OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 24 October 1991 *

Mr President,
Members of the Court,

1. In the present case the Court is requested to define the term import price as used in Article 3(1) of Commission Regulation (EEC) No 1626/85 of 14 June 1985 on protective measures applicable to imports of certain Morello cherries [1] ('the regulation').

The measure in question was adopted on the basis of Article 14 of Regulation (EEC) No 516/77, [2] in order to bring to an end the serious disturbances to which the Community market was subject as a result of the marketing, at abnormally low prices, of Morello cherries imported from non-member countries. [3]

To that end, the regulation lays down a minimum price for the import of Morello cherries into the Community and provides for the application of a countervailing charge for products not conforming to that price.

More particularly, Article 1(1), adopting the definition used in the Common Customs Tariff, fixes for 'Morello cherries containing added sugar, in immediate packings' the minimum price of ECU 60.80 per 100 kg net for products in immediate packings of a net capacity of more than 1 kg and at ECU 67.10 for products in immediate packings of a net capacity of 1 kg or less.

Those minimum prices were calculated, as the Commission itself stated, on the basis of the prices notified by the Member States, the normal costs of packing also being included. The different price levels for different capacities of containers is accounted for by the differing impact of the cost of the packing on the price of the product.

The import price for Morello cherries from non-member countries is in turn determined, pursuant to Article 3(1) of the regulation, on the basis of the FOB price in the country of origin and of the costs of transport and insurance as far as the point of entry into the customs territory of the Community.

Article 3(3) further provides that if the invoice presented to the customs authorities has not been drawn up by the exporter in the country in which the products originated or if the competent authorities in the Member State consider that the price declared does not reflect the FOB price in the country of origin, those authorities are to take the necessary measures to determine that price, in particular by reference to the importer's resale price.

* Original language: Italian.

1 — OJ 1985 L 156, p. 13. See also Commission Regulation No 1712/85 of 21 June 1985 amending the German, Greek, English, French, Italian and Dutch versions of Regulation No 1626/85 (OJ 1985 L 163, p. 46).

2 — Council Regulation (EEC) No 516/77 of 14 March 1977 on the common organization of the market in products processed from fruit and vegetables (OJ 1977 L 73, p. 1).

3 — See the first three recitals in the preamble to the regulation.

The period of validity of the regulation, initially expiring on 9 May 1986 (Article 5), was extended for one year by Regulation (EEC) No 1257/86.[4]

2. The facts giving rise to the proceedings pending before the national court are relatively simple. Over the period 5 December 1985 to 10 September 1986, Soba, the plaintiff in the main proceedings, cleared through customs at the Göggingen office of the Hauptzollamt (Principal Customs Office), Augsburg ('the Hauptzollamt'), a total of 103 batches of stoned Morello cherries in glass jars. On each occasion it enclosed with the customs declaration the calculation of the reference price, which included not only the invoice price of the Morello cherries but also the value of the packing materials (glass jars, lids, labels, cardboard boxes and shrink-wrapping materials) which it had made available to the Yugoslav supplier free of charge.

The Hauptzollamt initially accepted the declarations presented by Soba and did not apply any countervailing charge to the imported Morello cherries. However, by an amended notice of recovery it imposed a countervailing charge of DM 80.02 per 100 kg net weight, requiring payment of DM 1 134 138.17.

After unsuccessfully appealing against that decision, Soba commenced proceedings before the Finanzgericht München (Finance Court, Munich) which, by order of 10 July 1990, stayed the proceedings and asked the Court of Justice whether Article 3(1) of the regulation in question was to be interpreted as meaning that, for the purpose of determining the import price, the costs of the containers and packing material, which the buyer has made available to the supplier free of charge, must be regarded as adding to the price.

