OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 24 APRIL 1980

My Lords,

This case comes before the Court by way of a reference for a preliminary ruling by the Finanzgericht of Hamburg. The plaintiff in the proceedings before the Finanzgericht is the Firma Gedelfi Großeinkauf GmbH & Co., KG (which I shall call "Gedelfi"). The defendant is the Hauptzollamt Hamburg-Jonas. Essentially the question that the Finanzgericht has to decide is whether Gedelfi is, under Community legislation, liable to pay a levy on four consignments of a product described as "orange syrup" that it imported into the Federal Republic of Germany from Israel during January 1978.

The common organization of the market in products processed from fruit and vegetables was established by Council Regulation (EEC) No 865/68. One of the objects of that regulation, as evinced by its preamble, was to bring the trading system for products processed from fruit and vegetables into line with the trading system for sugar, in view of the "direct and substantial incidence" on the cost of certain of those products of prices for sugar, glucose and glucose syrup.

Article 2 of the regulation accordingly provided that, in addition to the customs duty imposed under the Common Customs Tariff (the "CCT"), an import levy should be charged on added sugar contained in, among other products, "fruit and vegetable juices with an added sugar content exceeding 30 % by weight". The amount of the levy was to be calculated, in accordance with a prescribed formula, from the levy already imposed on certain products (mainly syrups) included in the common organization of the market in sugar. That organization, Your Lordships remember, had been established by Council Regulation No 1009/67/EEC, which was repealed and replaced by Council Regulation (EEC) No 3330/74.

It was soon found that in practice it was difficult to determine by analysis, at all events in the case of some imported fruit and vegetable juices, whether a high sugar content was due to the presence of added sugar or to a concentration of natural sugar. It was however also ascertained that products that were rich in natural sugar generally commanded a higher price than those to which an equivalent amount of sugar had been artificially added.

The Council accordingly, on 11 March 1969, amended Regulation No 865/68 by Regulation (EEC) No 455/69. Reciting that "charging of a levy on fruit or vegetable juices ... which have a high concentration of natural sugar should be avoided", it differentiated between the fruit and vegetable juices to which the former regulation applied, where they

had a specific gravity of 1.33 or less at 15 °C, according to their value.

In the case of orange juice the dividing line was placed at 30 u.a. per 100 kg net weight. Orange juice of which the value was above that dividing line was exempt from the levy, whilst orange juice of which the value was on or below that line remained *prima facie* subject to it. I say "prima facie" because it was always open to an importer to adduce evidence to show that in fact a particular product contained only natural sugar — see Case 3/71 *Gebrüder Bagusat* v *Hauptzollamt Berlin-Packhof* [1971] 2 ECR 577.

By the combined effect of Article 9 (2) of Regulation No 865/68 and Article 2 of Regulation No 455/69 the nomenclature resulting from the provisions of those regulations was incorporated in the CCT. The CCT thus came to include the following subheadings:

20.07 B II (a) 1,

comprising orange juice of a specific gravity of 1.33 or less at 15 °C and of a value exceeding 30 u.a. per 100 kg net weight, and

20.07 B II (b) 1 (aa),

comprising orange juice of the same specific gravity but of a value of 30 u.a. or less per 100 kg net weight, and with an added sugar content exceeding 30 % by weight.

Regulation No 865/68, as amended, was repealed and replaced with effect from 1 April 1977 by Council Regulation (EEC) No 516/77. As the first recital in the preamble to that regulation indicates, it was a consolidating measure.

Article 13 (1) of Regulation No 516/77, corresponding to Article 9 (2) of Regulation No 865/68, provides:

"The general rules for the interpretation of the Common Customs Tariff and the special rules for its application shall apply to the tariff classification of the products covered by this regulation . . ."

