JUDGMENT OF THE COURT
OF 12 JULY 1973 [1]

Hauptzollamt Bremerhaven
v Massey-Ferguson GmbH
(preliminary ruling requested by the Bundesfinanzhof)

'Value for custom purposes'

Case 8/73

Summary

1. *Customs duties — Value for customs purposes — Regulation No 803/68 of the Council — Validity*
2. *Customs duties — Value for customs purposes — Determination — Deferred payment — Price to be taken into account — Different price for forward payment — Proof — Conditions — Jurisdiction of the national court*
   (Regulation No 803/68 of the Council 11 (2) (b))

1. The authority for Regulation No 803/68/EEC of the Council of 27 June 1968, on the value of goods for customs purposes is to be found in Article 235 of the Treaty and reveals no factor calculated to affect its validity.
2. Article 11 (2) (b) (second branch of the alternative) of Regulation No 803/68 of the Council of 27 June 1968 must be interpreted as meaning that it is inadequate, as proof of the existence of a price different from the price for forward payment, to show that the price for forward payment payable includes credit charges. What must be proved is the existence of another price of a definite amount which the buyer or other buyers in similar circumstances are entitled to settle in the event of payment before the agreed date. It is for the national court to judge in every case of this kind whether or not proof has been furnished of the existence of a different price.

In Case 8/73

Reference to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.

HAUPTZOLLAMT BREMERHAVEN supported by the Federal Minister of Finance, as intervener,

and

MASSEY-FERGUSON GMBH, of Kassel,

on the validity of Regulation No 803/68 of the Council on the valuation of goods for customs purposes and, as a secondary consideration, on the interpretation of Article 11 (2) (b) of the same Regulation,

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, H. Kutscher, C. Ó Dálaigh, M. Sørensen (Rapporteur) and A. J. Mackenzie Stuart, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact of and law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. Regulation No 803/68/EEC of the Council of 27 June 1968 (OJ L 148, 28. 6. 1968, p. 6) on the valuation of goods for customs purposes cites as its legal basis 'the Treaty establishing the European Economic Community, and in particular Article 235'.

Article 11 of this Regulation provides:

'1. The price to be taken into account in determining the value for customs purposes of goods declared for direct home use shall be the cash price payable on the date specified in Article 5 (a).

2. The following shall, however, also be taken to be cash prices:

(a) .....

(b) a price payable later than the date specified in Article 5 (a), if there is no provision for a discount for cash payment, or if proof of the existence of a different price for cash payment has not been furnished to the customs authorities.

3. .....'

Article 5 (a) provides:

'The material time for valuation for customs purposes shall be:

(a) for goods declared for direct home use, the date of acceptance by the customs authorities of the declarant's statement of his intention that the goods should enter into home use.

2. Between 3 July and 25 October 1968, Massey-Ferguson GmbH of Kassel cleared through customs at Bremerhaven-Ratersand 121 Tractors, the seller being the company's sister firm in the United Kingdom. The date for payment was fixed for the fifteenth day of the fourth month following the transactions. The customs authority collected the entry taxes on the basis of the invoice price, and refused to take account of the 3 % discount which the company had declared as for credit. Referring to Article 11 (2) (b) of Regulation No 803/68, the customs invoked in support of its refusal the fact that the company had not furnished proof of the existence of a cash price different from the invoice price and also that there was no evidence of any discount agreement. The objections of Massey-Ferguson GmbH lodged at the Hauptzollamt Bremerhaven (Principal Customs Office) were rejected and the company brought an action before the Finanzgericht of Bremen. The Finanzgericht annulled the decisions of the administrative authorities and recognized the company's right to be granted a 3 % deduction on the value for customs purposes, corresponding to the credit charges. The Finanzgericht was of the opinion that the company had proved the existence of a different price for cash payment within the meaning of Article 11 by producing a letter from the supplier confirming that the credit charges were included in the invoice price. It was not of decisive importance, according to the Finanzgericht, that these charges were not specified by the supplier in his letter, because this letter had to be considered in conjunction with the customs declaration of the importer in which it could be seen that the credit charges amounted to 3 %. The detailed administrative rules for proof being at issue in this case, Regulation No 803/68 does not require a specific method for proving the existence of a price different from that on the invoice. The Hauptzollamt Bremerhaven, supported by the intervention of the Federal Minister of Finance, appealed to the judgment of the Finanzgericht.