3. In its written observations to the Court, the Commission contends that the question submitted by the national court should be answered in the negative and that therefore, in circumstances like those of the present case, the countervailing charge may be lawfully applied. In its opinion, a distinction must be drawn between the value of the goods, which includes all expenses incurred up to loading of the goods in the country of origin, and FOB price, which includes the costs incurred until the goods are loaded onto the means of transport only to the extent to which they have actually been borne by the seller and are thus included in the invoice.

That interpretation is not, in the Commission's view, contradicted by Article 3(3) of the regulation, which refers to the resale price, since, if the authorities in the Member State of importation find that the packing costs have not been included in the invoice issued by the seller, those costs cannot be taken into account, according to the Commission, when the import price is worked out subsequently.

Finally, the expression used in Article 1(1) of the regulation ('Morello cherries ... in immediate packings'), literally reproducing as it does the corresponding item in the Common Customs Tariff, is intended solely, in the Commission's view, to identify the

4 — OJ 1986 L 113, p. 37.

goods in question, without giving rise to any obligation on the customs authorities to take account of the packing in the event of the costs relating thereto not having been incurred by the seller and entered on the invoice.

4. Let me say straight away that that seems to reflect an excessively formalistic approach which is liable to lead to misapplication of the regulation, distorting its purpose and scope.

In the first place, the literal arguments advanced by the Commission can easily be countered by arguments of similar worth, to the effect that, according to commercial practice, the FOB price generally includes the value of the normal packing of the goods and that, whatever the reasons, the fact remains that Article 1(1) speaks of 'Morello cherries ... in immediate packings', thus referring not only to the product but also to its packaging.

But above all, a logical and systematic interpretation of the provision in question shows the lack of any foundation for the solution proposed.

The aim pursued by the regulation is not in any doubt: it is to ensure that imported Morello cherries are not marketed at abnormally low prices, thus impeding disposal of the Community product.

What is more, the calculation of the minimum import price for Morello cherries included the costs of packings which, furthermore, as the Commission itself acknowledged, are not usually re-used.

It should also be noted that the costs of the containers and packing materials made available to the seller free of charge were in fact borne by the importer and thus passed on in the retail price.

Against that background it is thus difficult to understand why a countervailing charge should be imposed on goods which are not in fact imported at a price falling below the limit laid down by the regulation.

5. The Commission itself appears to have conceded at the hearing that the application of the countervailing charge, in circumstances like those of the present case, is not specifically justified from the economic point of view. However, it is of the opinion that the importer could avoid unjustified application of the charge by selling the packings to the exporter and then re-purchasing them so that their price can appear on the invoice.

The logic underlying that reading of the provisions in question is not apparent to me and I see no possible benefit in requiring the importer to resort to such paper-chasing expedients once it is established that it is the importer who has actually borne the costs of the packing materials.

Nor in my view can any importance be attached to the fact that the Hauptzollamt's decision is in conformity with an interpre-

tative note prepared by Commission officials, discussed by the appropriate management committee in October 1985 and notified to all the Member States, a note with which, according to the Commission, all the traders involved must certainly have been familiar.

In the first place, the interpretative note in question cannot change the effect of a provision contained in a regulation and secondly there is nothing to indicate that its content was brought to the attention of the traders concerned. On the contrary, the facts of the case show that the national customs authorities themselves, far from having clear views on the subject, did not challenge the customs declarations presented by Soba until some time had elapsed.

6. Before concluding, I think it may be appropriate to emphasize that the interpretation of the provisions suggested by the Commission, besides conflicting with the aims of the regulation, is liable adversely to affect the conditions of competition as between economic agents by penalizing, without reason, those importers who obtain supplies from producers that are unable to provide the requisite containers and to create an unjustified obstacle to international trade by allowing protective measures to be applied against imported products that are not marketed at abnormally low prices.

7. In the light of the foregoing considerations, I suggest that the question submitted by the Finanzgericht München be answered as follows:

Article 3(1) of Regulation No 1626/85 is to be interpreted as meaning that, in determining the import price, the costs of the containers and packing materials made available free of charge by the buyer to the supplier must be regarded as components to be added to the price.