OPINON OF MR ADVOCATE-GENERAL ROEMER DELIIVERED ON 3 FEBRUARY 1972[1]

Mr President,
Members of the Court,

After the Deutschmark was allowed to float in May 1971, that is to say after the widening of the margins of fluctuation of that currency, the current rate of exchange of the Deutschmark in the Federal Republic of Germany rose above the official parity. This created difficulties as regards the functioning of the common market because trade to which the current rate of exchange applied could be done at a price in Deutschmarks lower than the intervention or buying-in prices laid down by Community rules on the basis of the official parity. For this reason the Council, on 12 May 1971, adopted Regulation No 974/71 (OJ L 106, p. 1). English Special Edition, 1971 (I) p. 257) by which it created a system of compensatory amounts for trade with Member States and with third countries with the object of compensating for the incidence of this monetary measure on the price of agricultural products. Under this measure, if, for the purposes of commercial transactions, a Member State allows the exchange rate of its currency 'to fluctuate by a margin wider than the one permitted by international rules', it shall be authorized to charge compensatory amounts on imports of certain products from Member States and third countries and to grant compensatory amounts on exports of certain products to other Member States and third countries. The system applies to products 'covered by intervention arrangements under the common organization of agricultural markets' and to products whose price depends on the price of the products just referred to and which are governed by the common organization of the market or are the subject of a specific arrangement under Article 235 of the Treaty. Article 2 of Regulation No 974/71 defines in detail the extent of the compensatory amounts. Article 6 of the regulation further specifies that 'Detailed rules ..., which may include other derogations from the regulations on the common agricultural policy', shall be adopted and shall cover in particular the fixing of the compensatory amounts in accordance with the procedure laid down in Article 26 of Council Regulation No 120/67 (JO No 117, 1967, p. 2279) that is to say, the procedure under which reference is made to the Management Committee. Article 8 provides that 'This Regulation shall be applicable with effect from 12 May 1971'.

The aforementioned provisions for the implementation of the regulation were originally set out in Regulation No 1013/71 of the Commission of 17 May 1971 (JO L 110, 1971, p. 8). The compensatory amounts provided for were fixed for certain products by another regulation of the Commission, No 1014/71 of 17 May 1971 (JO L 110, 1971, p. 10). The details are to be found in Annex I to that regulation. From this it can be inferred that where cereals are concerned only basic products are shown in principle and that *inter alia* flaked barley and maize groats, the products involved in the present case, are not included among the products processed from cereals. Article 2 of the regulation, which was published in the Journal Officiel of 18 May 1971, specifies that 'This Regulation shall enter into force on the day of its publication in the Official Journal of the European Communities. It shall apply from 12 May 1971'. I ought to add that, in subsequent regulations of the Commission, for example Regulations Nos 1033/71 (JO L 112, 1971, p. 26) and 1272/71 (JO L 133, 1971, p. 1), the compensatory amounts were altered on the basis of fluctuations in the rates of exchange.

As I have stated, the system thus created is of concern to the present applicant, which runs a mill at Lübeck and, using basic products which it buys on the world market, manufactures products processed

1 — Translated from the German.

from cereals, in particular maize groats for the brewing industry and flaked barley. It appears that the products are exported in the main to Poland and Denmark (to the latter country for making beer). The applicant has suffered loss as a result of this system: compensatory amounts were charged on the basic products imported but, because there was no reference to them in the list in Regulation No 1014/71, no compensatory amounts were granted on exports of the processed products. It was for this reason that, by telex of 26 May 1971, the Nordgetreide undertaking got into touch with the Cereals Directorate of Directorate-General VI of the Commission of the European Communities. It emphasized that the compensatory system was giving rise to distortions in conditions of competition in the products which it manufactured and that it was impossible for it to conclude export contracts for the third quarter of 1971. The applicant concluded with these words: 'We earnestly appeal to you to take full account of our position and of the injustice which it represents and accordingly to supplement the list of goods'. At this juncture, after sending a telex reminder on 4 June, Nordgetreide received a telex dated 16 June 1971 from the Commission and signed by the Deputy Director-General, Mr Heringa, in the following terms: 'The Commission is well aware that the fixing and, on occasion, the non-fixing of compensatory amounts is liable to create difficulties in trade in certain products. It must however point out that, in certain cases in which the market situation in the products concerned justified the belief that the application of the monetary measures in question would not lead to disturbances in trade, the necessarily general character of the measures adopted persuaded it not to fix compensatory amounts'.

