OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 MAY 1978 [1]

Mr President,
Members of the Court,

As the Court is already aware from other cases, the German mark was revalued as from 27 October 1969 in relation to the official parity applicable until that date. Since the Community agricultural prices are linked to units of account, this monetary measure was bound to entail loss of income for German agriculture if the value of the units of account remained unchanged: in fact the net profit in German marks on products coming within the organizations of the market fell by approximately 9 %.

The Council gave this matter its attention at its meeting on 27 October 1969. It refused both to alter the unit of account, because it would have involved an increase in prices in other Member States and incentives to production, and to introduce compensatory measures at the borders requested by the Federal Republic of Germany. It decided rather to grant aid which was intended to be financed chiefly by the Federal Republic of Germany. The Federal Republic of Germany was authorized solely until the aid came into force to increase the intervention and buying-in prices and to apply a system of import levies and export subsidies. In this way the existing level of prices was maintained until 31 December 1969.

So far as the grant of aid was concerned, which was intended to compensate for the loss of income, Regulation No 2464/69 of the Council of 9 December 1969 on measures to be taken in agriculture as a result of the revaluation of the German mark (Official Journal, English Special Edition 1969 (II), p. 527) was adopted. It contained an authorization to grant aid to German agricultural producers as from 1 January 1970. In this connexion it was provided that the aid could reach the amount of DM 1 700 000 000 for each budgetary year from 1970 to 1973 and that the Community, in other words the European Agricultural Guidance and Guarantee Fund, would contribute to the financing as stipulated. In particular, Article 1 (3) of the regulation provided as follows:

"Aid may be granted in the form of direct aids to agricultural producers in so far as they are not calculated on the basis of the price or the quantity of the product.

Aid may be granted partly in the form of an advance to the agricultural producer when he sells his products, subject to a maximum of 3 % of the selling price, to be paid either by the buyer or by an agency to be appointed by the competent national authorities."

This measure was extended by Council decision of 21 January 1974, not published, Article 1 of which provided as follows:

"The Federal Republic of Germany shall be provisionally authorized to grant aid to agricultural producers in the form of compensation, paid to the producer when he sells his products, subject to a maximum of 3 % of the selling price, to be paid either by the buyer or by an agency to be appointed by the competent national authorities."

On 23 December 1969 the German Gesetz über einen Ausgleich für Folgen der Aufwertung der Deutschen Mark auf dem Gebiet der Landwirtschaft

1 — Translated from the German

(hereinafter referred to as "the Aufwertungsausgleichgesetz") (Law on compensation for the effects of the revaluation of the German mark on agriculture) was adopted on the basis of the above-mentioned regulation. Article 4 thereof provided that agricultural undertakings within the meaning of Article 24 (2) of the Umsatzsteuergesetz (Law on turnover tax) may reduce turnover tax by 3 %. Under Article 24 (2) (2) of the Umsatzsteuergesetz of 29 May 1967 "Establishments which breed and keep livestock, in so far as their livestock satisfies the criteria of agricultural use in accordance with Article 51 and 51 (a) of the Bewertungsgesetz (Law on valuation) are deemed to be agricultural and forestry undertakings". Article 51 (1) of the above-mentioned Bewertungsgesetz provides as follows:

"Livestock fully satisfies the criteria of agricultural use if in any financial year

in the case of the first 20 hectares not more than ten head of livestock,

in the case of the next ten hectares not more than seven head of livestock,

in the case of the next ten hectares not more than three head of livestock

and in the case of additional areas no more than 1.5 head of livestock per hectare of the land regularly put to agricultural use by the owner of the undertaking are reared or kept. Livestock is to be expressed by head of stock according to its feeding requirements".

According to these German provisions the plaintiff in the main action did not benefit from the compensation for the effects of the revaluation of the German mark. In addition to the manufacturing of animal feeding-stuffs, it engages in the fattening of calves with feeding-stuffs containing milk powder in substitution for other protein which it produces itself. The plaintiff does this however without using any agricultural land by buying calves, having them reared on the basis of contracts for fattening which it enters into with farmers, and then selling them after four months to slaughterhouses. For that reason it is taxed as an industrial undertaking and the tax office therefore refused the application made in its tax declaration for 1974 for an aid amounting to 3 % of the turnover from fattened calves.

The plaintiff therefore appealed to the Finanzgericht Münster after unsuccessfully lodging an objection.