3. By order dated 23 January 1973, the Bundesfinanzhof decided to suspend proceedings and to ask the Court of Justice, under Article 177 of the EEC Treaty, for a preliminary ruling on the following questions:

'1. Is a sufficient authority for the validity of Regulation No 803/68/EEC of the Council of 27 June 1968 on the valuation of goods for customs purposes contained in Article 235 of the Treaty establishing the European Economic Community, on which the Regulation is based, or in another provision of the Treaty?

2. If question 1 is answered in the affirmative:

How is Article 11 (2) (b), second alternative, of this Regulation (proof of the existence of a different price for cash payment) to be interpreted? Is it necessary that another price of a definite amount has been fixed between seller and the buyer, or other buyers, for cash payment, or is it sufficient that the price for forward payment includes a charge for credit?'

In the grounds of its order, the Bundesfinanzhof states that the Court of Justice in its Judgment 27/10 December 1970 (Rec. 1970, p. 1035) has already given an interpretation of certain provisions of Regulation No 803/68. But in its opinion, as the question of the validity of the Regulation did not arise in that case, it is necessary to ask the Court of Justice to settle this question,

especially considering the doubts of legal writers on this matter.

In addition, the arguments of the parties on the second question are summarized by the Bundesfinanzhof in the grounds of its order as follows:

'The Finanzgericht and the plaintiff company consider it sufficient in this respect that the existing documents allow one to conclude in favour of the existence of a price for cash payment which, because of short term credit, is increased to the level of the invoice price. Moreover, the plaintiff considers that if this interpretation were not accepted, it would result in a rule of law misconceived as to its merits, on the ground that, by reason of the credit charges which it includes, the price for forward payment is always greater than the price for cash payment and consequently it is impossible to maintain the fiction that this price for forward payment is deemed to constitute the cash price. In this respect, the plaintiff refers to Judgment VII 2/61 V which the Bundesfinanzhof delivered on 29 October 1963 on paras. 53 (2) and 53 (3) of the German Customs Law of 1939 (Rec. of the Decisions of the Bundesfinanzhof 76, 68; Bundessteuerblatt III 1964, 25; Bundeszollblatt 1964, 168) and in which it decided that when an invoice price appears to be a price for forward payment it must be adjusted in order to reduce it to the level of the price, even when no discount has been agreed upon.

The Hauptzollamt and the Federal Minister of Finance, who intervened in the action, allege that there can be no question of invoking the case law of the Bundesfinanzhof, on the ground that in relation to national laws the provision the interpretation of which is at issue introduced innovations, establishing rules, the necessity for which arose from the divergence in the ideas of the various Member States. In support of their arguments, the Hauptzollamt and the Minister of Finance make the following points. The simple fact that the invoice price includes credit charges for deferred payment does not of itself mean that this price differs from the cash price. It can also happen that the seller bears the financial costs resulting from the postponement of the date of payment by a reduction in his profits. The only point which has any significance in terms of the value for customs purposes is whether there actually exists a different price in the case of cash payment. Equally proof must be adduced of the amount of such cash price. There is little importance in the fact that if the vendor includes the cost of credit in calculating the price it does not alter either the date of payment or the price due under the contract of sale.'

4. The order of the Bundesfinanzhof was received at the Court Registry on 19 February 1973.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 18 April 1973 on behalf of Massey-Ferguson GmbH by H. Ditges of the bar of the Oberlandsgericht of Cologne, and on 25 April 1973 on behalf of the Council of the European Communities by H. J. Lambers, acting as agent, and on 30 April 1973 on behalf of the Commission of the European Communities by H. Matthies, acting as agent.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to proceed without any preparatory inquiry.

The oral observations of Massey-Ferguson GmbH, the Council and the Commission were made at the hearing on 5 June 1973.

The Advocate-General presented his opinion at the hearing on 27 June 1973.

