(2) Consideration of the third question raised has disclosed no factor of such a kind as to affect the validity of the regulation at issue.

Bosco Donner O'Keeffe

Delivered in open court in Luxembourg on 9 March 1978.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 25 JANUARY 1978

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Finanzgericht of Hamburg. The Plaintiff in the proceedings before that Court is the Firma Kühlhaus Zentrum AG. The Defendant is the Hauptzollamt Hamburg-Harburg.

The Plaintiff is the owner of a customs warehouse at Hamburg and, as such, became accountable on behalf of a customer for the charges leviable on the removal from that warehouse on 12 November 1975 of a consignment of 2 760 kg of frozen beef imported from the Argentine. That consignment was entered as part of a tariff quota conceded by the EEC under the GATT. The effect of this was that the meat in question was exempt from import levy though it remained liable to the customs duty of 20% chargeable under the Common Customs Tariff and also to the payment of an m.c.a. The question at issue between the parties is as to the proper amount of that m.c.a. It was assessed by the Defendant, in accordance with Commission Regulation (EEC) No 2195/75 of 22 August 1975 "on the monetary compensatory amounts applicable in the beef and veal sector" at DM 67.64 per 100 kg, i.e. in all DM 1 866.80.

Your Lordships will have it in mind that import levies are, broadly speaking, designed to cover the difference between world market prices and Community prices — see in the case of beef and veal Articles 10 and 13 of Council Regulation (EEC) No 805/68 of 27 June 1968 "on the common organization of the market in beef and veal". Such levies are fixed in units of account. For application in any particular case they need to be converted into the national currency of the Member State concerned. Since the entry into force of Council Regulation (EEC) No 475/75 of 27 February 1975 "on the exchange rates to be applied in agriculture" that conversion has in every case been effected at the "repres-

entative rate" (the "green" rate) for that currency fixed from time to time by the Council. As is well-known the representative rates of Member States' currencies as so fixed do not generally correspond to their real values in the market.

In the early days of m.c.a.'s, i.e. from 1971 to 1973, the Commission used to fix different m.c.a.'s for trade with third countries and for trade between Member States. Since 1973, however, for the sake of simplicity and to make the system more readily administrable, it has fixed a single m.c.a. for each product and for each Member State in respect of which the conditions for the application of m.c.a.'s laid down in Council Regulation (EEC) No 974/71 have been fulfilled. It has calculated the m.c.a.'s by applying to Community prices the percentage prescribed by Article 2 (1) of that Regulation as amended by Council Regulation (EEC) No 1112/73, i.e., in the case of a currency "in the snake", which of course the Deutschmark is, the percentage difference between, so far as now relevant, its "representative rate" and its "central rate".

It follows that, in theory at least, in the case of an importation from a third country on which a levy is chargeable, the amount obtained by applying that percentage to the amount of the levy would, in the absence of a corrective, be taken into account twice, once in the m.c.a. (since the Community price in theory equals the world market price plus the levy) and once in the conversion of the levy from units of acount into national currency at the "representative" rate. In such a case a corrective is therefore applied to the levy, in the shape of a "coefficient" derived from the percentage used to calculate the m.c.a. The coefficient is a figure by which the amount of the levy is multiplied. The coefficients are fixed from time to time by the Commission and, at the date here relevant (12 November 1975), that for the Deutschmark was 0.9 — see Annex II to Commission Regulation (EEC) No 2147/75 of 14 August 1975 "altering the monetary compensatory amounts".

At that date the relevant rules were contained in Commission Regulation (EEC) No 1380/75 of 29 May 1975 (Official Journal L 139 of 30 May 1975) which is described in its title as "laying down detailed rules for the application of monetary compensatory amounts". Article 4 of that Regulation provides, so far as material:

"1. A monetary compensatory amount shall be fixed for each product and for each Member State in respect of which the conditions for the application of monetary compensatory amounts are fulfilled.

The monetary compensatory amount shall be calculated on the basis of the common price . . .

2. The amount fixed in accordance with the preceding paragraph shall apply in trade between the Member States and in trade with third countries.

3. However,

(a) in trade with a new Member State the accession compensatory amounts and the fixed components, and

(b) in trade with third countries the import charges and the export refunds and levies,

fixed in units of account, applicable to the products referred to in paragraph 1 shall be muliplied by a coefficient. This coefficient shall be derived from the percentage used to calculate the monetary compensatory amount and shall be fixed by the Commission at the same time as that amount.