The version of the CCT applying in January 1978 was that annexed to Council Regulation (EEC) No 2500/77 of 7 November 1977. To find out what the dividing line of 30 u.a. meant at that time in terms of national currencies one has to look at the "Preliminary Provisions" in that version of the CCT. They included, in Section I, General Rule C.3, which provided:

"The unit of account (u.a.) by reference to which certain specific customs duties are expressed or the scope of certain headings or subheadings is defined has a value of 0.88867088 gram [sic] of fine gold. The exchange rate to be used in converting the unit of account into Belgian francs, Danish kroner, Dutch guilders, French francs, German marks, Irish pounds, Italian lira, Luxembourg francs or pounds sterling shall be that corresponding to the par value communicated to and recognised by the International Monetary Fund in respect of these currencies."

The par value communicated by the Federal Republic to the International Monetary Fund (the "IMF"), and recognized by that body, was then 3.66 DM. So 30 u.a. amounted to 109.80 DM.

Rule C.3 had appeared unchanged in every version of the CCT since its introduction in 1968, except for the addition at the time of the accession of the new

Member States of the mention of their currencies. It was clearly framed having regard to the international monetary system resulting from the Bretton Woods Agreement. That system, of which the essentials were fixed, though adjustable, parities *vis-à-vis* the United States dollar and the convertibility of the dollar into gold at the rate of 0.88867088 of a gramme of fine gold to the dollar, came to an end, as Your Lordships know, when the dollar was taken off the gold standard in August 1971. There followed the Smithsonian Agreement of December 1971 which, among other things, allowed a temporary widening of the margins of fluctuation between the currencies of Members of the IMF and introduced the concept of "central rates" for the benefit of those Members not maintaining rates based on a par value for their currencies. However, even that more flexible system was unable to withstand the effects of the energy crisis in 1973, which made floating exchange rates the rule. Agreement to legalize floating rates by amending the Articles of the IMF was reached at Kingston in 1976 and the amendments entered into force on 1 April 1978.

We were told by the Commission that by 1974, because of the developments in the international monetary situation that I have summarized, the application of Rule C.3, in the form in which it had stood since 1968, was leading to significant and clearly discernible anomalies. In other words the rule had become an anachronism. The solution adopted in the case of two categories of agricultural products, viz. cheeses falling within CCT heading 04.04 and wine falling within subheading 22.05 C, was to replace the rates prescribed by Rule C.3 with the representative rates applicable under the common agricultural policy (the "green rates"). That, so we were told, was because of a close relationship between the tariff treatment of those products and the application to them of monetary compensatory amounts ("MCAs"). Apart from those special cases, a solution was sought in the extension to the CCT of the use of the European Unit of Acount (the "EUA") based on a "basket" of Member States' currencies.

The EUA was first introduced in 1975 for the purpose of expressing the amounts of aid mentioned in Article 42 of the Lomé Convention (see Council Decision 75/250 of 21 May 1975), for the purposes of the accounts of the European Investment Bank (see the Decision of the Council of Governors of the Bank of 18 March 1975) and for the purposes of the ECSC (see Commission Decision No 3289/75 of 18 December 1975). A proposal that it should be used in all legal acts of the Community institutions, including the CCT, as from 1 January 1978 was submitted by the Commission to the Council on 6 October 1976 (see OJ C 271 of 17. 11. 1976, p. 5) but was not proceeded with. The EUA was, however, adopted for the purposes of the Community Budget by the Financial Regulation of 21 December 1977 (OJ L 356 of 31. 12. 1977, p. 1).

In customs matters it was only with effect from 1 January 1979 that the old u.a. gave way to the EUA, by virtue of Council Regulation (EEC) No 2779/78 of 23 November 1978. Consequential changes were made in the 1979 version of the CCT, and in particular to Rule

C.3, by Council Regulation (EEC) No 2800/78 of 27 November 1978.

Different rules on the conversion of currencies apply in the valuation of goods for customs purposes. The relevant provision there is Article 12 of Council Regulation (EEC) No 803/68, as amended by Article 3 of Council Regulation (EEC) No 338/75, paragraph 1 of which provides:

"Where factors used to determine the value for customs purposes of goods are expressed in a currency other than that of the Member State where the valuation is made, the rate of exchange to be used shall be the latest selling rate recorded on the most representative exchange market or markets of that Member State."