II — Observations submitted before the Court

The observations submitted before the Court may be summarized as follows:

1. The first question

Massey-Ferguson GmbH points out that this question still bears today a very great importance. The uncertainty relating to the legal basis of the Regulation affects not only the economic areas concerned but, according to all the evidence, several Member States as well. The decision, on this question is also very important for the future. Regulation No 803/68 governs only a part of the questions relating to the valuation of goods for customs purposes, and is augmented by subsequent regulations. It is advisable for other regulations to be adopted in this area. In particular the legal procedure needs to be harmonized. The company states that on the other hand there is good reason to consider that Regulation No 803/68 intentionally differs somewhat from the case law of the highest courts of the Member States. It is the same for example in the case of discounts; in this field, on the Commission's proposal to the Council, a regulation was adopted which was much less favourable to business circles. In the company's opinion a regulation which because of its effects bears such an importance, must *a fortiori* be founded on an unassailable legal basis.

The company points out that before the adoption of the Regulation, the question of its foundation was the subject of much discussion. It was questioned whether it was sufficient for the Regulation to be founded on the EEC Treaty in general, and on Article 235 in particular. The company stresses that one must specify the provisions of the Treaty which serve as the legal basis for an implementing regulation and that it is not sufficient to be content with a too general formula.

It was also questioned whether Article 235 could constitute a proper basis in law. Massey-Ferguson GmbH points out in this respect that the harmonization of customs laws can and must be effected by means of regulations based on Article 113 of the EEC Treaty. By basing themselves on Article 100 and Article 235, the Community authorities have needlessly divided the efforts to unify the customs system and have deprived themselves of the power to create from the very beginning and by means of a regulation, customs legislation which is uniform throughout the EEC. The EEC Treaty involves and justifies in law an obligation to set up uniform customs legislation which would in turn make possible the harmonization and eventual unification of the customs system and cause it to develop. This opinion is in no way invalidated by the fact that Article 113 appears in the chapter headed 'Commercial Policy', because the Customs policy forms an integral part of the common commercial policy. For example, Article 113 mentions matters of customs policy and even alterations relating to tariffs. Article 235 is simply a provision which gives authority to fill in the lacunae in the Treaty. In the company's opinion, it is necessary therefore to examine first of all the need for it to be based exclusively on Article 113. But even if one presumes that the Treaty has in actual fact left a lacuna in relation to the valuation of goods for customs purposes, this lacuna cannot have been filled by means of Article 235. That Article does not create a discretionary power. It is for the Court of Justice to resolve this problem of the 'power to confer power'.

The company concludes by saying that the solution to the question is of general interest and has a wider import than the decision on the validity of Regulation No 803/68.

The *Council of the European Communities* observes that the first question must be examined in the light of each of the conditions required under Article 235 of the EEC Treaty. The first condition is the need for Community action to bring about in the actual functioning of the Common Market one of the objectives of the Community. In accordance with Article 2 of the Treaty one of those objectives is to promote a harmonious development of economic activities by establishing a Common Mar-

ket. The establishment of a Common Market means, *inter alia,* the creation of a customs union. Such a union also includes the standardization of provisions in customs legislation to the extent necessary for the creation of conditions similar to those operating in a domestic market. In this respect, the uniform determination of the value of goods for customs purposes is of very special importance. Consequently, such a uniform determination, is in the opinion of the Council one of the objectives of the Community.

As another condition required for the application of Article 235 is the failure to provide the necessary powers in other provisions of the Treaty, the Council goes on to examine Articles 27, 28, 100, 111 and 113.

Article 27, second sentence, provides that the Commission shall make all appropriate recommendations to Member States for harmonizing national customs legislation. The Council rules out the argument based on Article 95, first paragraph, of the ECSC Treaty, according to which Article 27 excludes all recourse to Article 235 because that Article can only be used to fill 'an actual lacuna in the Treaty' and because such a lacuna exists only when the Treaty fails to provide rules for a specific field. In the Council's opinion, it is obvious that the necessary powers do not exist where the Treaty fully provides for the power to enact certain rules in the field in question — in this case, recommendations under Article 27 and directives under Article 100 — but precisely not those considered as necessary to attain the objectives in view. In addition, the Council considers that Article 27 must be considered as a particular case coming within Article 155 of the Treaty which gives the Commission the general power to address recommendations to Member States. Therefore, in the Council's opinion, if one followed the above argument to its conclusion, it would result in Article 235 having practically no application whatsoever.

Article 28 provides that the Council has the power to alter or suspend the duties in the Common Customs Tariff. In the Council's opinion, the use of the word 'duties' rules out an interpretation of Article 28 by which that Article should include the power to enact provisions relating to the value for customs purposes.

