

On those grounds,

THE COURT

in answer to the questions referred to it by the Finanzgericht Berlin by order of that court dated 4 June 1975, hereby rules:

Examination of the questions referred has revealed nothing capable of affecting the validity of the compensatory amount in question.

Lecourt	Monaco	Kutscher	
Donner	Mertens de Wilmars	Sørensen	Mackenzie Stuart

Delivered in open court in Luxembourg on 22 January 1976.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL
DELIVERED ON 17 DECEMBER 1975¹

*Mr President,
Members of the Court,*

Balkan-Import Export, which has a registered office in Berlin, regularly imports from Bulgaria into the Federal Republic of Germany cheese of sheep's milk on the basis of a long-term contract made with the Bulgarian national trade department 'Rodopa-Impex' for which

the price is agreed in German marks. In accordance with Community rules which were to be examined, from various points of view, in cases before the Court for a preliminary ruling the sum of DM 9 244-62 was charged by way of a monetary compensatory payment at the frontier on a consignment which was cleared into free circulation on 25 April 1974.

¹ — Translated from the German.

Balkan-Import Export does not regard this as permissible and it therefore brought an action before the Finanzgericht Berlin.

In support of its contention, which I will later examine in greater detail, it argues that the products concerned here produce no risk of disturbance within the meaning of Regulation No 974/71 (OJ, English Special Edition 1971 (I), p. 257) since cheese of sheep's milk is not a product in competition with cow's milk cheese for which the protection of the monetary compensation rules in the cheese sector was primarily intended. Moreover it must be taken into consideration that the production of cheese of sheep's milk is vary labour-and-wage intensive and that its price has for some time risen to such a level that the revaluation effect may be regarded as superseded. However, if in view of the incidence of currency measures compensation is sought, this is contradictory to the purpose of the compensatory rules which is to spread over a period of time the effects of a sudden change in currency rates.

The defendant Principal Customs Office contests this with the argument that there is competition between cheese of sheep's milk and other types of cheese and that it is therefore not impossible that the level of prices of products which are subject to intervention measures may be endangered by the importation of cheese of sheep's milk. Further, the Principal Customs Office refers to judgments of the Court of Justice delivered in respect of the time before 1 July 1970, in particular that in Case 5/73 (*Balkan-Import Export GmbH v Hauptzollamt Berlin-Packhof* [1973] II ECR 1091). According to that judgment it is above all essential that for reasons of practicability the compensatory rules could only have been formulated in an abstract and general manner and that they therefore had to be based on groups of products. It was thus clear that examination of the risk of disturbance

could not be required for each individual product.

In this case the national court was evidently impressed by the plaintiff's submission. It regards the doubts as to the validity of the monetary compensatory amounts fixed by the Commission as well founded, particularly so as regards imported cheese of sheep's milk because, since May 1973, certain varieties of cheese which are of greater importance on the market than cheese of sheep's milk have been exempted from monetary compensation.

Therefore by an order of 4 June 1975 the Finanzgericht Berlin stayed the proceedings and referred the following questions for a preliminary ruling in accordance with Article 177 of the EEC Treaty:

1. Was it still compatible with Community law on 25 April 1974 to levy a monetary compensatory charge under Regulation (EEC) No 974/71 of the Council in the version in force on 25 April 1975 (*sic*) when cheese of sheep's milk which comes under heading 04.04 E I b 4 of the Common Customs Tariff was imported from third countries, especially in view of the exemptions under Regulation (EEC) No 1265/73 of the Commission of 14 May 1973 for imports of other types of cheese from payment of a monetary compensatory amount? If question 1 is answered in the affirmative:
2. Is the monetary compensatory charge of DM 63.80 per 100 kg levied on 25 April 1974 on imports of cheese of sheep's milk from third countries justified? In particular how can this rate of charge be justified arithmetically?

Before answering these questions I should first like to make some preliminary observations which, so to speak, serve to delineate the matters at issue.

