels in one of them (the exporting country) were higher than the levels in the importing country.

As regards the level of the compensatory amounts, those which were to be applied in trade between the Community as originally constituted and one of the new Member States were equal to the difference between the prices fixed by the competent Community institutions for the new Member State concerned and the common prices (Article 55 (2) of the Act of Accession and Article 1 of Regulation No 229/73 of the Council). In the trade between the new Member States, the compensatory amounts were however equal to the difference between the amounts applicable to trade between each of the new Member States and the Community as originally constituted (Article 55 (3) of the Act of Accession and Article 3 of Regulation No 229/73).

It should be borne in mind in connection with this case that Article 6 of Regulation No 229/73 permitted the introduction of a system of advance fixing the compensatory amount analogous to the one provided for under the system of import levies and export refunds applicable to trade with non-member countries. Regulation No 3280/73 of the Commission of 4 December 1973 (Official Journal 1973, L 337, p. 14) provided for the establishment of that system and prescribed *inter alia* that the compensatory amount should be calculated at the rate in force on the day on which each application for the issue of an advance-fixing certificate was lodged. The period of validity of that certificate would be limited, furthermore, a certificate issued in one of the original Member States could also be used in another original Member State. As regards cereals, provision was made for the compulsory lodgement of a security of three units of account per tonne; the security would be released upon production of proof of completion of the customs formalities prescribed in Article 8 of Regulation No 3280/73 and, in the case of exportation, further proof that the product had left the territory of the Member State in which those formalities were completed.

I would emphasize finally that by virtue of Article 5 of Regulation No 269/73 of the Commission, as amended by Regulation No 1466/73, payment of the compensatory amount to the exporter was also conditional upon the furnishing of proof that the product had left the geographical territory of the Member State in which the export customs formalities were completed. That proof had to be furnished by production of the so-called T/5 control copy endorsed by the authorities of the State of destination, and bearing *inter alia* the following declaration by the exporter: "intended for entry for home use". It will be seen, however, that there is a lack of concordance between the various language versions of this provision and it is precisely for that reason that the trial court's doubts have arisen.

2. I shall now briefly summarize the facts. On the basis of a certificate issued on 29 July 1975 by the Danish authorities, valid until 26 September 1975, the undertaking Töpfer of Hamburg — which is engaged in the international cereals trade — had secured advance fixing of an "accession" compensatory amount for the export of 5 000 tonnes of grain from Denmark to the United

Kingdom, at the rate of 24.05 units of account per tonne (in favour of the exporting undertaking), and lodged the prescribed security for that purpose. On 27 August of the same year Töpfer had also obtained from the Belgian authorities advance fixing of an "accession" compensatory amount for the import of grain originating in Denmark and the United Kingdom into a Member State of the Community as originally constituted. The amount was two units of account per tonne (payable by the importing undertaking). A security was also lodged on that occasion.

On 4 September 1975 Töpfer concluded a contract with the undertaking Bremer Rolandmühle, Bremen, for the sale of 1 800 tonnes of Danish grain. On 15 September, Töpfer sold 1 800 tonnes of Danish grain for a price of UKL 63 per tonne to the English undertaking Dalgety Franklin Ltd, Norwich, but on the following day (16 September) repurchased the goods from that undertaking for a price of UKL 66.35 per tonne. In the meantime, by telex messages dated 15 and 19 September, Töpfer chartered three vessels from an English shipowner to carry the abovementioned quantity of grain from Denmark and gave the following instructions: "For destination Lowestoft" — "discharging and reloading into the same vessel" — "final destination: Bremen". The 1 800 tonnes of Danish grain in question were thus transported to Lowestoft, in the United Kingdom, where they were discharged, at least in part, into a silo unit of the Lowestoft Storage Shipping Co. at the expense of Dalgety Franklin Ltd. Immediately after completion of the import formalities, the grain was reloaded into the same vessels and re-exported to Bremen.

Using the advance-fixing certificate dated 29 July, Töpfer received in Denmark a compensatory amount of DKR 287 500 (which corresponds to about 20.62 units of account per tonne) and obtained release of the security. Having then completed the import formalities in Germany, Töpfer paid the compensatory amount of two units of account per tonne, on the basis of the certificate obtained on 27 August in Belgium. But on the form known as "T/5 control copy", duly endorsed by the British authorities and produced to the Danish authorities, Töpfer had declared that the goods were intended for entry for home use in Great Britain. In the light of the facts described above, that declaration was found to be misleading and accordingly the Danish Assistant Public Prosecutor, who is empowered to initiate prosecutions for offences of an economic nature, by an indictment of 14 November 1979, charged the responsible officers of the Töpfer undertaking with infringement of Law No 595 of 22 December 1972 concerning the administration of regulations of the European Economic Community relating to the organization of markets in agricultural products and sought an order that the accused repay the compensatory amounts improperly received.