Not being satisfied with this decision, Nordgetreide brought proceedings before the Court of Justice on 21 July 1971 claiming in its application the annulment of the Decision of the Commission of 16 June 1971, with all the necessary consequences in law, namely the inclusion of the products under heading 11.02 of the Common Customs Tariff, in particular, flaked barley and maize groats and meal (for the brewing industry), in the list of goods in the annex to Regulation (EEC) No 1014/71 of the Commission and of Annex I to Regulation (EEC) No 1271/71 of the Commission (this reference should obviously be to Regulation No 1272/71); and claiming, in the alternative, a declaration that the Commission is in breach of the Treaty by not acting on the applicant's request of 26 May 1971, as is shown by the failure of the Commission in its telex of 26 June 1971, to give any decision on the said request, with all the necessary consequences in law, namely, the inclusion of the products under heading 11.02 of the Common Customs Tariff, in particular flaked barley and maize groats and meal (for the brewing industry) in the list of goods in the annex to Regulation (EEC) No 1014/71 and in Annex I to Regulation (EEC) No 1271/71 of the Commission (again the reference should obviously be to Regulation (EEC) No 1272/71).

After proceedings were commenced, the Commission adopted Regulation No 1687/71 of 30 July (JO L 173, 1971, p. 1) 'amending the annexes to Regulation No 1014/71 concerning the compensatory amounts applicable in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States'. In the regulation, it fixed a new rate for the compensatory amounts and, in part, for new products, in particular maize groats and meal (tariff heading 11.02 A V(a) 1) and flaked oats (tariff heading 11.02 E I(b) 1). Under Article 1, the annexes to this regulation replace the annexes to Regulation No 1014/71. Article 2 specifies that the regulation shall enter into force on 2 August 1971.

In the Commission's view this means that there is no longer any need to rule on the application in the main action.

Replying to a communication to this effect addressed to it on 22 September 1971, the applicant agreed that, in view of Regulation No 1687/71, there was certainly no longer any need to rule on the application in the main action 'in so far as compensatory amounts have been granted for the period since 2 August 1971'. Nevertheless it con-

sidered that a ruling was required on its application for 'the grant of compensatory amounts for the period between the beginning of the floating of the currencies on 12 May until 1 August 1971'. These statements were made in a letter of 27 September 1971 addressed to the Commission.

In a statement of defence dated 7 October 1971, the Commission reiterated before the Court its contention that there was no longer any need to rule on the main action. It accordingly asks the Court to rule, under Article 69(5) of the Rules of Procedure, that the case in the main action will not proceed to judgment and to order the applicant to pay the costs; in the alternative, it asks the Court to rule, under Article 91 of the Rules of Procedure, on the admissibility of the application without going into the substance, to dismiss the application as inadmissible, and to order the applicant to pay the costs.

Since the applicant maintained its view that there was a case to answer, the Court decided to give preliminary consideration to the objection of inadmissibility. This was done in the oral proceedings on 26 January 1972, and accordingly my task today is to give my opinion on this issue alone.

1. There is no need for me to re-read the main conclusion in the application. It is concerned with the decision of the Commission of 16 June 1971 in which it informed the applicant that there was no occasion to supplement the list of products in Regulation No 1014/71.

In considering whether its annulment may be demanded we must, since the application was submitted by a private undertaking, first of all consider, whether the decision in question is actionable at all under Article 173 of the EEC Treaty. This is open to doubt: it was not in fact signed, as required by Article 12 of the Commission's Rules of Procedure, either by the President or by any other member of the Commission but only by the Deputy Director-General. The Court will be aware that, in such circumstances, the precedents which it has established in regard to the ECSC rule out the possibility that the decision is actionable (see for example Joined Cases 35/62 and 16/63 [1963] ECR 197 at p. 204). Nevertheless, during the oral procedure, the representative of the Commission assured the Court that the Deputy Director-General referred to acted on the instructions of the Commission and that the formula used in the telex 'the Commission is well aware' must imply that it was the Commission's opinion which was communicated to the applicant. Again, the impression can be gained from study of the case-law that the principles, referred to above, developed in relation to legislation dealing with the ECSC do not automatically apply in the case of the EEC. This conclusion is based on the judgment of the Court in Case 48/65 [1966] ECR 19 at p. 27, in which it was called upon to review a letter sent by a department of the Commission and signed by a Director-General in his own name; the application was held to be inadmissible, though without any reference to this circumstance. I am therefore in agreement with the argument developed by my former colleague, Mr Advocate-General Gand, in that case and reported in [1966] ECR 19 at p. 31. In the present case, too, the fact that the decision in question was drawn up by a department of the Directorate-General for Agriculture and that it was signed in his own name by a Deputy Director-General cannot be regarded as decisive. On the contrary the decisive factor is that it is clear from the wording of the letter that 'its signatory is expressing the point of view of the Commission'.

The decisive issue of admissibility must, therefore, be put in different terms. In the case of the rejection of a request, as in the present case, attention should not be concentrated mainly on the fact that the individual who made the request personally received a negative reply but, if the limitations on the right to seek redress contained in Article 173 of the EEC Treaty are not to be ignored, it must be recognized that a decision rejecting the request may be impugned only if the positive measure which the request sought to obtain, but which has been refused, was actionable. This is the argument urged convincingly by the Commission. In my view, the conclusion can be drawn from

the indications given in the judgment delivered in Case 15/70 [1970] ECR 975 at pp. 979 and 980 that this contention is consonant with the basic concepts of the Court.