In its view the Aufwertungsausgleichgesetz is incompatible with Community law. The latter makes no distinction between agricultural and industrial livestock keepers; in particular the organization of the market in beef and veal which is of interest in this case (Regulation No 805/68, Official Journal, English Special Edition 1968 (I), p. 187) contains a guarantee to all producers. Accordingly, and because they are equally affected by the revaluation, the concept of "agricultural producers" contained in Regulation No 2464/69 also includes industrial livestock keepers. In addition it is necessary to object to the restrictive use of the authorization made by the Federal Republic of Germany from the point of view of Article 40 (prohibition against different treatment of producers) and, since intra-Community trade is hindered by distortions in competition, from that of the prohibition against measures having an effect equivalent to quantitative restrictions.

The defendant Finanzamt Warendorf contradicts this view. In its opinion the fact that Regulation No 2464/69 contains only an authorization, in other words, sets the bounds within which the German legislature had a margin of discretion, is important. It is impossible to speak of an infringement of the prohibition on discrimination, first because the criterion for the differen-

tiation is not linked to nationality and secondly because industrial undertakings can adapt themselves more easily to changes in market conditions and cost situations. It is equally impossible to speak of an infringement against the prohibition on measures having an effect equivalent to quantitative restrictions on imports, for that prohibition generally covers only access by foreign products to the domestic market, which is irrelevant in the present case.

The Finanzgericht Warendorf stayed the proceedings by order of 26 September 1977 and referred to the Court of Justice under Article 177 of the EEC Treaty the following questions for a preliminary ruling:

1. Under Community law does the expression "agricultural producers" in Article 1 (1) and (3) of Regulation (EEC) No 2464/69 include industrial livestock breeders and keepers within the meaning of German tax law?

   If the answer to this question is in the affirmative:

2. Are Articles 39 and the second subparagraph of Article 40 (3) of the EEC Treaty and Article 1 of Regulation (EEC) No 2464/69 of the Council or any other provisions of Community law to be interpreted as meaning that they forbid the Federal Republic of Germany, as a Member State of the EEC to which Regulation (EEC) No 2464/69 was addressed, in the event of the grant of direct aid by way of compensation for the revaluation of the German mark in respect of agricultural products subject to an organization of the market, to exclude specific classes of agricultural producers — in this case, industrial livestock breeders and keepers within the meaning of German tax law — from the grant of aid?

3. Is this prohibition directly applicable in the national sphere so that an individual trader is entitled to rely upon it before the national courts?

My opinion on these questions is as follows:

1. It follows from the account of the facts that Regulation No 2464/69 was only applicable up to and including 1973. The application for tax reduction which is to be dealt with in the main action related, on the other hand, to 1974. Therefore the Council decision of 21 January 1974 is primarily the determining factor with regard to this request, so far as Community law is concerned. Accordingly, it is necessary to relate the questions which have been submitted to this Court principally to that decision. This does not however basically alter the task of the Court of Justice. In fact, the expression "agricultural producers" is used in the above-mentioned decision. In addition, it is clear that the decision, which was adopted on the basis of Article 3 of Regulation No 2464/69, was intended essentially to extend the period for which the regulation was applicable and that therefore the expression "agricultural producers" has the same scope as it has in Regulation No 2464/69.

2. So far as the interpretation of the above-mentioned expression is concerned, the plaintiff emphasizes from the outset that it should not be concluded from the use of the word "German" in Article 1 of Regulation No 2464/69 that a reference is thereby made to German law. This adjective, it claims, is in fact intended only to delimit the territorial scope of the regulation; moreover, it is however necessary to assume that the expression "agricultural producers" has a meaning under Community law.

In my opinion it is possible to agree with this unreservedly. In this connexion

it is important that the regulation is based on Articles 42 and 43 of the EEC Treaty, in other words that it constitutes a measure adopted within the context of the common agricultural policy. It is also possible to refer to Article 3 (3) of the regulation, according to which the Council must, in the light of the development of the common agricultural policy, decide on appropriate measures to be taken, in accordance with the procedure laid down in Article 43 (2) of the Treaty. Finally, it is of interest that the Community contributes to the financing of the measures.

With regard to the question of the meaning of the concept of Community law no express definition of which is contained in the regulation, the plaintiff considers that the regulation starts from the concept upon which the Treaty is based. In this connexion it refers to a number of articles of the Treaty (Articles 37 (4), 40, 42, 43 and 45) and concludes from them that the expression "producers" used therein must be interpreted as meaning that it covers any person who manufactures agricultural products within the meaning of Article 38 and Annex II to the Treaty. Accordingly the method of production — within the context of a typical agricultural undertaking or of an industrial undertaking — is not important and therefore it must also be assumed that such a distinction, for which there are in addition no criteria laid down in Community law, is also irrelevant with regard to Regulation No 2464/69.