In the course of the criminal proceedings the accused admitted that before the goods were exported from Denmark it had been thought that they would finally be delivered to a customer of the undertaking Töpfer in the Federal Republic of Germany in accordance with the contract of 4 September 1975. They contended however that, in the light of the Community rules, there was no prohibition on the re-exportation of the goods to the Federal Republic of Germany after they had been released into free circulation in Great Britain. The

Copenhagen court, by an order dated 17 October 1980, stated that it was necessary to ascertain the meaning of Article 5 (2) of Regulation No 269/73 of the Commission as amended by Regulation No 1466/73, having regard to the differences between the various language versions and having regard also to the observations of the Public Prosecutor's Office to the effect that the said provision was applied in different ways in the various Member States. Accordingly, pursuant to Article 177 of the EEC Treaty, the judge asked the Court to give a preliminary ruling on the following question:

"Is a Member State (A) in a case where it has issued an advance-fixing certificate concerning an 'accession' compensatory amount on the export of wheat to a second Member State (B) entitled pursuant to Article 5 (2) of Regulation (EEC) No 269/73 of the Commission, as amended by Article 2 of Regulation (EEC) No 1466/73, to refuse payment of the amount to the claimant if the wheat is placed in free circulation, for customs purposes in B, and the claimant submits a control document issued in B, as referred to in Regulation (EEC) No 2315/69 of the Commission, *inter alia* containing the information 'Bestemt til afsætning til forbrug' [literally 'intended for sale for use', translated as 'intended for entry for home use'] or 'Für den freien Verkehr bestimmt' but the wheat is placed in free circulation in B for the sole purpose of its re-exportation immediately thereafter to a third Member State (C)? In this connection it is assumed that the provisions concerning the 'accession' compensatory amounts are observed in relation to the exportation from B to C."

3. At the centre of the problem raised by the court in the main action therefore lies Article 5 (2) of Regulation No 269/73 of the Commission, as amended by Article 1 (not Article 2 as incorrectly stated in the order making the reference to the Court) of Regulation No 1466/73 of the Commission. I have already stated that the article in question relates to the proof which the claimant must furnish in order to secure payment of the "accession" compensatory amount. If he is unable to furnish such proof, no payment may be made. It seems to me therefore that, by determining the means of proof to which payment is made, that provision lays down real and specific conditions for entitlement to receipt of the compensatory amount (further conditions are laid down in other articles of the same regulation, for example, in Article 7).

Paragraph (2) provides for more extensive proof than that referred to in the first paragraph where the compensatory amount is adjusted for the amount of customs duties or is higher than the lowest export refund applicable to the product in question on the day of exportation or where it is applicable for a product for which no refund is fixed. In particular, the second subparagraph of paragraph (2) specifies which document is to be produced to prove that, in the Member State of destination, the import formalities have been completed and the duties and charges having equivalent effect which were payable have been collected. In the text amended by Regulation No 1466/73 of the Commission, that subparagraph provides: "The proof required under the preceding subparagraph shall be furnished by production of the control copy referred to in Article 1 of Regulation (EEC) No 2315/69". In its turn, Article 1 of Regulation No 1466/73 indicates in which sections of the control copy "special endorsements" are to be made and states (in subparagraph (b)) "Section 104, deleting as

necessary and inserting one of the following: "intended for entry for home use; Bestemt til afsætning til forbrug; Für den freien Verkehr bestimmt; Destiné à être mis à la consommation; destinato ad essere immesso in consumo; bestemd om in het vrije verkeer te worden gebracht". Finally, Article 1 provides that the competent customs office of the Member State of destination is to fill in the section "Control of use and/or destination" by indicating the amount of customs duties actually levied at the time of importation.