At a time of floating exchange rates the real rates applicable under that provision were obviously liable to diverge significantly from the historical rates applicable under Rule C.3 in its unamended form.

For completeness, I should remind Your Lordships that a different rate again, namely the "green rate", was applicable for calculating the amount of any import levy actually charged (see Council Regulation (EEC) No 878/77 "on the exchange rates to be applied in agriculture").

I return to the facts of the present case.

The four consignments of orange juice in question were imported by Gedelfi through the port of Hamburg under the simplified procedure provided for by paragraph 40a of the German Zollgesetz. Gedelfi declared the orange juice as falling within subheading 20.07 B II (a) 1 of the CCT, i.e. as being worth more than 30 u.a. per 100 kg net weight. It accordingly paid no levy at that stage.

When the Hauptzollamt Hamburg-Jonas came to check Gedelfi's declaration, it took a different view and classified the orange juice under subheading 20.07 B II (b) 1 (aa), i.e. as being worth less than 30 u.a. per 100 kg net weight. Its reasons for so doing were these.

The price of the orange juice in the relevant contract of sale was expressed in United States dollars. That price, converted into DM on the basis of "the latest selling rate recorded on the most representative exchange market", which was 2.10 DM to the dollar, meant that the four consignments were worth, per 100 kg net weight, from 98.94 DM to 103.63 DM. Those values were of course below the figure of 109.80 DM, representing 30 u.a. converted into DM at the rate of 3.66 DM to the dollar under Rule C.3 in Regulation No 2500/77.

The Hauptzollamt calculated the levy at the rate fixed in u.a. for the first quarter of 1978 by Commission Regulation (EEC) No 2857/77 converted into DM on the basis of the "green rate" for the DM. It came to 23,672.59 DM. A notice of assessment dated 1 March 1978 was issued by the Hauptzollamt requiring Gedelfi to pay that sum. An objection against the notice lodged by Gedelfi on 10 March 1978 was rejected by the Hauptzollamt by an "Einspruchsentscheidung" dated 13 October 1978. Gedelfi thereupon brought the present proceedings before the Finanzgericht.

In those proceedings Gedelfi does not challenge the Hauptzollamt's calculations, nor does it contend that the Hauptzollamt incorrectly applied the relevant Community legislation. Its case is that that legislation is invalid because,

if the importations in question had been made into any other Member State, its application would have resulted in the orange juice being valued at more than 30 u.a. per 100 kg net weight so that it would have been exempt from the levy, the reason being that the currencies of other Member States had not appreciated as against the dollar as much as the DM or, in the case of some of them, at all.

Such are the circumstances in which the Finanzgericht has referred three questions to this Court.

The first question, putting it shortly, is whether the relevant Community legislation is invalid in so far as it requires a levy to be charged on the products in question when imported into the Federal Republic of Germany but not when imported into the other Member States.

In this Court Gedelfi's main argument on that question was based on the provisions of the Treaty relating to the customs union as interpreted by the Court in Cases 37 and 38/73 *Sociaal Fonds voor de Diamantarbeiders* v *Indiamex* [1973] 2 ECR 1609, i.e. as "intended to achieve an equalization of customs charges levied at the frontiers of the Community on products imported from third countries, in order to avoid any deflection of trade in relations with those countries and any distortion of free internal circulation or of competitive conditions." (See paragraphs 8 and 9 of the judgment.) That argument requires little elaboration. The customs union forms part of what the Treaty calls "the Foundations of the Community". It would clearly be unlawful for the Council to enact legislation directly providing for a levy to be charged on a particular product when imported into one Member State but not when imported into other Member States. It must equally be unlawful for the Council to enact legislation that produces that result indirectly. The application of obsolete fixed exchange rates inherent in the use of the u.a. was by its very nature susceptible of producing it, and was therefore unlawful.

