OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 17 OCTOBER 1972[1]

Mr President,
Members of the Court,

The reference for a preliminary ruling which concerns us today relates to the validity of the fixing of a free-at-frontier price by the Commission.

This price was fixed under Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of a common organization of the market in cereals (JO 1962, p. 933). Initially, as I have frequently had occasion to state, the said organization of the market, far from bringing about uniformity of prices in the Common Market, allowed certain differences in prices between the Member States to subsist. It was consequently necessary to impose levies within the Community in order to achieve equal prices. In this matter an important factor was the level of prices in the importing country, expressed more precisely: the threshold prices based on the target prices which the Member States determined in accordance with the Community provisions. The free-at-frontier prices of the exporting States are also involved: the Commission is responsible for fixing these prices. In this connexion Article 3 of Regulation No 19 provides: 'The price of the product coming from the exporting Member State delivered free-at-frontier to the importing Member State shall be determined on the basis of the prices ruling on the most representative markets of the exporting Member State for exports to the relevant importing Member State ...'. Further details were established by the provisions of Regulation No 89 of the Commission of 25 July 1962 (JO 1962, p. 1899). Article 2 thereof provides that 'the free-at-frontier price shall be determined on the basis of the most favourable price for the importing Member State from the prices ruling on the most representative markets for exports to that State and taking account of transport costs'. Article 3 of the said Regulation No 89 explains that 'with regard to each product there shall be considered as the most representative markets those from which the product may be exported at the most favourable price to the importing Member State'. Article 4 defines the most favourable price as 'that which is lowest, taking account of the prices ruling on the most representative markets, adjusted pursuant to Article 6, and taking account of the costs of transport and of marketing not already included in such prices'. Finally Article 5 requires that there be taken into account 'the lowest transport costs up to the marketing centre of the area with the largest deficit in the importing Member State'. If the marketing centre of the area with the largest deficit does not coincide with one of the frontier crossing points laid down in the annex to Regulation No 68 of the Commission fixing the criteria for determining the cif prices for cereals, flour, cereal groats and cereal meal (JO 1962, p. 1861) the lowest transport costs up to the marketing centre of the area with the largest deficit in the importing Member State reduced by the proportion of the costs corresponding to the transport to the frontier crossing point towards the marketing centre of the area with the largest deficit. This applies to imports into the Federal Republic of Germany because in the annex to the said Regulation No 68 Emmerich is named as the frontier crossing point whilst the marketing centre of the area with the largest deficit in the Federal Republic is Duisburg.

With regard to maize exported from France into the Federal Republic of Germany prices were fixed in accordance with these provisions for the week from 24 January 1966 by the decision of the Commission of 21 January 1966. In this decision the free-at-frontier price was fixed at FF 508.86.

This is the decision which concerns the

1 — Translated from the German.

plaintiff in the main action. In fact on 28 January 1966 it obtained from the Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Frankfurt, the competent German agency under this organization of the market, an import licence valid for February 1966 under which certain quantities of maize were imported in that month from France. In the import licence the Einfuhr- und Vorratsstelle, on the basis of the said free-at-frontier price, fixed in advance a levy amounting to DM 11.59 per tonne. Nevertheless the licence-holder does not consider this amount correct. It considers that the Commission has failed to determine the free-at-frontier properly and that it has thereby given rise to an excessive levy. The licence-holder accordingly submitted a complaint against the rate of levy and subsequently initiated proceedings before the Hessisches Finanzgericht with a view to having the amount of the levy reduced by DM 10.57 to the sum of DM 1.02, as it considers the relevant free-at-frontier price ought to be. Since, as I have indicated, the application is based on the view that the decision of the Commission on the fixing of the free-at-frontier price is incorrect and so invalid, the court before which the matter was brought, having regard to the provisions of Article 177 of the EEC Treaty, stayed proceedings by an order of 9 March 1972 and submitted the following question for a preliminary ruling:

Is the decision of the Commission of the European Economic Community fixing at FF 508.86 per tonne the free-at-frontier price on 28 January 1966 for French maize imported into the Federal Republic of Germany valid?

I now wish to consider the answer to be given to this question, that is, I wish to consider the view which must be taken of the objections raised by the plaintiff in the main action and of the submissions made by the Commission in its defence (these are the only parties submitting observations in the context of this reference for a preliminary ruling).

1. It must first of all be emphasized that the parties are correct in agreeing to proceed on the basis that a flat-rate system is to be applied in fixing the free-at-frontier price and that regard is not to be had for the data obtained from any particular import transaction (a view which indeed has already been approved in the decisions of the Court). Likewise they agree on a series of facts taken into account by the Commission in its calculations. Although I do not wish to go into details at this point, mention should be made of the offer price for maize in Bayonne, which is the most representative French market for exports to the Federal Republic.