The doubt which led the Copenhagen court to make a reference to this Court arises specifically from the entry to be made in Section 104 of the control copy. In fact, the entry in French "Destiné à être mis à la consommation" the precise equivalent of which is reflected in the Danish, English and Italian expressions, implies that, according to the exporter's declaration, the goods are intended to be marketed in the country of importation, that is to say, placed on the market in that country so that they are available to local consumers. However, the entry in German "Für den freien Verkehr bestimmt", to which the Dutch text corresponds, was interpreted by the defendants in the Danish criminal proceedings as being equivalent to "intended to be released into free circulation", that is to say, in substance, intended to be cleared through customs in the country of importation. The repercussions of each of the two divergent forms of wording are clear if they are interpreted as I have indicated: the first prevents the exporter from claiming payment of the compensatory amount in his favour in cases where the goods are intended to be made available for use on a market other than that of the first country in which they were cleared through customs; the second form of wording on the other hand allows payment to be made subject only to the condition that the goods must be cleared through customs in the first country to which they are exported.

4. The defendants in the main proceedings contended in their defence that the disputed provision must be interpreted in a uniform manner and on the basis of objective criteria. This requirement cannot be disputed but the result to which it leads is the opposite of what the defendants hope.

The first argument against their view is derived from a closer consideration of the German wording (and the corresponding Dutch wording) of Article 5 (2). The requirement that a product be intended for release into free circulation ("Für den freien Verkehr bestimmt") in the State of importation to which the advance fixing of the compensatory amount refers is not *ipso facto* satisfied by completion of the formalities of customs clearance (in German "Abfertigung"), which merely constitutes a prerequisite for release of the product on to the market of the State in question. If a further condition is not fulfilled — offer of the product on the market, offer to potential purchasers in the State of destination or the existence of a purchaser to whom the goods are consigned — the very idea of *trade* is not fulfilled. It should be remembered that in this case the sale to the English undertaking Dalgety Franklin Ltd (effected on 15 September 1975) was followed the next day by repurchase by the undertaking Töpfer. Thus, when the goods reached the English port of Lowestoft they belonged to the exporting company.

On a general level, however, it should be emphasized that it is possible to interpret

the German and Dutch form of wording in a manner such that they are consonant with the forms of wording used in the other Community languages. The common element is the market of the importing State. In my opinion, the idea that the product is intended for the local market is adopted in all the language versions and therefore to interpret the phrase "Für den freien Verkehr bestimmt" in the restricted and formal sense of releasing the product into free circulation (that is to say, clearing it through customs) is to misconstrue the German language version. Moreover, it is clear that, where two interpretations of a text in a given language are possible in theory, the one which is closest to the corresponding texts in other languages should be preferred. It should be noted in that regard that the need for uniform interpretation to which I have already referred becomes even more evident here by reason of the fact that, in all the language versions of Regulation No 1466/73, the article in question sets out the endorsements regarding the destination of the product in all the Community languages. That fact should have made the parties concerned more cautious but they maintain that they based their conduct only on the German version, interpreting it in a manner which suited their own interests.

There is a further argument to support the view that the various versions can be construed consistently. The reasons for the provision under discussion are to be found in the fourth recital in the preamble to Regulation No 269/73 ("..., when the compensatory amount granted by the consigner Member State is either higher than the refund on exports to third countries or corrected for the amount of customs duties levied in the importing Member State, it proves necessary to require proof that the product has been *released for consumption in the Member State of destination*"). However, in the Danish version of Regulation No 269/73, the final phrase of that recital embodies the concept of release into *free circulation* in the Member State of destination, whereas Article 1 of Regulation No 1466/73 (again, in the Danish version) speaks — as I have mentioned above — of release for consumption. The fact that both expressions are found within the same language version clearly reveals that the Community legislature assigned the same meaning to them. In this case, the defendants in the main action should have taken that fact into account since their application for advance fixing of the compensatory amount had been addressed to the Danish authorities.

5. In addition to the textual arguments which I have set out above there is a systematic argument, one which is of decisive importance. All the Community provisions on "accession" compensatory amounts were based on that fact that, for a time, there were discrepancies between the price levels for agricultural products between the original Member States as a whole and each new Member State and also between the new Member States themselves. The object of these rules was, as has been seen, to allow free movement of agricultural products within the Community by means of offsetting discrepancies in price levels. The system therefore involved a

comparison from time to time between two markets (exporting State and State of destination) and on the basis of that comparison the compensatory amount was determined. In such circumstances it must be excluded that a product enjoying the benefit of a specific compensatory amount by reason of the lower price level in another Member State may be sent to that State merely for the purpose of carrying out customs clearance operations there and immediately afterwards be re-despatched by the same exporter to a third Member State without ever having been released on to the market of the first State of destination. Such a procedure (which was followed in this case) is in open conflict with the rationale of the measures adapted, in the form of compensatory amounts, to assist exporters, such measures being dependent upon release of the product on to the market of the State of destination and upon the difficulty of competing successfully with local traders — who have the benefit of low prices — without Community support.