To apply this test to the present case, it is at once apparent that the conclusion in the application which is based on the request of 26 May 1971 and which vests it with a certain formal validity seeks to supplement two regulations. This invites the conclusion that the rejection of the request does not constitute an individual act but amounts to confirmation of regulations which, according to the applicant, should be supplemented. This view is confirmed on a closer study of the legal nature of the system of rules involved. As I said at the beginning, these rules are, owing to the floating of the Deutschmark rate of exchange, concerned with fixing compensatory amounts to be applied to both imports and exports in external trade in certain products. There can be no doubt that these rules possess the attributes which under the case-law of this Court, they must have if, they are to constitute regulations within the meaning of the EEC Treaty. The system of rules is of a legislative nature, is applicable not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly, it applies to objectively determined situations and involves legal consequences for categories of persons viewed in a general and abstract manner (as was held in, for example, the judgment delivered in Cases 16 and 17/62 [1962] ECR 471 at pp. 478 and 479. As the Commission emphasized, the essential factor is that the category of persons affected by the rules is not identifiable and is not determined by reference to the time at which the measure was adopted; when the rules are adopted, no one can identify the producers and traders which they cover and, depending on the scheme of the rules (which recalls the dicta in the judgment of the Court in Case 38/64 [1965] ECR 203 at p. 208), this applies not only to exports but also to imports of the products concerned.

Furthermore, the fact that the applicant was concerned with only two specific products and that the group of undertakings producing these goods in the Federal Republic of Germany is small, has no relevance. On this point, too, the case-law of the Court has for some time past made the position clear along lines which, in fact, contradict the applicant's argument. On this I need only refer to the judgment of the Court in Case 6/68 [1968] ECR 409 at pp. 414 and 415, and to what it held perhaps even more clearly in Case 1/64 [1964] ECR 413 at pp. 416 and 417.

Finally it also appears impossible to distinguish the disputed measure and to class it differently according as it involves rules intended to be applied in the past (it is a declaration to this effect which the applicant is endeavouring to obtain and it is certainly impossible to deny that such rules affect specific persons) involves a measure to take effect in the future. In my opinion in Case 63/69 [1970] ECR 205 at p. 217 I said that for legal purposes such a distinction would be artificial and therefore invalid, and the Court clearly adopted my view (at pp. 211 and 212).

In common with the Commission I have, accordingly, reached the conclusion that the application for annulment submitted by the applicant is inadmissible on account of the legal nature of the contested measure. There is, consequently, no need to go into the other questions which regularly arise under Article 173 and, in particular, to ascertain whether the applicant is directly and individually concerned.

To the extent that the first conclusion refers to the determination of certain legal consequences it must be remembered that, in the case of an application for annulment the Treaty provides only for the annulment of a contested act (Article 174). After the annulment the defendant institution shall, in accordance with Article 176, take the necessary measures, and in so doing it enjoys some discretion. But the Court may not, in giving judgment, indicate what form these measures should take. In any event, this part of the application must also be declared inadmissible.

2. Having demonstrated that the main conclusion is inadmissible in its entirety, I have the following comments to make on

the alternative conclusion based on Article 175 of the EEC Treaty.

As the Court will be aware, the object of this conclusion is to obtain a declaration of failure to act against the Commission because it did not take action on the request of the applicant for an addition to be made to the list of goods in Regulations Nos 1014/71 and 1272/71 (Regulation No 1272/71 is meant).

As the Court will be aware, any natural or legal person may 'complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion'. Since the real objective of the application is, as I have shown, to cause the regulations of the Commission to be supplemented, and, therefore, to amend legislative acts, this raises the question whether such applications also come within the ambit of Article 175. I must state, without further ado, that the reply to this question can only be in the negative. Of course, it can be argued that Article 175 expressly excludes only recommendations and opinions, and not regulations, but since, on the other hand, Article 173, which prohibits private parties from contesting regulations, and Article 175 constitue an integrated system and since Article 175 refers to an act *to be addressed to the applicant*, even on the basis that this last expression is not to be understood as meaning an act addressed to the applicant, the conclusion must be that Article 175 refers only to acts adopted on the basis of the legal position of an individual applicant which have special application to him as distinct from measures of *general* application. On this point, too, I refer to the views expressed in previous opinions (Case 103/63 [1964] ECR 425 at p. 433) which my former colleague, Mr Advocate-General Gand, expressly adopted ([1966] ECR 19 at p. 30).

Without going further into this question I am therefore of the opinion that the alternative conclusion is also inadmissible on account of the legal nature of the measure being sought.

3. To sum up and notwithstanding the Commission's view that the application in the main action has been settled, I am of the opinion that the conclusions contained in the application are inadmissible. It follows that the applicant must be ordered to pay the costs.