On the other hand, there is disagreement over certain parts of the transport costs in their widest acceptation (including loading and unloading costs) as well as the question whether the exporter's profit margin should be included in the marketing costs.

The plaintiff complains first—to go into greater detail—that the Commission adopted an amount of only FF 6.60 for the loading costs in Bayonne. In reality it ought to have accepted FF 11 for this and should probably have added FF 2 for bringing the goods from the ship's rail to the hold. Further the plaintiff considers it incorrect to take into consideration an amount of only FF 4.32 for the unloading costs in Rotterdam (where the goods had to be transferred from ship to barge). An amount of FF 0.50 for supervision of unloading and FF 2.00 for free-out costs (that is, for removing the goods from the hold to the ship's rail) were also concerned. Nor does the plaintiff consider that the costs of transport from Rotterdam to Emmerich (the relevant German frontier crossing point) should be estimated at a mere FF 4.64 and that FF 8.50 should in fact be taken into account. Finally the plaintiff criticizes the Commission for including the profit margin of FF 6.25, as it emerges, whilst deducting certain marketing costs from the FF 10 established by the Commission as a fixed amount for marketing costs (that is, the interest paid by the exporter on the financing of the purchase price until it is paid by the importer—FF 2.50; bank and collection charges—FF 0.25 and brokerage—FF 1). On the contrary, the plaintiff considers that one must proceed on the basis of a

fixed amount of FF 22 for marketing costs which gives a profit margin of FF 8.93 when certain costs are taken into account (more precisely: transport insurance—FF 0.50, exporter's interest—FF 2.50, supervision of unloading—FF 0.50, brokerage—FF 1, bank and collection charges—FF 0.25, free-out costs Bayonne and Rotterdam—each FF 2 and unloading costs Rotterdam—FF 4.32).

With regard to the data which it has mentioned, the plaintiff principally takes as its source the reports communicated by ONIC (Office National Interprofessionnel des Céréales) (the 'National Cereals Trade Board') that is to say the competent French authority under the organization of the markets, which, in this capacity, is required under Article 7 of Regulation No 89 to provide the Commission with data on the market and proposals for determining the free-at-frontier prices. In addition the plaintiff justifies its objections by the fact that the cereal is transported from Bayonne to Rotterdam in coasters which are not fitted with their own unloading equipment. Only net freight charges are calculated in this respect, excluding the costs of loading and unloading the ship: accordingly the said costs are not usually included in such cases in the free-on-board clause.

The Commission counters this by claiming that the plaintiff ought not simply to have adopted the figures supplied by ONIC. Instead, it was its duty to check the data supplied to it with the assistance of its own experts who are in constant touch with trade and unloading circles. It is clear that this claim is justified from the mere fact that ONIC continued to communicate the same data although the freight rates frequently fluctuated. It also appears significant that ONIC, despite communicating the fixed sum for marketing costs, accepted, in discussions with the experts of the Commission and from other Member States within the framework of the Management Committee, a fixed sum of FF 10 for marketing costs. Finally the fact that, when allowance is made for the level of prices in Duisburg, the free-at-frontier prices calculated by the Commission coincided with the level prevailing at that time for offer prices cif Duisburg, which constitutes persuasive evidence that the Commission was not mistaken in its determination of the free-at-frontier price.

When we consider the attitude to be adopted to this dispute it must be confessed from the outset that it certainly appears questionable that, despite the undeniable fluctuations of freight prices over a lengthy period, ONIC should communicate data which was plainly unaltered. It also provides food for thought that in the Management Committee ONIC accepted a fixed amount of FF 10 for marketing costs (this, at any rate, has not been disputed) and thereby departed from the figure of FF 22 which it has itself communicated. It may further be stated that with regard to the Rhine freight (another disputed issue) ONIC probably has a less reliable impression than the Commission is able to obtain through its more direct contacts and that ONIC possibly took as its basis the national freight rates, which are fixed by tariff and consequently higher, for the Rotterdam-Emmerich route, instead of the lower quotations prevailing in international transport, as supplied by the Rotterdam and Duisburg freight markets. This undoubtedly weakens the plaintiff's argument to the extent to which it is based exclusively on ONIC's data.

There are in addition the following considerations which likewise contradict the plaintiff's argument.

The plaintiff states that in Bayonne-Rotterdam transport coasters are used *as a rule* and that net freight rates are *usually* taken into account. This does not rule out that transport costs might sometimes be lower than those adopted by the plaintiff. It is consequently important for the application of Regulation No 89 because according to that provision the *lowest* costs are decisive.