Gedelfi relied also on the principle of non-discrimination and on the particular manifestation of it that is to be found in Article 40 (3) of the Treaty. I do not, for my part, think that that adds much to the argument based on the principles of the customs union. Gedelfi (whose business is at Cologne) would not have been called upon to pay the levy if it had imported the goods through (say) Rotterdam or Antwerp. So the discrimination was between German ports and ports in other Member States rather than between German importers and importers in other Member States.

As its first line of defence the Council said that the legislation of which the validity was impugned by Gedelfi had been in force as to part since 1968 and as to part since 1969, and was undoubtedly valid when it was enacted. As the Court held in Cases 9 & 11/71 *Compagnie d'Approvisionnement* v *Commission* [1972] 1 ECR 391 (in paragraph 39 of the judgment) legislation that was valid at the date of its enactment could not become invalid as a result of subsequent events.

In truth however the legislation on which the Hauptzollamt's claim against Gedelfi is based and of which Gedelfi challenges the validity was all enacted in 1977. Your

Lordships will remember that when I raised this point at the hearing the answer given on behalf of the Council was that the 1977 legislation was mere consolidation.

I agree with the Council that consolidating legislation must enjoy the same protection from "supervening invalidity" as the legislation it consolidates. That is because consolidating legislation, by definition, cannot change the law and is generally enacted under a procedure that precludes consideration of its merits. On that view Regulation No 516/77 is immune, because it did no more than to consolidate the previously existing basic provisions of the common organization of the market in products processed from fruit and vegetables. It is not, however, in any provision of Regulation No 516/77 that the vice here lies. As was pointed out on behalf of the Commission, the vice (if any) lies in General Rule C.3 of the CCT as enacted by Regulation No 2500/77, for it was that rule that enjoined the use in 1978 of the obsolete u.a. for tariff classification purposes.

Regulation No 2500/77 was not a mere consolidating measure. As its title and preamble indicate it was in many respects an amending measure. What it did was to re-enact with amendments the CCT that had applied in 1977. It is significant, I think, that it was by Regulation No 2800/78, which fulfilled the same function for 1979, that Rule C.3 was finally amended: that regulation did not consolidate into the CCT for 1979 a previously amended Rule C.3. The question is therefore whether there should be extended to a regulation of that kind, in so far as it does not change the law, the privilege enjoyed by consolidating legislation. In my opinion the answer must be 'No'. The general rule is undoubtedly that the legality or validity of an act must be judged as at the time of its adoption. An exception in favour of consolidating measures makes sense for the reasons I have stated. But there is no logical reason for widening the exception. The very fact that a measure amends previous legislation means that its adoption imports that a review of the previous legislation has been undertaken and could, if need be, have been more extensive. I therefore think that the validity of Rule C.3, in so far as it applies in the present case, must be judged on the footing that it was enacted on 7 November 1977, the date of Regulation No 2500/77.

The Council's second line of defence, as I understood it, was that it enjoyed in such matters a wide discretion. No doubt it does. But it does not enjoy a discretion to ignore the fundamental principles laid down in the Treaty, such as those of the customs union. If it enacts legislation that is *prima facie* incompatible with those principles, it must in my opinion adduce cogent reasons to show that that legislation is nonetheless valid.

It was suggested on behalf of the Council that the amendment of Rule C.3 could not precede the entry into force on 1 April 1978 of the amendments to the articles of the IMF that had been agreed upon at Kingston in 1976. But it was never explained to us why that should be so. Your Lordships will remember that I

asked about this too at the hearing. The answer I was given on behalf of the Council was that, whilst it would not have been illegal, it would have been unwise. The reasons were left unspecified. Obviously no reason for thus delaying had occurred to the Commission, which had proposed on 6 October 1976 that the EUA should be substituted for the u.a. in all legal acts of the Community, including the CCT, as from 1 January 1978.