Article 100 of the Treaty permits the issue of directives for the approximation of such provisions laid down by law, regulation or administration action in Member States as directly affect the establishment or functioning of the Common Market. In the case of provisions relating to the value for customs purposes, the Council considers that, in adopting rules in that connection, it could have based itself on Article 100. But in this field the Council considers that the power to issue directives provided by Article 100 is insufficient. Absolute uniformity in all Member States is in fact necessary for determining the value for customs purposes, failing which importers would be tempted to use the rules most favorable to them, thus distorting competition. Moreover, according to the Council, there is still doubt, in the case of directives, whether the uniform interpretation of national legislation could be fully ensured by preliminary rulings by the Court of Justice. The Council therefore considers that Article 100 is insufficient in this case.

The Council contends that Articles 111 and 113 cannot be taken as a legal basis for the promulgation of uniform provisions relating to the value for customs purposes, which cannot be regarded as a measure related to the common commercial policy. In the Council's opinion, it must be recognized that the contents of the measures of commercial policy are liable to change, but it is not possible to go so far as to consider all the measures on trading in goods which the Community applies at its external frontiers as depending on commercial policy. It is above all a question whether the measures are

intended to have an influence on the volume of goods in circulation and on their source. Measures which in essence have other aims cannot be classed within the common commercial policy. That applies in particular to the provisions in the Regulation on the valuation of goods for customs purposes.

As a subsidiary plea, the Council points out that — even assuming that the enactment of the provisions in question could have been considered as a measure of commercial policy — Article 111 (1), second paragraph, could not have constituted an adequate legal basis. At the time when the Council adopted Regulation No 803/68, the Community was still in the transitional period. The objective justifying recourse to the measures for the standardization of commercial policy is limited by Article 111 (1), first paragraph: such measures must bring about, by the end of the transitional period, the conditions needed for implementing a common policy in the field of external trade. In the Council's opinion, it was necessary, without waiting for the end of the transitional period, to implement a Regulation on the value for customs purposes from 1 July 1968, since it was from that date that the Common Customs Tariff was applied in its entirety. Therefore it was merely a question of preliminary measures relating to the common commercial policy applicable as from 1 January 1970.

In addition, the council points out that the Regulation in question includes an adequate statement of the reasons on which it was based and it was adopted in accordance with the procedure provided for by Article 235.

The *Commission of the European Communities* asserts that, in this case, one must take account of the fact that Regulation No 803/68 was in substitution for the rules in force in the Member States the content or application of which differed up to that time, that the Regulation was in force for almost five years and that the plea of invalidity could also be directed against the other customs regulations which are based on Article 235.

The Commission summarizes the objections made by legal writers against the use of Article 235 as a legal basis for Regulation No 803/68 as follows:

(a) This field is governed by Articles 27 and 28 of the Treaty;

(b) To the extent that those provisions do not come into play, the customs laws must be based on Article 111 (during the transitional period) and Article 113 (at the expiration of such period);

(c) The general provision of Article 100 and — to the extent that directives are inadequate and that uniform Community rules which are directly applicable are necessary — Article 235 are only operative in the event of the inapplicability of Articles 111 and 113.

In regard to Articles 27 and 28, the Commission holds the same opinion as the Council.

In regard to the second objection, the Commission considers that the question whether one is dealing with a commercial measure must be determined not in terms of the measure's objective but in terms of its subject matter, namely precise rules for the external trade of the Community. As the Common Customs Tariff has as its object the establishment of such rules, one can maintain that rules on the 'basis of taxation' which specify the actual amount of the customs duty also form part of the implementation of the common commercial policy and, in the absence of any special provisions, can therefore be based on Article 113.

The main objection against the use of Article 113 as a legal basis is that it only refers to measures which have an influence on commercial relations with third countries. But the provisions relating to the value for customs purposes are neutral in this regard and do not constitute an instrument of

commercial policy. For reasons of legal certainty the Commission therefore preferred not to base on Article 111 its proposed Community Regulation on the value for customs purposes.

With regard to the third objection, the Commission points out that Article 100 has in reality served as a basis for a certain number of directives in the customs field. The experience gained within the framework of the Convention on the valuation of goods for customs purposes signed in Brussels on 15 December 1950, has proved that in the field of legislation on the value for customs purposes a mere harmonization is inadequate to ensure uniform application. It is generally accepted that a regulation is the required Community legislation in this field.