With regard to the loading and unloading costs (for bringing the goods from the rail to the hold of the ship and vice versa) which, it is alleged, the Commission failed to take into account, it must be stated that the plaintiff itself adopted the figure of Fl. 2 (FF 5.43) for each trans-shipment of cereal into barges at Rotterdam. When it is

considered in this context that the Commission estimated the unloading costs in Rotterdam at FF 4.32 it is scarcely clear, in comparing it with the figures mentioned by the plaintiff, that an additional FF 2 should be taken into account for free-out costs. Viewed in this light it further seems extremely doubtful whether for the loading costs in Bayonne there should be assessed, in addition to the FF 6.60 mentioned by the Commission or indeed to the costs of FF 11 mentioned by the plaintiff, an additional FF 2 for transferring the goods from the rail to the hold of the ship (a view which the plaintiff itself only considers as a *possibility* arising from a particular interpretation of the fob clause). It should finally be remarked that the divergence in profit margins arising from comparison of the Commission's data with that of the plaintiff is relatively insignificant. When it is also borne in mind that the Commission is in this respect further obliged to proceed on the basis of the lowest possible figures and that the figures adopted by it, which remained unchanged for a long period, never appear to have given rise to difficulties it can scarcely be alleged in this connexion that an erroneous appraisal was made.

Nevertheless I hesitate to base a conclusive decision solely on these considerations and thereby to consider the plaintiff's complaints incontestably disproved. This could scarcely be defended under the rules of procedure. Instead it appears evident that in a situation such as that with which we are faced further investigation must be carried out in order to clarify matters completely. For this purpose consideration might for example be given to questioning ONIC in order that it might thereby explain its point of view or to take the opportunity of carrying out direct investigations in trade circles with regard to the data, especially concerning freight rates and loading and unloading costs.

Ultimately I consider it by no means necessary to recommend this course and thereby to bring the matter to a final decision. This is because there is reason to doubt the efficacy of such an investigation in view of the period which has elapsed in the meantime. Furthermore—and this is indeed more important—on another view an entirely admissible solution appears possible. In this respect I recall that the Commission stated that in determining the disputed free-at-frontier price it acquired its data on the offer price in January 1966 for goods arriving cif Duisburg from trade circles (the Deutsches Getreidekontor) and from the Einfuhr- und Vorratsstelle. However, these prices coincided with the data which it was possible to obtain through converting the free-at-frontier prices on the basis of Duisburg. In my view this is an important factor in the appraisal of the present case, and it cannot be excluded from consideration—as the plaintiff endeavours to do—by the objection that the Commission should not have proceeded in its calculations on the sole basis of the figures for the market in the exporting country together with the transport and marketing costs which have been ascertained. In fact it is clear from Article 8 of Regulation No 89 that the Commission 'in determining the free-at-frontier price ... shall also have recourse to any data which may be communicated to it by the *importing* Member States'. Consequently the plaintiff cannot succeed in its objections when it states that there were higher quotations on the German market at this time and that the data produced by the Commission can be explained in the circumstances by special factors such as importations carried out earlier or carried out on the basis of certificates fixed in advance. With regard to the last part of this submission, although this can in my view explain *certain particular* quotations, it cannot explain the general impression of the market as it is reflected in the data mentioned by the Commission. In addition the higher quotations mentioned by the plaintiff must be ignored since, as I have said, the Commission is obliged under the common organization of the market to adopt as its basis the *lowest* figures, which are those most endangering the market.

It may finally be held, when the conclusions based on the figures mentioned by the Commission as characteristic of the market in the Federal Republic are apposed to the doubts relating to the plaintiff's

argument, that the accuracy of the Commission's decision on the free-at-frontier price cannot be doubted with regard to the relevant data on the market.

2. In the view of the plaintiff the decision of the Commission is also mistaken on another ground, namely that the free-at-frontier price was converted from French francs into Deutschmarks at an exchange rate 'which corresponds to the par value communicated to and recognized by the International Monetary Fund' (Article 2(1) of Regulation No 129 of the Council of 23.10.1962) (OJ, Special Edition, 1959–1962, p. 274). At the time this rate differed significantly from the actual exchange rate on the German foreign currency market and, if that market had been adopted as the basis, in the view of the plaintiff, a free-at-frontier price approximately 1% higher would have been obtained and the levy would have been lower by a corresponding amount. The Commission was in fact empowered pursuant to Article 2(2) of the said regulation of the Council to allow the actual exchange rate to be employed. That this was not done, that is, that the Federal Republic was not granted the appropriate power, represents a mistaken appraisal which should not be left out of account in considering the decision on the free-at-frontier price.