Another point made on behalf of the Council was that it had to have regard to the Community's obligations under the GATT. The relevant provisions of the GATT are paragraph 3 of Article II, which provides:

"No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement"

and paragraph 6 of the same Article which provides for the use, as between Members of the IMF, of the par values accepted by the Fund at the date when the GATT came into force and for adjustments to be made in the event of those values being reduced by more than 20 %.

That looked at first sight like a formidable point. We were told however on behalf of the Commission that consultations had taken place within the framework of the GATT at the time of the introduction of the EUA into the CCT; that its introduction had been easy to defend because it constituted not a withdrawal of tariff concessions but a return to normality; and that overall it resulted in a decrease in the tariff protection at the external frontiers of the Community, because the EUA was worth less than the old u.a. The crux, in my opinion, is that neither on behalf of the Council nor on behalf of the Commission was it ever suggested that, because of the Community's obligations under the GATT, the introduction of the EUA into the CCT had to be postponed to 1 January 1979 and could not be effected, as proposed by the Commission, on 1 January 1978.

One of the surprising features of this case is that, although the Council did not accede to the Commission's proposal, the Commission, in the arguments that it put forward before us, supported the Council. In so doing it mentioned other difficulties with which the Community institutions were confronted, such as the choice of unit to be adopted in place of the u.a., the effect of the introduction of the EUA on Member States' respective shares of Community tariff quotas, and its effect on the amounts of specific duties chargeable under the CCT. At no time, however, did the Commission go so far as to say that the existence of those difficulties warranted the postponement to which I have referred.

The Commission also made the point that so long as Member States retain their own currencies and control of them no solution of the problem of fluctuating exchange rates can be perfect. That is plainly right, but we are not concerned in this case with variations unavoidably inherent in the existence of different national currencies. We are concerned with the use of a measure, the u.a., that was unquestionably out of date and the use of which was manifestly bound to create anomalies.

On this question of discretion, certain authorities were cited to us on behalf of the Council and of the Commission. I do

not think that any of them is in point. *Compagnie d'Approvisionnement* v *Commission* (already cited) was concerned, so far as material, with a subsidy granted by the Council in exercise of its powers under Article 103 of the Treaty in order to cushion French importers against the effects of the devaluation of the FF in 1969. It is hardly surprising that the Court should have held that the Council was not bound to compensate them for the full effect of the devaluation. Case 43/72 *Merkur* v *Commission* [1973] 2 ECR 1055, Case 7/76 *IRCA* v *Amministrazione delle Finanze dello Stato* [1976] 2 ECR 1213 and Case 98/78 *Racke* v *HZA Mainz* [1979] ECR 69 were about MCAs Case 138/78 *Stölting* v *HZA Hamburg-Jonas* [1979] ECR 713 was about the fixing of "green rates". MCAs and green rates, which are closely connected, belong, to my mind, to a rather special field of Community law. Their purpose is to protect the common organizations of agricultural markets against stresses resulting from floating exchange rates. They exist and can exist only because they are considered (rightly or wrongly) not to touch the foundations of the Community. Case 28/74 *Gillet* v *Commission* [1975] 1 ECR 463 was a staff case. It was there held that Article 63 of the Staff Regulations, which, in the version applicable when the facts of that case occurred, referred to the parities accepted by the IMF, was not invalid because the Council had power under Article 65 to allow for changes in the cost of living in different Member States by means of weightings. That is, plainly, very remote from the issue in the present case.

The Commission in its written observations painted an alarming picture of the possible consequences of Your Lordships' decision in this case in an untold number of other cases, arising under any number of headings and subheadings of the CCT, if Your Lordships should hold that Gedelfi was entitled to succeed. At the hearing, however, it was indicated to us on behalf of the Commission that, if the Court confined itself to declaring that Rule C.3 was invalid or partially invalid, the practical consequences would be serious.

Happily it is that solution that seems to me right as a matter of law.