In my opinion — and in this respect I share the Commission's view — this consideration is not convincing.

First, the expression "agricultural producers", which is of course used in the regulation, does not appear in the above-mentioned articles of the Treaty. The Treaty, for example Article 42, speaks of the production of agricultural products. Article 37 (4) and Article 43 speak of the "producers concerned" thus referring to agricultural products the disposal of which is made easier by State monopolies (Article 37 (4)), or national market organizations for particular products (Article 43). Here we find, as in Article 40 in connexion with the prohibition on discrimination applying to the common organization of the agricultural markets, simply the expression "producers" and we find, as in Article 45, the terms "national producers", for whom national arrangements guarantee a market, or "producers within the Community", in respect of whom discrimination must be abolished.

Secondly, I would recall that in my opinion in Case 85/77 (*Società Santa Anna Azienda* v *Istituto Nazionale della Previdenza Sociale and Servizio Contributi Agricoli Unificati*, opinion of 31 January 1978, judgment of 28 February 1978) I took the view that it was worth considering deducing the concept of "agricultural undertaking" upon which the Treaty is based from several factors which may be inferred from Articles 38, 39 and 42. The Court of Justice did not however agree with that or with the view that the important factor is the manufacture of agricultural products within the meaning of Article 38. The judgment in Case 85/77 states that the Treaty contains no definition of the expressions "agriculture" and "agricultural undertaking". It is rather for the Community institutions to work out where appropriate for the purposes of the rules deriving from the Treaty such a definition and in this connexion the objectives pursued by the rules are particularly important.

The question which has been raised can therefore only correctly be answered by attempting to discover from the wording, purpose and history of the origins of Regulation No 2464/69 what is meant by the expression "agricultural producers". Applying the method described the Commission reached the

view that the above-mentioned expression does not include industrial producers of agricultural products. If you will permit me to say so immediately, it will certainly be necessary to agree with this point of view.

The history of the origins of the provision indicate this quite clearly. In this connexion I have already mentioned that the Federal Republic of Germany originally sought a compensatory amount payable at the frontier, in other words a measure related to products. No decision could be reached to adopt such a measure but only to adopt the less far-reaching measure consisting in the grant of aid. This however also gives cause to interpret narrowly the concept of "agricultural producers" which is decisive with regard to the grant of aid, in accordance with the principle that it is necessary to interpret restricitvely rules which derogate from the general law laid down in the Treaty. In addition, it not only became clear in the deliberations that in the calculation of the loss of income spoken of in the regulation only actual agricultural undertakings were envisaged. On the contrary it was, what is more, expressly made clear that the grant of aid must be restricted to agricultural undertakings within the meaning of German tax law. In this connexion I would refer to the minutes of the Council meeting of 9 December 1969 which have been produced to this Court. They contain a corresponding clear statement by the former member of the Commission, Mr Mansholt; directly afterwards the members of the Council of Ministers gave their consent on that basis.

An important fact is also however that because, according to the case-law referred to by the plaintiff, reservations and explanations which have remained internal — the minutes of meetings of the Council are not published — cannot by themselves determine the interpretation of a provision, the restriction which has been identified is sufficiently expressed in the regulation itself. In this connexion it is of interest that the regulation uses the expression *"agricultural producers"*, in contrast to the Treaty which speaks of the *production* of agricultural products, in other words places the emphasis on the products. In fact the use of the adjective "agricultural" makes one think of typical agricultural production and the fact that Article 3 of the regulation speaks of German agriculture might well also indicate this.

In the same way it seems to me to be of importance that the recitals of the preamble to the regulation state that it is possible to ensure the continuation of aid through measures of social or structural policy. In this connexion the first factor, measures of social policy, reveals the social character of the compensation for the revaluation of the German mark: it is intended to mitigate the loss of income for sectors of the population who are organized chiefly as small-scale or medium-scale farmers and who can only adapt slowly to developments in the monetary situation. In addition, reference can be made to the opinion of the Parliament which was also referred to in the recitals of the preamble to the regulation. It was prepared by the report drawn up by Mr Vredeling on behalf of the Committee on Agriculture (European Parliament, *Working Documents* 1969-1970, Document 165). In my opinion the fact that it speaks of the increase in the purchasing power of the income of German *farmers* and of the improvement in the social and economic situation of German *farmers* is just as interesting as the fact that the expression "German agriculture" and "farmers" were used in the resolution adopted by the Parliament (Official Journal 1969, C 160, p. 37 *et seq.*) and that reference was made to the social and economic situation of German agriculture.