Let us then consider the attitude to be adopted to this argument.

It is clear from the outset that in the order of 9 March 1972 referring the matter no request was made for consideration of the validity of the decision of the Commission from the aspect which has just been mentioned: instead the plaintiff only adopted this line of argument before the Finanzgericht in a written statement of 5 July 1972. In a letter of 10 July 1972 the judge-rapporteur of the court transmitted this to the Court and 'relied on the wisdom' of the Court of Justice 'with regard to the question whether the facts cited by the plaintiff should be taken into consideration'. This certainly constitutes an unusual procedure and it is understandable that the representative of the Commission should have expressed doubts in this respect in the oral procedure. In fact there are good reasons for thinking that when the court of reference seizes the Court of Justice of a preliminary question it should be composed of the same members as are to decide on the national proceedings after the Court of Justice has given its preliminary ruling so as to circumscribe precisely the subject-matter of the proceedings. It would thus be inadmissible to extend the material in the preliminary question in the way which has been described. On the other hand, it must be borne in mind that the present case relates to consideration of *validity*. In such procedure it does not appear to be excluded that new aspects should be brought before the Court and—if their validity is not immediately to be discounted—included for consideration. This is so in order that in certain circumstances further preliminary rulings may be avoided thus saving the time of the Court. Accordingly, without elaborating further on the question of admissibility, I shall consider the additional question of validity which has been put, always bearing in mind that the Court has allowed the parties to comment on the matter. In addition there is even less reason to object to this extension of the consideration in that all the necessary explanations can be given without tiresome deliberations and extensive complications.

As I have already said, the plaintiff bases its point of view on Article 2(2) of Regulation No 129. This reads as follows: 'However, where in one or more countries the exchange rate operative on the foreign exchange market supervised by the monetary authorities fluctuates in relation to the rate which corresponds to the par value communicated to and recognized by the International Monetary Fund and where in exceptional circumstances such fluctuation ... might jeopardize the implementation of the instruments or provisions referred to in Article 1' (that is to say, the instruments relating to the common agricultural policy) 'the Council or the Commission, acting within their powers under those instruments or provisions and in accordance with the procedures laid down therein for each individual case, may decide that the exchange rates for the currencies in question on the most re-

presentative foreign exchange market or markets, as provided by paragraph 4, must be applied temporarily in measures taken in pursuance of those instruments or provisions'. It is immediately clear that exceptionally stringent conditions attach to the application of the derogation. In this respect, the argument advanced by the Commission undoubtedly has substance in that its application is envisaged only when serious disturbances of the markets occur and if fluctuations in the exchange rate jeopardize the functioning of the common organization of the market or the implementation of the agricultural policy. The Commission emphatically denies that this was the case in the relevant period and indeed the plaintiff has by no means claimed that this was so. In essence the plaintiff produced a quite different line of argument, that is, relating to Regulation No 67 of the Commission laying down the criteria for modifying the levies (OJ No 66 of 28.7.1962, p. 1860). The plaintiff relies upon the fluctuations mentioned in this regulation and claims that the existence of differences exceeding 0.75 u.a. must be considered as evidence of the existence of a disturbance of the market. Nevertheless this argument is clearly unacceptable. As the Commission has properly stressed, Regulation No 67 has another purpose in view. The levy is to be altered only on the ground of an alteration in the state of the market, when certain minimum limits are exceeded. It is expressly stated in the recitals to the regulation that fluctuations within those limits should not be taken into account 'in order that the procedure for fixing the levies should not be subjected to excessive complications'. The purpose and emphasis of Regulation No 67 thus differ completely from those represented by the plaintiff and provide no basis for asserting that the presence of variations on the scale envisaged in Regulation No 67 may invariably be termed disturbances of the market and in particular disturbances of the market within the meaning of Regulation No 129. With regard to the point of view which the plaintiff has in addition put forward, it may likewise be held that it provides no grounds for doubting the validity of the decision on the free-at-frontier price and it does not affect the consideration that the exchange rate not only has an effect on the conversion of the free-at-frontier price but furthermore—and this affects the overall impression—on the determination of certain specific items in the calculation, such as, for example, freight costs originating in third countries.

3. I can accordingly summarize my opinion as follows:

No circumstance in the procedure can be discerned which is capable of providing grounds for doubting the validity of the decision of the Commission whereby it determined the free-at-frontier price at FF 508.86 per tonne on 28 January 1966 for French maize imported into the Federal Republic of Germany.