I am of the opinion that, in answer to the first question referred to the Court by the Finanzgericht, Your Lordships should rule that General Rule C.3 of the Common Customs Tariff as enacted by Council Regulation No 2500/77 was invalid in so far as it had the effect of requiring orange juice imported into the Federal Republic of Germany to bear a levy at a time when the same orange juice would have borne no levy if imported into another Member State.

I can deal, I think, more shortly with the second question referred to the Court by the Finanzgericht, which is put in case the first question should be answered in the affirmative, and is in these terms:

"May national authorities or courts themselves waive the charging of the levy on the ground of the declaration of invalidity made by the Court of Justice of the European Communities, or does

this require an act of the competent legislature?"

Gedelfi and the Council were at one in saying that, if this Court should rule that the charging of a levy in circumstances such as those of this case was unlawful, the national court concerned should give effect to that ruling without further ado. I agree.

I imagine that the Finanzgericht asked the question because of the answers it had itself received from this Court in the first *"Quellmehl"* case (Cases 117/76 & 16/77 *Ruckdeschel* v *HZA Hamburg-Annen* [1977] 2 ECR 1753), which were the same as the answers given to the Tribunal Administratif of Nancy in the first *"Maize Groats"* case (Cases 124/76 & 20/77 *Moulins Pont-à-Mousson* v *OIPC* [1977] 2 ECR 1795). Those answers were to the effect that the granting of production refunds on starch but not on quellmehl or maize groats was incompatible with the principle of equal treatment and that it was for the institutions responsible for the common agricultural policy to adopt the measures necessary to correct the incompatibility. The Commission urged the Court to follow those cases here if, contrary to its submission on the first question, the unequal incidence of the import levies on orange juice should be held unlawful.

In my opinion the *Quellmehl* and *Maize Groats* cases are distinguishable. The Council regulations in question there were unlawful, not because of any charge they had imposed, but because of what they had failed to do. Unlawfulness of that kind cannot be corrected as a result of proceedings under Article 177, because national courts are powerless to take the positive action that is necessary: the Finanzgericht and the Tribunal Administratif could not have ordered that production refunds be paid to the complainants. In such circumstances responsibility for remedial action can lie only with the Community institutions. The Commission or the Council must legislate, failing which the Court can award damages in an action brought under Article 178, as the sequel in the *Quellmehl* and *Maize Groats* cases illustrates (see Cases 64 & 113/76, 167 & 239/78 and 27, 28 & 45/79 *Dumortier* v *Council*, Case 238/78 *Ireks-Arkady* v *Council & Commission*, Cases 241, 242 & 245-250/78 *DTV* v *Council & Commission* and Cases 261 & 262/78 *Interquell Staerchemie* v *Council & Commission*, — 4 October 1979 — not yet reported).

Here in contrast the complaint is of the exaction by a national authority in compliance with invalid Community legislation of a specific charge. It is well established that in such a case the remedy lies in the appropriate national court (see Case 96/71 *Haegeman* v *Commission* [1972] 2 ECR 1005, Case 46/75 *IBC* v *Commission* [1976] 1 ECR 65 and Case 26/74 *Roquette* v *Commission* [1976] 1 ECR 677).

I am therefore of the opinion that, in answer to the Finanzgericht's second question, Your Lordships should rule that, where, as a result of a ruling of this Court as to the validity of Community legislation, it appears that the charging of a particular levy is unlawful, the competent national court should itself grant the appropriate remedy.

The Finanzgericht's third question is put only in case the answer to the first question should be in the negative. It is:

"May the national authorities or courts in the case mentioned in Question 1 waive the charging of the levy on the ground that the imposition of a levy would lead to a violation of the principle of equality which would conflict with the precepts and values of the legislature?"

That question, if I have understood it correctly, suggests that national authorities or courts may, in a particular case, refrain from applying valid Community provisions, on the ground that such application would infringe principles of equity derived from national law. That is not so, as is clear from Case 118/76 *Balkan-Import-Export* v *HZA Berlin-Packhof* [1977] 1 ECR 1177. If, however, Your Lordships share my view as to the answer to the first question, this question will not call for an answer.