The Commission consequently proposed that the basis for the Regulation be Article 235 which requires consultation with the Assembly and a unanimous decision by the council.

In the existing state of integration and of the common commercial policy, the Commission does not deny that Article 113 can constitute an adequate basis for uniform Community legislation on customs matters. The Commission is of the opinion however that this possibility cannot affect the validity of the Regulation adopted in 1968, against the substance of which no plea of nullity has been raised.

2. The second question

Massey-Ferguson GmbH asserts that Article 11 of Regulation No 803/68 is a regrettable provision. For example, an error both in fact and in logic was made in subsection 2 (b). A price reduction is only allowed in principle when a discount has been granted; the price for forward payment without discount is not considered. Logically this position is untenable, as a price for forward payment without discount is no less a price for forward payment than one which includes a discount. This faulty logic can be overcome by specifying that proof of the existence of a different price for cash payment has to be furnished to the customs authorities. As experience has already shown sub-paragraph 2 (b) is difficult to understand.

In the company's opinion, the errors in Article 11 which it has brought to light and especially the refusal to take account of the price for forward payment properly so called shows that independently of the question of interpretation, the very existence of a price for forward payment implies that such price includes credit charges. The Administration always begins with the idea that the seller is not making a gift, but it must also interpret this principle as meaning that there is a presumption that the seller will include in the price for forward payment the interest charges under the heading of credit.

Massey-Ferguson GmbH considers therefore that proof of the existence of credit charges must be considered as being supplied in the presence of a duly established price for forward payment. And even if one did not hold this opinion, there is good reason for not making this proof subject to conditions which are too severe. The Federal Minister of Finance forgets the fundamentals of the problem by requiring reference (on the invoice) for a different cash price. In the company's opinion this requirement indirectly brings one back to the idea of discount. The seller who allows a lower cash price could just as easily grant a discount. Nevertheless, by not doing so his behaviour is still completely in accordance with usage. The company wonders why the seller, under the pretext that he consents to forward payment, must forgo the credit charges when he does not grant a lower cash price. The company asserts that assuming that the argument of the Hauptzollamt is well-founded then Article 11 (2) (b) would be of no effect since there would always be a discount

(the difference between the price for cash payment and the price for forward payment).

Moreover, assuming that the argument of the Hauptzollamt and the Federal Minister is well-founded, the seller would be bound to produce his books of account in order to put the buyer in a position to prove:

(a) that the price is higher because of the interest charges under the heading of forward payment,

(b) that to the extent of such amount the interest owing under the heading of forward payment has been passed on.

In the company's opinion there is no basis for such a requirement.

In the same way, the opinion of the tax authorities that he who allows forward payment can equally well grant a discount, is wrong because such forward payment means the waiver of an undefined interest whereas a discount can be completely different. That explains why numerous sellers agree to forward payment without making any deduction in terms of discount. That is precisely the usage in the sector of agricultural machinery.

The company considers that the inclusion of the credit charges in the price presupposes the existence of a cash price to which these charges are added. The amount of the cash price is not known by the buyer which situation, moreover, is not envisaged by Article 11 (2) (b). Thus, in this case, account was taken of the strict meaning of Article 11 (2) (b).

The *Commission of the European Communities* points out that the question whether and in what circumstances the 'prices for forward payment' by means of the time limit allowed must be adjusted to determine the normal price for the value for customs purposes has continued to raise difficulties. In those states which were signatories to the Brussels Convention on the valuation of goods for customs purposes of 15 December 1950, such valuation was certainly governed by the said Convention before the entry into force of Regulation No 803/68, but, in practice, that did not lead to a uniform application in all respects due to the powers of alteration offered by Article IV of the Convention as well as the unequal application of optional provisions which were not accepted by all the Member States. In Germany, the Bundesfinanzhof came to the conclusion in its case law on the recognition of prices for forward payment that the invoice prices had to be reduced in many instances by a very small amount.

The Commission asserts that the questions which dominated the drawing up of Regulation No 803/68 were that of the practicability of the rules and the concern for limiting adjustments to a minimum.

In relation to the practice followed up to that time in Germany for 'prices for forward payment', these rules contain important alterations. And so it is no longer possible to invoke in this matter the earlier case law of the Bundesfinanzhof.