In the proceedings before the Court the imposition of monetary compensatory amounts on the importation of cheese of sheep's milk in April 1974 was contested by the plaintiff in the main action with a series of arguments which I did not set out in full above. May I say immediately that, in my opinion, it is not necessary to examine all these reasons in the present proceedings.

Two considerations are decisive in this respect.

In proceedings such as this where the validity of Community measures are at issue, the subject-matter and the limits of the examination are determined by the court making the order for reference. The parties to the main action do not have any right of initiative and are not able to make any substantial alteration or addition to the formulation of the questions. This has been emphasized repeatedly in the decided cases. However, if one considers the order for reference made by the Finanzgericht Berlin in this light it is immediately evident that the crux of the considerations of the Finanzgericht is the fact that since May 1973 certain Italian types of cheese and the better varieties of Swiss cheeses have been exempted from monetary compensatory amounts. It is largely in view of this fact that the Finanzgericht asks whether the imposition of monetary compensatory amounts on Bulgarian cheese of sheep's milk is still admissible.

On the other hand it is relevant that the same plaintiff has already criticized the system of monetary compensatory amounts in Case 5/73. In so far as the Court of Justice discovered no foundation for this criticism at the time there is, in principle, no ground for re-examining it, in particular as there are no fresh arguments or facts.

For those reasons I did not think it necessary to examine a number of questions in the present context.

All that may be regarded as criticism of the principles of monetary compensation as laid down in the basic Council regulation may be ignored for the validity of the system in itself was not put in question by the court making the reference. We need therefore not concern ourselves with the plaintiff's submissions, in part with reference to decided cases, with regard to the temporary nature of the system and its justification solely on exceptional grounds and its alleged purpose merely of ensuring swift adaptation to sudden fluctuations in currency rates. Of equally little concern is what the plaintiff has said as regards the purpose of the rules — to moderate the effects of monetary measures — and as regards the necessity to provide for a gradual abolition in connexion with which it has in mind periods which do not exceed six months. It should, however, be noted in this respect that the impression may arise that the original nature of the system of monetary compensatory amounts has altered on account of continuing difficulties in the sphere of currencies, since in the meantime the rules have become firmly embedded in the context of the common agricultural policy. Moreover, it must not be forgotten — and this applies to the observation of the plaintiff that all is now quiet on the currency front — that fluctuations still occur in the relationship of the so-called 'snake currencies' with other currencies and that in this respect monetary compensatory amounts fluctuate considerably.

Similarly there is no need to go any further into the fact raised by the plaintiff that the import contracts in question were concluded in German marks or into the need it emphasized to take into consideration that the effects or the revaluation of the German mark were less significant as third countries had also revalued and that in countries which had revalued favourable effects for agriculture resulted from the reduction in the price of means of production. The Court of Justice had in fact to deal with similar

arguments in Case 5/73. In the judgment it was emphasized on the one hand that the individual characteristics of particular import transactions could not be considered and reference could not be made to individual products, but on practical grounds a flat-rate basis for the compensatory rules was unavoidable ([1973] ECR (II) 1111). Furthermore it was not contended — for example with regard to Article 39 (1) (e) and Article 110 of the EEC Treaty — that because favourable effects of the currency measures are left out of account an increase in the monetary compensation might result. In this respect I refer to passages in the judgment on page 1112 of the 1973 volume of Reports of Cases before the Court and to statements in the Advocate-General's opinion on page 1127 of the same volume. I need say no more about these points.

1. If we now return to the individual questions then, within the context of the *first question*, it must be examined whether the imposition of monetary compensatory amounts on imports of cheese of sheep's milk from third countries in April 1974 was still compatible with Community law, and in particular — and this, as I have said, is the crux of the matter — in view of the exemption of other varieties of cheese which occurred in May 1973.

In this connexion the plaintiff in the main action relies particularly on Article 1 (2) of Regulation No 974/71 (as amended by Article 1 (3) of Regulation No 2476/72) according to which monetary compensation is only payable when currency measures would lead to disturbances in trade in agricultural products. It takes the view that since this provision constitutes an exceptional rule, it must be strictly interpreted. The existence of concrete evidence of disturbance of trade is indispensable; the market and the individual products must be carefully observed and the monetary compensation must be dispensed with as soon as the required preconditions cease

to exist. In the case of cheese of sheep's milk from Bulgaria this was particularly necessary, *inter alia* because of the considerable rise in the offer prices.

