OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 6 MARCH 1979 [1]

Mr President,
Members of the Court,

As you know there was a world-wide surplus on the beef and veal market after 1974 which led to a collapse of crisis proportions in market prices and thus put in jeopardy the aims of Regulation (EEC) No 805/68 of the Council of 27 June 1978 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187). The Commission therefore had recourse to protective measures in foreign trade and began suspending the issue of import licences and advance-fixing certificates for beef and veal products. After a tendency towards stabilization of the market became evident the Commission felt it had to allow some restoration of the flow of trade and this it did by Regulation (EEC) No 1090/75 of 23 April 1975 on the issue by way of protective measures of import licences for certain beef and veal products (EXIM) (Official Journal L 108 of 26 April 1975, p. 1). This regulation provided for quantitative control in such a way that import licences were issued only for those quantities which the importer had previously taken off the internal market by way of export.

This so-called EXIM procedure was at the same time intended as an alternative to the more usual cash refunds on export. Anyone exporting without a refund could apply for a licence to import an equivalent quantity of meat and the waiver of the claim to the refund was in addition financially compensated for by a reduction in the levies on import which, in view of the poor state of the market, were too high.

Import licences were issued monthly under Regulation No 1090/75 in a sort of tendering procedure which was formulated as follows: under Article 3 (1) (b) and Article 4 (1) applications for import licences had to be submitted at the beginning of each month, the applicants offering the rate of levy which they were prepared to pay. Under Article 3 (2) only those applications were accepted which related to a quantity of at least 10 tonnes and for which proof of export without refund was given by an accompanying certificate of the agency responsible for paying refunds. The Commission compared the offers with the market information available to it and under Article 4 (3) determined a minimum rate of levy in units of account per 100 kg of beef or veal in carcase. In accordance with Article 4 (4) the Member States then issued licences to those applicants who had offered at least the minimum rate fixed by the Commission. All applications showing a lower rate of levy were rejected whilst the applicants who had offered a higher rate of levy than the minimum rate fixed were bound to that higher rate.

1 — Translated from the German.

Finally the Commission could decide under Article 4 (4) not to accept applications for licences or to issue them only in respect of a percentage of the quantity applied for.

In so far as import licences applied for were not issued, the applicant could renew his application later or elect to take the usual cash refund in accordance with Article 6 (2).

After it became apparent at the end of 1975 that the tendency towards stabilization of the market in beef and veal was continuing the Commission replaced the EXIM procedure set up by Regulation No 1090/75 as already outlined with Regulation (EEC) No 76/76 of 16 January 1976 setting up a system linking imports of beef and veal products effected by way of protective measures with the sale of beef held by intervention agencies (Official Journal L 10 of 17 January 1976, p. 21). Under this so-called linked-sales system all those applicants received an import licence who had previously bought an equivalent quantity of intervention meat, without regard to export.

Under Article 2 of Regulation No 3170/75 (Official Journal L 314 of 4 December 1975, p. 13) applications for import licences could be lodged under the EXIM procedure up to 15 December 1975. By Decision of 19 December 1975 (Official Journal L 5 of 10 January 1976, p. 35) the Commission determined a minimum rate of levy of 42.998 units of account per 100 kg of beef or veal in carcase for applications made until then.

Article 11 of Regulation No 76/76 made transitional arrangements for operators who had effected imports without refund under the EXIM arrangements before 16 December 1975 but had received no import licence on the basis of Regulation No 1090/75. Up to 2 February 1976 they could apply for an import licence which was to be issued to them upon their undertaking to pay the rate of levy fixed in advance of 50.320 units of account per 100 kg of beef or veal in carcase.

Firma E. Danhuber, Munich, which had previously taken part in the tendering procedure under the EXIM arrangements and on its last tender had received an import licence with a rate of levy of 43 units of account per 100 kg of beef or veal, availed itself of this transitional provision and on 29 December 1975 lodged applications, confirmed in writing on 30 December 1976, with the then competent Einfuhr- und Vorratsstelle für Schlachtvieh, Fleisch und Fleischerzeugnisse (Import and Storage Agency for Fatstock, Meat and Meat Products) for the issue of import licences for beef or veal under the EXIM arrangements along with the prescribed proof for exports which it had effected before 15 December 1975.

The Einfuhr- und Vorratsstelle satisfied this application by granting two import licences for boned or boneless frozen beef or veal and two import licences for live domestic bovine animals and by fixing the levy in accordance with the transitional provisions of Article 11 of Regulation No 76/76 on the basis of the rate of levy of 50.320 units of account per 100 kg at DM 309.74 and DM 95.44 per 100 kg respectively.