. . .

4. Where the levy or refund is to be increased or reduced, as the case

may be, by accession and monetary compensatory amounts and multiplied by a coefficient, the calculation shall be made as follows:

(a) the levy or refund shall be reduced or increased, as the case may be, by the accession compensatory amount;

(b) the resulting amount shall be multiplied by the coefficient; and

(c) the amount obtained after multiplication shall, after conversion into national currency, be reduced or increased, as the case may be, by the monetary compensatory amount."

It is thus clear that the coefficient is not applicable to the m.c.a. Where, as here, no levy is chargeable and the customs duty is *ad valorem* (and not fixed in units of account) the coefficient has no part to play.

Yet the Plaintiff has strenuously contended, both before the Finanzgericht and before this Court, that, in a case such as the present, the m.c.a. should be reduced by the amount by which the levy, if it had been chargeable, would have been reduced by the application of the coefficient, an amount which the Plaintiff calculates to be, in this case, DM 1 483.20. The Plaintiff submits that Regulation No 1380/75 should be interpreted as permitting such a deduction; alternatively that, if the Regulation does not permit it, it should be held *pro tanto* invalid.

The Finanzgericht felt some sympathy for the Plaintiff's contention and it recorded in the Order for Reference that the Defendant had stated to it that the Federal Ministry of Finance felt some too. The Finanzgericht's doubts were as to the validity of the Regulation, rather than as to its interpretation.

The questions referred to this Court by the Finanzgericht are these:

"1. Is Regulation (EEC) No 1380/75 to be interpreted in the sense that where, on the import into Member States of goods from third countries, the levy has been fixed but its imposition has been suspended and where monetary compensation is charged for such goods the monetary compensation should be reduced by multiplication by a monetary coefficient?

2. If Question 1 is answered in the affirmative:

Is the monetary compensation to be reduced by the amount by which, if a levy had been imposed, it would have been reduced by application of the coefficient set out in Regulation (EEC) No 2147/75?

3. If Question 1 is answered in the negative:

Is Regulation (EEC) No 1380/75 void in so far as, where a levy is fixed in units of account but its imposition is suspended, the monetary compensation on imports into the Federal Republic of Germany from third countries is not reduced by application of a monetary coefficient?"

The arguments upon which the Plaintiff's contention rested, and which, as I have indicated, appealed to some extent to the Finanzgericht, were, as I understood them, that, in a case where no refund was leviable, the "monetary measures" referred to in Regulation No 974/71 had, so far as an importer was concerned, an impact only on the world market price, i.e., in terms of the present case, the revaluation of the Deutschmark affected only the conversion into Deutschmark of the "world market price" as determined by the Commission (in units of acount) for the purpose of calculating m.c.a.'s. Therefore, said the Plaintiff, in such a case as this, all monetary compensation attributable to that part of the

Community "common price" that corresponded to a notional levy should be eliminated. Otherwise, so the Plaintiff submitted, a two-fold discrimination would be caused: first a discrimination against imports into the Federal Republic of Germany from third countries as compared with imports from other Member States and secondly a discrimination against imports from third countries into the Federal Republic as compared with such imports into Member States with depreciated currencies. The first kind of discrimination would arise because the same m.c.a. would be charged in situations that were different. The second would arise from the circumstance that Member States with depreciated currencies grant m.c.a.'s on imports. In their case, the absence of a corrective would mean that the m.c.a. was greater than it ought to be.

I agree with the Finanzgericht that, if those arguments can lead anywhere, it must be to the conclusion that the relevant Community legislation is defective, not to the conclusion that Regulation No 1380/75 can be interpreted otherwise than according to its tenor.

On the question of interpretation the Plaintiff relied heavily on the seventh recital in the preamble to that Regulation, which is in these terms:

"Whereas accession compensatory amounts, fixed components as referred to in Article 61 of the Act of Accession, import charges, export refunds and all other amounts charged or granted in units of account in respect of trade with third countries are, like the prices in the Member States concerned, converted into the currencies of those Member States by applying the exchange rates provided for under the common agricultural policy; whereas, therefore, in calculating the monetary compensatory amount only the difference between the price level and the amount in question expressed in units of account need be taken into consideration; whereas, in order to simplify the system so that the same compensatory amount may be applied in respect of the trade of a given Member State with every other Member State and with third countries, accession compensatory amounts, fixed components, import charges, export refunds and all other amounts charged or granted in respect of trade with third countries should be corrected by a coefficient expressing the position of the currency of the Member State which is to apply the monetary compensatory amount."