Article 11 (1) of Regulation No 803/68 provides that the price to be taken into account in determining the value of goods for customs purposes shall be the cash price payable on the date specified. As, in practice, the invoice price is only to be paid in very rare cases at the precise time specified in Article 5 (a), simple and practicable rules must clarify the concept 'cash price' appearing in the legislation on the value for customs purposes in comparison with current usage and must define it so as to exclude even minute adjustments of payments in advance and prices for forward payments.

The Commission points out that the rule, that the price thought of as the 'cash price' is the price payable after the date specified in Article 5 (a), is one which aims at avoiding any price adjustment — by commercial usage it applies to the cash price — because the

seller has granted a time-limit for the payment but was not prepared to grant a refund for immediate payment. The seller can accept for the most varying reasons a postponement of the date of payment without on the other hand being obliged to grant a refund (discount) in the case of immediate payment. In that case there is no lower cash price within the meaning of the legislation on the value for customs purposes even if in commercial terms this price is called a 'price for forward payment'.

To this rule there are only well defined exceptions expressly provided for in Regulation No 803/68.

One of these exceptions concerns the case where 'there exists a different price for cash payment'. It is this exception which is at issue in the present case.

In the Commission's opinion, it can be seen from the spirit of the rules that there is only a different price for cash payment where, because he pays immediately the buyer has only to hand over an amount less than that specified and this applies even where a discount has not in fact been agreed upon. The object of the second exception is to cover cases similar to those where a discount was agreed upon. The cases particularly in view are those where no discount is provided for certain buyers because the seller knows that they will use the full period for payment whereas for similar transactions and for other buyers a discount is expressly provided.

If the required proof was supplied, then the existence of a price for cash payment would be established and such price would fix the value for customs purposes. The proof must — by reason of the absence of any stipulated discount — satisfy strict requirements so as to exclude the authorization of a certificate of compliance.

The proof consists in the fact:

— that the general scales in force provide in similar transactions a discount for cash payment;

— that a discount for cash payment is granted at the same time to other buyers.

On the other hand, the seller's declaration according to which the credit charges are contained in the invoice price is inadequate. The only thing which matters is whether, during the period under consideration, the seller has not only habitually granted a time-limit for payment in transactions of this type but especially whether he has granted a discount in the case of cash payment.

The Commission proposes to reply to the second question as follows:

'Article 11 (2) (b) (i.e. the second branch of the alternative) of Regulation No 803/68 of the Council of 27 June 1968 — on the proof of the existence of a different price for cash payment — is to be interpreted as meaning that there must exist a different specified price which the buyer is entitled to discharge by paying cash. In the other hand it is inadequate to furnish proof that the seller is to bear the credit charges because he granted a time-limit for payment or because the price includes the credit charges.

At the *hearing, Massey-Ferguson's* lawyer explained, in reply to a question put by a Member of the Court, that the buyer cannot be acquainted with the credit charges in every case, but that a decree of the Federal Minister of Finance had fixed the permitted discount at 1 % per month, with a maximum of 3 %.

The *Commission's* representative added that this decree, dated 1964, had been made following the judgment of the Bundesfinanzhof of 26 October 1963 according to which the price for forward payment should be adjusted to take account of credit charges. This decree is no longer applicable since the entry into force of Regulation No 803/68.

Grounds of judgment

1 By an order dated 23 January 1973, received at the Court Registry on the following 19 February, the Bundesfinanzhof referred, under Article 177 of the EEC Treaty, two preliminary questions on the validity and the interpretation of Regulation No 803/68 EEC of the Council of 27 June 1968 (OJ L 148, p. 6) on the valuation of goods for customs purposes.

The first question

2 By the first question it is asked whether the necessary authority for the validity of the Regulation is to be found in Article 235 of the Treaty, on which it is based, or in any other provision of theTreaty.

3 The first recital in the Preamble to the Regulation declares that it is adopted by virtue of 'the Treaty establishing the European Economic Community, and in particular Article 235 thereof'.

Thus it is proper to examine first of all whether this Article constitutes a sufficient legal basis.

Article 235 authorizes the Council to take the appropriate measures if action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community and if the Treaty has not provided the necessary powers.

The establishment of a customs union between the Member States is one of the objectives of the Community under Article 3 (a) and (b) of the Treaty.

The functioning of a customs union requires of necessity the uniform determination of the valuation for customs purposes of goods imported from third countries so that the level of protection effected by the Common Customs Tariff is the same throughout the whole Community.