Finally, the objective of the regulation, as revealed in the recitals of the preamble thereto, is also of interest. According to those recitals it concerns compensation for loss of income for German agriculture, which loss is precisely evaluated. In establishing that loss of income the positive effects of the revaluation — the reduction in the price of imported feeding-stuffs and resources — were evidently also an important factor. It is however certain that this is of greater importance in the case of industrial livestock keepers, who only use purchased feeding-stuffs and primary products, than in the case of farmers who use primarily their own products. In the case of industrial livestock keepers, the losses caused by revaluation — a general view justifies this assumption — were therefore less serious because of their different structure and greater flexibility; in their case there was not such a marked emergency that it must have seemed imperative to include them in the rules on compensation.

For all these reasons I consider that the term "agricultural producers" used in Regualation No 2464/69 and in the Council decision of 21 January 1974 can only be interpreted as meaning that it does not cover industrial producers. In the present case we must adhere to this fact. On the other hand, without precise knowledge of all details of the case, it is now impossible to attach any importance to the fact that a similar authorization in favour of the Netherlands contained in a Council Regulation of 19 November 1973 was evidently interpreted in that country, as may be deduced from a law of 19 December 1973 and a decree of 7 December 1973, as meaning that industrial producers also enjoy the benefit of aid.

3. In view of this conclusion an examination of the further questions referred to the Court might seem superfluous as they were only raised in case the first question was answered in the affirmative, in other words if it were answered to the effect that industrial livestock keepers must also be deemed to be agricultural producers within the meaning of the regulation. I should like however to continue the examination of the remaining questions from two aspects:

— The remaining questions may be related to Regulation No 2464/69 and to the Council Decision of January 1974. Accordingly it would be necessary to consider whether Articles 39 and 40 (3) of the EEC Treaty or any other provisions of Community law make the restrictive interpretation which I have proposed of the term "agricultural producers" used in both enactments of the Council seem impermissible.

— On the other hand, if it were intended to assume that the meaning of the expression "agricultural producers" is that which the plaintiff considers correct, it is possible to examine the question whether, for various reasons of Community law, it is prohibited for the person to whom the authorization is addressed, the Federal Republic of Germany, to use the authorization more restrictively.

This gives rise to the following considerations:

(a) To begin with, so far as the question of the validity of the enactments of the Council is concerned, the question is whether, in restricting the authorization, as I have explained above, there was a breach of the prohibition laid down in Article 40 (3), according to which any discrimination between producers or consumers within the Community must be excluded.

This consideration however does not apply even if, as seems justifiable, one

assumes that Article 40 must also be applied to the unequal treatment of producers within a single Member State. Article 40 provides no more than that identical or similar situations should not be treated differently unless substantial objective reasons speak in favour of this. In the present case however there is no similarity between these situations; it is necessary at least to acknowledge that there were good objective grounds for a differentiation.

Above all it is an essential factor that the industrial livestock keepers were less affected by the revaluation because they could gain advantages by using imported feeding-stuffs and basic products which had become cheaper. This applies to a considerably lesser extent to farmers who work the soil, who in other words use at least partially feeding-stuffs which they have produced themselves and who were therefore less able to change over to reduced imported goods. The fact that this should not apply to the same degree in the case of calf breeders — the plaintiff claimed in this connexion that agricultural calf fatteners also bought calves and feeding-stuffs and that therefore agricultural land is irrelevant — is not clear to me, since it must be assumed that some smaller farmers use other methods, in other words rear their own calves and use feeding-stuffs for them which they have themselves produced. In any case however, assuming that the plaintiff's argument is correct, it would be necessary to bear in mind that because of the imminent expiry of the transitional period it was an urgent measure and that when it was adopted — there was as yet no experience — approximate schematic solutions disregarding the particular features of individual methods of production could not be excluded.

In addition, an important factor — the Commission has also correctly referred to this — is that industrial undertakings were privileged for other reasons. In this connexion too much attention should not be paid to the fact that the plaintiff as a manufacturer of feeding-stuffs obtained a competitive advantage from the reduction of the profit margin. It is sufficient to indicate that in the case of producers of its size livestock-keeping often constitutes only a part of their livelihood and that they can more easily extend or restrict this additional source of income than farmers, in other words they are considerably more flexible in the organization of their activities.