The Plaintiff fastened in particular on the last sentence. But, in my opinion, the reference there to "all other amounts charged or granted in respect of trade with third countries" must be interpreted in the light of what has gone before. It can only refer to "amounts charged or granted in units of account" and cannot include m.c.a.'s, which are fixed in national currencies.

The Commission in its written Observations conceded that the method of computing m.c.a.'s laid down by Regulation No 1380/75 was, in its application to a case like the present, theoretically imperfect. The imperfections were, however, said the Commission, only marginal, in particular owing to the way in which m.c.a's on beef and veal were in fact calculated. The under-correction in the present case amounted to no more than DM 193.46 and a correction of DM 1 483.20 as proposed by the Plaintiff would be quite unwarranted.

In those Observations the Commission relied in the main on the proposition that no system of calculating m.c.a.'s can ever be other than rough and ready: to achieve perfection it would be necessary to calculate a different m.c.a. for every transaction, based on the price paid under that transaction. The Commission referred to cases where

that proposition has been accepted by this Court: Case 5/73 the first *Balkan* case [1973] ECR 1091 (see paragraphs 39 to 41 of the Judgment), Case 154/73 *Becher* v *HZA Emden* [1974] ECR 19 (paragraphs 6 to 8 of the Judgment) and Case 55/75 the second *Balkan* case [1976] ECR 19. It referred also to provisions of Council Regulations introducing elements of arbitrariness into the system, for example the proviso to Article 2 (1) (b) of Regulation No 974/71 introduced by Article 5 of Regulation No 475/75, by which, as amended by Article 4 of Regulation No 557/76, the first 1.5 points of depreciation in the currency of a Member State with a depreciated currency are ignored.

I agree of course with the Commission that the system of m.c.a.'s, to be administrable, must necessarily have arbitrary features. To the authorities to that effect cited by the Commission I would add Case 7/76 the *IRCA* case [1976] ECR 1213. But I do not think that that is the key to the present case.

At the hearing the Commission, as I understood it, resiled from the concession it had made in its written Observations and submitted that there could be no "economic" objection to the application, in a case such as this, of the full m.c.a. I agree. The grant, under the quota here in question, of exemption from levy was an illogical departure from the Community system of determining prices for beef and veal. There was not inherent in it any particular logical consequence as to the quantum of the m.c.a. that remained chargeable. This is well illustrated by the fact that, as we were told by the Commission, under another part of the same quota importations were exempted from the whole m.c.a. In truth, whether particular importations effected under the quota were to be exempted from no part of the m.c.a. normally chargeable, or from some part of it, or from the whole of it, depended entirely on what had been agreed upon by the Community in the framework of the GATT. It did not depend on any logical principle to be derived from Regulation No 974/71 or from anywhere else.

Moreover, in order to establish the invalidity, be it partial, of Regulation No 1380/75, the Plaintiff must show that its provisions are incompatible with a superior rule of law binding on the Commission. The only superior rule of law invoked by the Plaintiff is the principle of equality and, in particular, the manifestation of it to be found in Article 40 (3) of the Treaty excluding "discrimination between producers or consumers in the Community".

That principle, however, clearly does not forbid less favourable treatment being accorded to imports from third countries than to imports from other Member States. Indeed in the third *Balkan* case, the Court expressly said, in the context of the fixing of m.c.a.'s, that "the general principle of Community preference" justified a different treatment of products coming from another Member State as compared with those coming from a third country (paragraph 15 of the Judgment).

As to the other form of discrimination suggested by the Plaintiff, it is manifest that m.c.a.'s do not affect importers in countries with appreciated currencies (such as the Federal Republic) and those in countries with depreciated currencies in the same way. For the former they constitute imposts, for the latter subsidies. The situations of such importers are thus different and no impermissible discrimination is involved in treating them differently — consider the Judgment of the Court in Case 126/76 *Dietz* v *Commission*, not yet reported (paragraph 26).

In the result I am of the opinion that, in answer to the questions referred to the Court by the Finanzgericht, Your Lordships should rule that:

(1) Regulation (EEC) No 1380/75 is not to be interpreted as meaning that, where goods imported from a third country are exempted from a levy that would otherwise be payable, a reduction should be made in any monetary compensatory amount chargeable in respect of them;

(2) Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of that Regulation.