If this reasoning is simplified, it may be observed that the compensatory amounts are a correcting factor for *trade* between two Member States whose market prices are at different levels. But if one State is chosen by the exporter as a transit point where the goods are held for a short time, it is a misuse of language to call it the State "of destination", for that State remains unconnected with actual trade which in effect takes place between the consigner State and the State of ultimate destination.

6. Finally, the actual aim of the provision which is to be interpreted should not be overlooked. I have already referred to the wording of the fourth recital of Regulation No 269/73 in which the aims mentioned are "to avoid fraudulent practices" and "to grant an adequate compensatory amount". The requirement of proof of release for use in the destination State is based on those aims. But in a case like the one in point there is a clear abuse. For a consignment of Danish grain intended for Germany (as indicated both by the contract of 4 September 1975 between Töpfer and Bremer Rolandmühle and the instructions given to the masters of the vessels used for carriage of the goods) the exporter arranged for a short stay in England for the sole purpose of receiving the compensatory amount. In general terms there is no doubt that a transaction effected by an exporter which is purely speculative and by virtue of which release of the goods into free circulation in the Member State where they were held for a short time is reduced to customs-clearance formalities constitutes an abuse. It may be added that a compensatory amount calculated on the basis of release of goods on to the market of a Member State (in this case the United Kingdom) is absolutely inappropriate, in the sense that it is excessive, where it is paid to a party which is in fact exporting the product to another Member State (in this case the Federal Republic of Germany).

Counsel for the defendants in the main action has objected that the subsequent movements of exported goods are unconnected with the commercial transaction in respect of which the compensatory amount is granted and that no importance should be attached to an exporter's knowledge of the fact that the goods were intended for re-exportation to another Member State. It was

further contended that an exporter's intentions, or his subjective motives, should not affect the way in which the system is applied. These assertions are clearly untenable in a case, like this one, where the exporter himself, within the framework of what was essentially a single commercial transaction, forwarded the goods to a Member State solely for the purpose of securing customs clearance, having already concluded a contract of sale with an undertaking in another Member State and having made arrangements for onward carriage to the latter country. But I take the view that even if the speculative manoeuvre had been otherwise devised — for example, using a purchaser in the country of first destination as an intermediary acting on behalf of the exporter — the Community provisions on compensatory amounts would make it possible to ascertain whether or not there was an abuse on the part of the exporter. Whilst it is indeed true that the release of a product on to the market of the State of destination cannot preclude subsequent transactions, involving in addition the markets of other States, it is also true that an exporter who receives compensatory amounts must effectively remain unconnected with subsequent movements to other Member States of the goods exported by him. His mere knowledge of such movements is not of course important but his intention to obtain a profit from technical defects in the system of aids, when such an intention is realized. without doubt offends against the general principle of good faith and constitutes an unlawful abuse.

Finally, may I be permitted to say, with regard to the technical defects of the system, that it is difficult to understand how such a considerable difference can exist between the compensatory amount which the exporter succeeded in obtaining by having the Danish grain temporarily held in Great Britain before despatching it to the Federal Republic of Germany and that which he could have obtained by sending the same goods direct from Denmark to the Federal Republic of Germany. It raises the question whether technical defects of that kind are really unavoidable! What is certain is that greater care in the drafting of Regulation No 1466/73 and in the coordination of the various language versions of it would at least have avoided a further defect (one of legal technique) thus simplifying the task of those called upon to interpret it.

7. On the basis of the foregoing considerations, I suggest that the Court reply to the request for a preliminary ruling made by the Byret, Copenhagen, by its order of 17 October 1980, by ruling that Article 5 (2) of Regulation (EEC) No 269/73 of the Commission, as amended by Article 1 of Regulation No 1466/73, must be interpreted as meaning that an exporter who sends to a new Member State agricultural products originating in another Member State where prices are higher may not claim payment of "accession" compensatory amounts when clearance of the goods through customs is not followed by effective release of those goods on to the market of the importing State but on the contrary the goods are re-exported immediately after customs clearance to a third Member State by the same trader.