It must first of all be stated with regard to this argument that the plaintiff is applying the wrong criteria in interpreting this provision. This may be said in view of two facts which may be drawn from previous decided cases. It is clear from this case-law that in examining whether currency measures may lead to disturbances of trade, the Commission has a *large* area of discretion (Case 74/74, *CNTA v Commission* [1975] ECR 533, at p. 547). It was also made clear that the compensatory system is rightly of a flat rate nature; in this respect reference was made to the requirements of practicability and from this it was inferred that the Commission need only consider disturbances in relation to groups of products and therefore not with regard to individual products (Case 5/73, *Balkan-Import Export v Hauptzollamt Berlin Packhoff* [1973] ECR (II) 1091, at pp. 1111 and 1116). In view of this, it appears more suitable to accept the interpretation recommended by the Commission, that is to say, to recognize the principle that the monetary compensation in itself encompasses all products to which intervention prices apply or whose prices are dependent on intervention prices and to speak of a presumption of content that the monetary measures concerned could lead to disturbances in this sector. In any event it cannot be said that the Commission is under an obligation continually to follow the market development of each individual product and to provide for an exemption as soon as the risk of disturbance disappears.

On the basis of this 'moderated' interpretation it can hardly be said with regard to the imposition of compensatory amounts on Bulgarian cheese of sheep's milk that the Commission, in accepting that there was a danger of disturbance,

was patently wrong in its judgment. A finding made in Case 5/73 is here relevant, namely that cheese of sheep's milk is also produced in the Community, namely in France and in Italy, and that cheese of sheep's milk competes with a number of varieties of soft cheese produced in the Community. In addition the market for cheese in the Community is already in difficulties because if import restrictions imposed in various third countries and it therefore shows a particular tendency to disturbance. This is not contradicted by the fact that the offer prices for cheese from third countries have risen, since the level of prices for cheese has risen generally in the last few years; as the Commission has shown us, the threshold price has risen by approximately the same amount as the lowest price for Balkan cheese.

Accordingly although there can be no objection to the assumption of the existence of a basic risk of disturbance and it cannot be alleged that the Commission wrongly exercised its discretion, it remains to be examined, and this is the crux of the matter, whether the treatment of other goods as regards monetary compensation, leads to the conclusion that the same must apply to Bulgarian cheese of sheep's milk on the grounds of equality of treatment.

Here I shall not confine myself to the reference made by the plaintiff to the recent exemption of certain processed products granted because of higher production costs and the argument that cheese of sheep's milk should be given similar treatment because its production is also very labour-and-wage intensive. This last point of view is certainly not new; it was considered in Case 5/73. Moreover the impression may be given that the plaintiff has not really shown that the products with which it is concerned are in the same position as the processed products to which it has referred.

We should rather concentrate on the treatment of various varieties of cheese

within the context of the monetary compensation scheme at the frontier. It must here be asked what importance is to be attributed to the fact that certain varieties of Italian cheese and some varieties of Swiss cheese were exempted from compensation at the beginning of 1973 and we must consider whether it in fact follows from this that Bulgarian cheese of sheep's milk should also be exempted.

With regard, first, to Italian varieties of cheese, there can, in my opinion, be no different conclusion on this point from the one given in the opinion in Case 5/73. If one omits from consideration this point of view with regard to the plaintiff's argument relating to price trends, the decisive factor is merely that the Italian varieties of cheese concerned have a quite special intended use and that they are not in the same competitive relationship with the ordinary varieties of cheese within the Community as cheese of sheep's milk and do not therefore produce the same risk of disturbance. Moreover, contrary to the view of the plaintiff in this respect, the concept of Community preference, to which Mr Advocate-general Roemer referred, is also relevant in this connexion, that is to say, in the context of rules which serve to protect the agricultural markets.