Such a uniform determination does not follow to the extent necessary from the fact that the Member States are all adherents of the Brussels Convention on the valuation of goods for customs purposes signed on 15 December 1950. This is because the provisions of this convention have to give the signatory States the power to amend certain specific matters.

As the procedure prescribed by Article 100 for the approximation of legislation by means of directives does not provide a really adequate solution, one must examine if the provisions on the implementation of the customs union and the common commercial policy could have possibly furnished the Council with an adequate basis for action.

4 If it is true that the proper functioning of the customs union justifies a wide interpretation of Articles 9, 27, 28, 111 and 113 of the Treaty and of the powers which these provisions confer on the institutions to allow them thoroughly to control external trade by measures taken both independently and by agreement, there is no reason why the Council could not legitimately consider that recourse to the procedure of Article 235 was justified in the interest of legal certainty. This is the more so as the Regulation in question was adopted during the transitional period.

By reason of the specific requirements of Article 235 this course of action cannot be criticized since, under the circumstances, the rules of the Treaty on the forming of the Council's decisions or on the division of powers between the institutions are not to be disregarded.

5 No one has disputed the fact that on the adoption of Regulation No 803/68 the procedure prescribed by Article 235 was carried out in the proper manner.

6 Consequently, as the authority for this Regulation is to be found in Article 235 of the Treaty, examination of the question raised has exposed no factor which is capable of affecting its validity.

The second question

7 In the second question on the interpretation of Article 11 (2) (b) (second branch of the alternative) of Regulation No 803/68, it is asked whether it is necessary 'that another price of a definite amount has been fixed between the seller and the buyer, or other buyers, for cash payment' or whether it is sufficient if the price for forward payment includes a charge for credit.

8 It follows from the provision in dispute that the price to take into account in determining the value for customs purposes in the case of deferred payment is the price for forward payment, unless a discount for cash payment was provided or the existence of a different price for cash payment was proved at the customs department.

9 To interpret this last provision, one must take account of its aim which is to establish the value of goods, expressed as a specific sum which can be taken as the basis for calculating the customs duty to be imposed on the goods.

It follows that the different price, the existence of which could be proved if necessary, is to be expressed in figures.

That is not only because the price for forward payment includes credit charges and because of the absence of any power on the part of the buyer or other buyers in similar circumstances to carry out their obligations under the contract by paying before the stipulated time a specific price lower than the price for forward payment.

10 It is for the national court to judge in every case of this kind, whether or not proof has been furnished of the existence of a different price within the meaning indicated above.

11 As regards this question one must reply that it is inadequate as proof of the existence of a price different from the price for forward payment to show that the price for forward payment payable includes credit charges. What must be proved is the existence of another price of a definite amount for which the buyer or other buyers in similar circumstances are entitled to settle in the event of payment before the agreed date.

Costs

12 The costs incurred by the Council and the Commission of the European Communities which have submitted observations to the Court are not recoverable.

As these proceedings are, insofar as the parties to the main action are concerned, in the nature of a step in the action pending before the Bundesfinanzhof, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the submissions of Massey-Ferguson GmbH, the Council and the Commission of the European Communities;

Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 3, 9, 27, 28, 100, 113, 177 and 235;
Having regard to Regulation No 803/68 EEC of the Council of 27 June 1968 on the valuation of goods for customs purposes, especially Article 11;
Having regard to the Protocol on the Statute of the Court of Justice of the European Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Bundesfinanzhof by order dated 23 January 1973, hereby rules:

1. **The basis of authorization for Regulation No 803/68/EEC of the Council of 27 June 1968 on the valuation of goods for customs purposes is to be found in Article 235 of the Treaty, and the examination of the question raised has revealed no factor capable of affecting its validity.**

2. **Article 11 (2) (b) (second branch of the alternative) of the said Regulation must be interpreted as meaning that it is inadequate, as proof of the existence of a price different from the price for forward payment, to show that the price for forward payment payable includes credit charges. What must be proved is the existence of another price of a definite amount which the buyer or other buyers in similar circumstances are entitled to settle in the event of payment before the agreed date.**

Lecourt	Monaco	Pescatore
Donner	Mertens de Wilmars	Kutscher
Ó Dálaigh	Sørensen	Mackenzie Stuart

Delivered in open court in Luxembourg on 12 July 1973.

A. Van Houtte
Registrar

R. Lecourt
President