After objecting unsuccessfully, Danhuber brought an action before the Hessisches Finanzgericht against the Einfuhr- und Vorratsstelle claiming that the rates of levy fixed by the defendant and its decision dismissing the objection should be annulled and that the defendant should be ordered to refix the rates of levy in the import licences, keeping to a rate of levy of 43 units of account per 100 kg of beef or veal.

The grounds of the claim of the plaintiff in the main action were that it had been unable to lodge its applications within the stipulated time in respect of the exports effected before 15 December 1975 under the EXIM arrangements because the Hauptzollamt [Principal Customs Office] Hamburg-Jonas which was responsible for the issue of a certificate for export without refund had been dilatory in following the procedure for furnishing the necessary proof. This practice was known to the Commission and led it to insert the above-mentioned transitional provisions in Regulation No 76/76. The plaintiff was therefore compelled to accept the rate of levy of 50.320 units of account laid down in that regulation for exports effected before 16 December 1975. The minimum rate of levy for applications which exporters had submitted to the intervention agencies up to 15 December 1975 with documentary proof had however been fixed at 43 units of account per 100 kg. To this extent they were put at a disadvantage through no fault of their own in relation to exporters who had received the necessary proof in time and had therefore been able to make their applications by 15 December.

The fixing of the contested rates of levy indeed fell within Article 11 of Regulation No 76/76 but that provision infringes the prohibition of discrimination in that the plaintiff is treated less favourably than applicants who had been able to make their application before 15 December. The provision in question also offends against the principle of legal certainty because the Commission misused its discretionary power in fixing the amount of the levy; on the one hand it did not have regard to the close connexion in terms of figures and finance between export and import and on the other did not take account of the fact that in the meantime the linked-sales system had started and therefore the offers by those taking part therein, which in the nature of things could be less costly had competed in the Community market with offers arising out of exports under the EXIM arrangements. After the Commission had illegally failed to adopt a provision that exporters, if they had made their applications within the stipulated time, could lodge proof of export afterwards the Commission was in the opinion of the plaintiff obliged to fix the rate of levy in the transitional arrangements at 43 units of account per 100 kg of beef or veal in carcase. On those grounds the rule in question is invalid.

The defendant in the main action on the other hand took the view that Article 11 of Regulation No 76/76 was directly applicable and which had to be applied so long as it had not been expressly repealed.

By order of 17 May 1978 the VIIth Senate of the Hessisches Finanzgericht

stayed the proceedings and referred the following question to the Court for a preliminary ruling under the second paragraph of Article 177 of the EEC Treaty:

"Is Article 11 of Commission Regulation (EEC) No 76/76 of 16 January 1976 (Official Journal 1976, L 10, p. 21) valid?"

My view on this is as follows:

I — As we have heard, the Commission adopted both the EXIM arrangements in Regulation No 1090/75 and the linked-sales system in Regulation No 76/76 — and it is in the context of these regulations that the transitional provision must be viewed — as a protective measure based on Article 21 (2) of Regulation (EEC) No 805/68 of the Council on the common organization of the market in beef and veal, because this market was liable to serious disturbances. In this connexion I need not specially emphasize that in the control of the agricultural market, especially as regards the adoption of such protective measures, a particularly wide margin of discretion is left to the Commission. According to the consistent case-law of the Court the Commission in such cases only misuses its discretion if its action is manifestly wrong and beyond the bounds of what can be considered reasonable and proper.

So the question arises whether the Commission has exceeded its margin of discretion in providing transitional arrangements which, in fixing a rate of levy of 50.320 units of account per 100 kg of beef and veal for those operators who had not yet obtained a licence under the EXIM system guaranteed that they would get one.

1. The plaintiff asserts that on the occasion of the last EXIM tendering procedure the lowest offer stood at 42.998 units of account and that this was precisely the lowest rate of levy which the Commission fixed. Accordingly all those taking part in this tendering procedure received their import licence. The plaintiff was the only undertaking unable to take part in the last tendering procedure because it had not been possible for the plaintiff through no fault of its own to lodge the export certificate within the stipulated time. The transitional measures were tailored exclusively to this case and were thus in reality a "lex Danhuber".