I have no doubt that such aspects were rightly taken into consideration in the context of a system of aid to which strict criteria as to permissibility and scope apply and that therefore the complaint that the requirement of equal treatment has been infringed is unfounded.

(b) In this connexion the plaintiff put forward a further point of view according to which the objectives and the functioning of common organizations of the market — in this case the organization of the market in beef and veal (Regulation No 805/68) — should not be jeopardized and that it is necessary to comply with Article 40 of the EEC Treaty which states any common price policy must be based on common criteria and uniform methods of calculation.

However, so far as acts of the Community institutions are concerned this may be doubted if only because in the case-law of the Court such considerations have hitherto only been raised in relation to measures adopted by the Member States. In this connexion I would refer to the judgments in Case 60/75 (*Carmine Antonio Russo* v *Azienda di Stato per gli Interventi sul Mercato Agricolo (AIMA)*, judgment of 22 January 1976 [1976] ECR 45 — no influence on conditions on the market

by national measures), Case 65/75 *(Riccardo Tasca,* judgment of 26 February 1976 [1976] ECR 291 — fixing of maximum national selling prices) and Case 77/76 *(Fratelli Cucchi* v *Avez S.p.A.,* judgment of 25 May 1977 [1977] ECR 987 — national interference in the machinery of price formation).

In addition, the principle of common prices and the maintenance of uniform bases of calculation, as they result from the common organization of the market, has not in reality been affected. The rules approved were intended merely to ensure that the loss of income resulting from the new parity of the German mark was mitigated in the case of those most affected — farmers working the land.

The grounds put forward by the plaintiff do not therefore justify seriously calling in question the validity of the enactments of the Council. At most it might be possible to ask, with regard to the development described by the Commission of the market prices of calves, which are not subject to intervention arrangements, whether in that connexion compensation for the revaluation of the German mark was still at all justified in 1974; this however would not help the plaintiff, which claims compensation payments for itself too, to succeed in its request.

(c) Accordingly it only remains to examine whether — if one were to relate the Community authorization to agricultural producers including industrial producers — the Federal Republic of Germany might have infringed any provision of Community law by the restriction use which it made of the authorization. In this connexion only short observations are necessary.

— Thus it is in my opinion necessary to concentrate conclusively on the fact that it was an *authorization*, in other words that the Community institutions had established a framework within which it was possible to derogate from the common rules. It may safely be concluded from this that from the point of view of Community law there was no objection to that framework's not being fully utilized and that there was even a certain duty — because they constituted derogations from the Community rules — to use the authorization only in those cases in which it was genuinely necessary.

— Assuming that a Member State is bound, in the adoption of measures which have effects on the common organizations of the markets as well as in the implementation of Community measures of agricultural policy, by the prohibition against discrimination laid down in Article 40 — in this connexion I refer to the judgment in Case 51/74 *(P. J. van der Hulst's Zonen* v *Produktschap voor Siergewassen,* judgment of 23 January 1975 [1975] ECR 79 and to my opinion in Case 52/76 *(Luigi Benedetti* v *Munari F.lli s.a.s.,* judgment of 3 February 1977 [1977] ECR 163) — the same applies in relation to differentiation by a Member State within the Community framework as to the question dealt with above whether the Council regulation might have infringed the prohibition on discrimination by employing a narrow concept of agricultural producer. Such differentiation must be regarded as unobjectionable if, as I have also shown above, objective reasons for them may be stated.

— Finally, so far as the alleged jeopardization of the objectives and functioning of the common organization of the market is concerned, it is also possible to refer essentially to what has already been stated. If it were accepted that derogations from common price mechanisms or other principles of the common organizations of the markets exist — the plaintiff refers here *inter alia* to the rules on subsidies for the

conversion of milk cows and to the use of milk products as feeding-stuffs for calves which was sought — these would in principle be covered by the Community measure. On the other hand alleged distortions of competition would come under the prohibition against discrimination alone, on which subject everything necessary has already been said.

— Accordingly it remains to state that it is impossible to complain that the Federal Republic of Germany has, if the meaning of the authorization by the Council is that assumed by the plaintiff, used it in a way which is objectionable from the point of view of Community law.

4. Finally I propose that the questions put by the Finanzgericht Münster should be answered as follows:

(a) The expression "agricultural producers" used in Article 1 of Regulation No 2464/69 and in Article 1 of the Council Decision of 24 January 1974 does not cover industrial livestock breeders within the meaning of German tax law.

(b) It is impossible to discern any provisions of Community law with which such a definition of the above-mentioned concept would be incompatible.