It is not quite so easy to come to a conclusion with regard to the exemption of Swiss cheese, in particular if it is correct that the offer prices for Bulgarian cheese of sheep's milk is close to or even above the prices of Swiss cheese. It would not be unjustified to ask why principles should apply with respect to the risk of disturbance in the case of cheese of sheep's milk which differ from those which apply in the case of Swiss cheese.

The Commission gave a number of explanations of which I will at first mention only the following.

It points out that in a system with flat-rate rules it is not possible to refer

only to the price level of Bulgarian cheese of sheep's milk. It is also relevant that the prices for Hungarian and Rumanian cheese of sheep's milk were, precisely from 1974 onwards, substantially below the Bulgarian level of prices, a fact which might, moreover, justify doubts as to whether the customs values for Bulgarian cheese reflected genuine trade prices.

The Commission further argues, with regard to the exemptions referred to by the plaintiff, that there does not exist a constant practice which enables individual variations, such as those which operate to the detriment of Bulgarian cheese of sheep's milk, to be described as discriminatory. In the submission of the Commission, Swiss cheese constitutes a borderline case. It is not possible to rule out any risk of disturbance, but doubts in this respect could be set aside for considerations of trade policy in order to avoid difficulties in trade policy since, as is known, Switzerland raised the issue of the unlawful exceeding of maximum rates consolidated in GATT. Such considerations cannot, according to the Commission, be regarded as irrelevant in a sector which is concerned with safeguarding the organizations of the market since these organizations of the market themselves certainly admit considerations of trade policy to be taken into account. However they certainly do not have to be applied in the same way in respect of State trade countries with which the Community has no treaty relations.

The Commission further points out that there cannot be said to exist competition between Swiss cheese and Bulgarian cheese of sheep's milk and for that reason the retention of compensation at the border in respect of cheese of sheep's milk cannot constitute discrimination directed against that cheese.

Finally, in the view of the Commission, it is also important that under the customs tariff higher free-at-frontier

values apply to Swiss cheese than to cheese of sheep's milk and that it may therefore be assumed that there is less risk of disturbance in the case of Swiss cheese.

In my opinion these considerations may, if I may express myself in general terms, certainly not be dismissed as wholly irrelevant in the present case. Moreover, in respect of the lastmentioned point, the plaintiff's objection that the free-at-frontier values for Bulgarian cheese of sheep's milk no longer accorded with economic reality since the offer prices reached a much higher level, is not conclusive. However it is significant, apart from what I have already said with regard to the import prices of cheese of sheep's milk from other countries, that until August 1975 there was apparently no tendency on the Bulgarian side towards increasing the prices relevant to the Community rules, which can only be construed as a recognition of the fundamental justification of those rules.

We need not here decide whether these explanations alone suffice to justify the point of view of the Commission since in addition there is the following significant consideration which relates to the special import rules which also apply to Bulgarian cheese of sheep's milk. In this respect Article 16 of Regulation No 1463/73 (OJ 1973, L 146) is important. Under that provision the free-at-frontier prices applicable for the Community are deemed to be maintained if the actual offer price, increased by the amount which in general corresponds to the monetary compensatory amount — I am here restricting myself to imports into countries whose currency has appreciated — is not lower than the free-at-frontier value. The lowest price can therefore be undercut to the extent of the compensatory amount without the higher levy provided for this eventuality being applied. As the Commission convincingly showed us by means of calculations, this means that in the long

run the importer is placed in the same position as if the monetary compensatory amount was not imposed. With reference to this regulation it may thus be said that there is no discrimination against importers of Bulgarian cheese of sheep's milk in the context of the compensatory rules.

For the sake of completeness it must also be said that the validity of this finding is also not disturbed by two conceivable objections which were actually raised in the proceedings.