On the other hand, as we heard from the Commission in the oral procedure, there were in the last tendering procedure seven offers below the minimum rate of levy of 42.998 units of account fixed by the Commission and these were accordingly not accepted. In all nine firms availed themselves retrospectively of the transitional arrangements in question and six of these received no licence from the last EXIM tendering procedure because they had offered rates of levy which were too low.

Accordingly transitional arrangements, if they were to be introduced at all, had in principle to cater for a large number of cases. As the Commission knew that there was a number of firms which had exported without refund but for a variety of reasons had not obtained licences, exception could not be taken to its being concerned as to how, in the transition from one protective measure to another, it could make arrangements for terminating the EXIM procedure. There is no need to go into the question whether there was any obligation on the Commission to provide such transitional measures at all if it is borne in mind that under the EXIM procedure no firm had

any guarantee that it would obtain an import licence and could instead always claim a cash refund.

A true *restitutio in integrum* as claimed by the plaintiff could only have been effected by the Commission's carrying out the tendering procedure afresh but for it to have done this would have been contrary to the spirit and the aim of Article 2 of Regulation No 3170/75 under which applications might be lodged up to 15 December 1975 so as to wind up the EXIM arrangements. Furthermore this tendering procedure would have had to take place under the same conditions as the last one in December with the result that the undertakings which took part would have had as little certainty of their applications being considered. Therefore it was the obvious thing for the Commission to give the undertakings concerned a guarantee that they would be allotted a licence so as to being the matter to an end. Such a guarantee however required that the amount of the levy be fixed in advance and this was not compatible with the idea of a tendering procedure.

The Commission accordingly did not misuse its discretionary power in prescribing the special conditions mentioned as a transitional measure for all undertakings which for whatever reason had received no licences out of the last tendering procedure.

2. At this point we must consider whether the level at which the amount of the levy was fixed was determined on the basis of proper considerations.

The plaintiff's view on this is that the Commission misused its discretionary power as it did not test the state of the market afresh in January but instead resorted to the tendering procedure of 15 December, declaring what was then the highest offer as the rate of levy for the transitional provision. In so doing it took no account of the fact that the then highest offer was probably in respect of a trivial quantity whilst the bulk of the imports related to the offers of around 43 units of account. Similarly there was left out of account the fact that imports under the linked-sales system overlapped in point of time with those made under the EXIM procedure and had to be put on the market at higher prices. If the Commission means that on the basis of a minimum rate of levy of 50.320 units of account per 100 kg there still remained a substantial advantage as against payment of export refunds it is simply working on the basis of the normal levy which was intentionally fixed at a prohibitively high figure. Furthermore it works from the rates of levy in January which in any case were some 10 units of account higher than those of December. If however one goes on the basis of these higher rates of levy then one must apply correspondingly higher refunds for that month.

The plaintiff further points out that it made a calculated decision on both buying and selling before 15 December according to the state of the market at that time and that on the basis of its calculation worked on a rate of levy of 43 units of account. It felt confident of receiving over and above this rate of

levy. If it must now import at a higher rate of levy it is being treated less favourably than those applicants who were able to comply with the time-limit.

The position at that time on the market in beef and veal compelled the Commission, as it has reliably assured us, to undertake a quantitative control as regards imports. As we have seen both the EXIM procedure and the linked-sales system served this purpose. The Commission therefore also had to fix a rate of levy in the transitional arrangements which was appropriate to this purpose.

In so doing it proceeded on the basis that the normal levies which follow the guide price had been too high in the low price situation prevailing at the time to admit substantial imports. On the other hand recourse could not be had for the purpose of quantitative control to an arbitrary minimum amount. The amounts had rather to be so much reduced in the EXIM procedure that on the one hand the losses arising out of the giving up of cash refunds on export were compensated for and on the other hand cheap imported meat was raised in price to such an extent that it could be sold without adversely affecting the stabilization of internal prices. It was therefore obviously appropriate for the Commission in determining the rates of levy to be fixed in the transitional arrangements to take as a starting point the amounts of levy offered in December in order to ensure a figure near to that prevailing on the market.

Since the idea and purpose of the transitional provisions was the creation of a general scheme for all those who had not taken part in the last tendering procedure, the Commission was also not in my view tied to the minimum rate of levy fixed in this procedure for the month of December. Rather had it a margin of discretion within which it could have regard possibly to the changed price situation prevailing in January. That the rate of 50.320 units of account was fixed in full accord with market conditions and was not manifestly erroneous emerges from the fact that several offers in December were for a rate of levy of more than 43 units of account per 100 kg and that some for 200 tonnes were even at a rate of around 50 units of account per 100 kg. Nor was it inappropriate that the Commission took account of the fact that those operators who in the last EXIM tendering procedure had offered as high a rate of levy as possible in order to obtain an import licence in any event should not suffer discrimination as against those who were possibly going to receive a guarantee of import at a lower rate.

No evidence has emerged in the course of the proceedings to show that in the exercise of its discretion the Commission should have taken account of the fact, alleged by the plaintiff, that those taking part in the linked-sales system were able at the same time to make more favourable offers. Furthermore reference has again been made to the fact that the whole purpose of the protective measures was a quantitative control and not to give the import trade special opportunities for profit and for effecting imports. Accordingly the question whether or not the transitional arrangements concerning the payment of

export refunds afforded a substantial advantage to individual operators is not in point. Even in the case of a theoretical disadvantage there would still have remained the possibility of recourse to a cash refund.

This last-mentioned view may well provide an answer to the question whether the Commission in fixing a higher amount of levy in the transitional arrangements than in the last EXIM tendering procedure violated the principle of the protection of legitimate expectation accepted by the Court (cf. Case 1/73 [1973] 2 ECR 723 *Westzucker* v *Einfuhr- und Vorratsstelle für Zucker,* judgment of 4 July 1973; Case 78/74 [1975] 1 ECR 421 *Deuka* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* judgment of 18 March 1975; Case 78/77 [1978] ECR 169 *Johann Lührs* v *Hauptzollamt Hamburg-Jonas,* judgment of 1 February 1978). Since the transitional rules sought a general scheme for all operators who had exported beef or veal before 16 December without refund but had not made application within the stipulated time, no question of the individual position of the plaintiff can arise. The principle of the protection of legitimate expectation would have been violated only if in the fixing of the rate of levy at 50.320 units of account per 100 kg the rightful expectation of all the persons economically concerned in the retention of a lower rate had been disregarded. As the Commission rightly emphasizes however it cannot be inferred either from the wording or the system of the EXIM arrangements in Regulation No 1090/75 that an operator after effecting an export could always receive the corresponding import licence by the next following time-limit and had to pay only the minimim levy prevailing for that period of allotment. Under those arrangements the exporter rather had no certainty at all of receiving an import licence and definitely not if he offered only the minimum amount fixed for the previous allotment because market conditions could change. If he wanted to be absolutely certain of receiving a licence he had to offer as high a rate of levy as possible which had to be paid even if the minimum rate of levy was fixed at a lower figure. However if anyone applying within the time-limit for a particular allotment had no guarantee of receiving a licence at all on the basis of the levy offered by him at the previous minimum rate, then anyone who like the plaintiff failed for whatever reason to apply within a particular time-limit could not have one either.

3. To summarize then, I come to the conclusion that the validity of the transitional arrangements in Article 11 of Regulation No 76/76 cannot be called in question either from the angle of the prohibition of discrimination or from that of the protection of legitimate expectation or misuse of discretion.

II — The plaintiff also raises the question of lack of a statement of reasons. It would certainly have made for legal clarity if the Commission in the recitals to Regulation No 76/76 had distinctly indicated how it arrived at the rate of levy of 50.320 units of account per 100 kg of beef or veal in the transitional arrangements. The requirement prescribed by Article 190 of the EEC Treaty that a statement of reasons shall be given is however a procedural one which only demands that the statement of reasons must make clear the essential factual and legal considerations.

So according to the case-law of the Court the statement of reasons for a regulation may be confined to indicating "the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to attain on the other". Consequently it is not possible to require that the regulation "should set out the various facts, which are often very numerous and complex, on the basis of which the regulation was adopted, or *a fortiori* that it should provide a more or less complete evaluation of those facts" (cf. Case 5/67 [1968] ECR 83 *W. Beus* v *Hauptzollamt München,* judgment of 13 March 1968; Case 80/72 [1973] 1 ECR 635 Koninklijke Lassiefabrieken, judgment of 20 June 1973). On the basis of these criteria I came to the conclusion that the transitional provision at issue is not invalid for infringement of the procedural requirement that a statement of reasons shall be given.

III — I accordingly propose that the question referred to the Court by the Hessisches Finanzgericht should be answered as follows:

Consideration of the question has disclosed no factors of such a kind as to affect the validity of Article 11 of Commission Regulation (EEC) No 76/76 (Official Journal 1976, L 10, p. 21).