The first relates to the fact that the effects mentioned only occur when the offer prices are not substantially higher than the lowest prices relevant for the import rules, which, however, was the case according to the plaintiff. On this point it should be said that it is for the exporting country concerned to achieve the necessary accord. The Commission stated, without being contradicted, that such applications are granted by the Community if they appear to be well founded. If they are not made or are insufficient — according to the Commission the lowest price was increased on several occasions between 1971 and 1974 in agreement with the Bulgarian Government — then it cannot be held against the Commission that the import rules have not had the abovementioned effects and for those reasons it cannot be concluded that the monetary compensatory system is unlawful.

The other objection is based on a question which at first sight appears justified; why is not the monetary compensation merely dispensed with in respect of such countries? In my opinion the Commission gave a satisfactory explanation in respect of this question as well. On the one hand monetary compensation only becomes actually operative in the case of collusion, that is, where the lowest prices are undercut, and this possibility cannot be excluded with the same certainty with regard to

state-trading countries as with regard to countries which are partners in GATT. On the other hand monetary compensation, a closed system, is of significance within the Community; its application in principle cannot be dispensed with in view of the maintenance of the level of prices in the Community. Indeed the Commission has shown that if monetary compensation were wholly abolished, Bulgarian cheese of sheep's milk could be imported into the Federal Republic of Germany via Italy at a price which was in fact lower. This is bound up with the conversion of the free-at-frontier price, which is expressed in units of account, into lire on the one hand and on the other hand into the German mark which is valued more highly. The comparison of prices in German marks undertaken by the Commission has shown that orders of magnitude of around 20 % are here at issue, or more precisely, that in the case of importation via Italy a price of DM 527·60 could be expected, applying the system in force, whereas if monetary compensation were dispensed with the price could have been DM 427·07. In view of the resultant risk of disturbance which, contrary to the view of the plaintiff, cannot be regarded as purely theoretical, even though there would be additional transport costs of around DM 40·00 arising from a diversion via Italy, objection can scarcely be raised against the principle of retaining monetary compensation for Bulgarian cheese of sheep's milk. It certainly falls within the Commission's discretion in this field.

In view of this necessary definition of the scope of the examination it may be concluded that nothing has emerged in connexion with the first question which could challenge the legality of the imposition of monetary compensatory amounts on imports of cheese of sheep's milk from third countries in April 1974.

2. The *second question* seeks to examine the justification of imposing compensatory amounts of DM 63·80 per

100 kg on 25 April 1974 on imports of cheese of sheep's milk and to examine whether it is arithmetically justified.

In this respect the Commission rightfully pointed to doubts which might arise with regard to the admissibility of both parts of the question. In so far as the court making the order for reference asks how the compensatory amount is calculated, that is, how the amount arose, this has essentially nothing to do with an interpretation of Community law which can only be given by the Court of Justice. The German court could have obtained the necessary illumination simply by asking the Commission for information since the application of the compensatory rules is entrusted to that body and it can most reliably give information as to their practical application.

In so far as the question relates to the justification of the level of compensatory amount applied at the time in question and thus essentially queries whether the amount is correct, it could also be objected that the order for reference does not state the reasons for this question and that it cannot be discerned from the question what doubts the German court entertains with regard to the level of the compensatory amount. I believe that this is not insignificant since the court making the order for reference must clearly define in this way the subject-matter for examination.

If, however, one goes beyond this and if it is still thought appropriate to consider the question, especially the second part of it, because the plaintiff in the main action has raised some doubts, then the following observations should be made:

(a) With regard to the method of computing the compensatory amount, we have heard from the Commission that it has basically not changed from the one explained in Case 5/73.

It is true that the system was subsequently refined; it is no longer based solely on *one* variety of cheese but

cheeses have been subdivided into groups with varying compensatory amounts according to the constituents (fat and protein content). For the purposes of the main action this is of no significance, however, since in calculating the compensatory amount the constituents of Gouda cheese are decisive for cheese of sheep's milk.

A further change which, however, is in fact also without significance because of its minimal arithmetical consequences, is that the compensatory rules were amended by Regulation No 648/73 (OJ 1963, L 64). If my understanding is right, compensatory amounts are no longer fixed according to the country of origin but, in order to keep within limits the calculations to be made by the Commission, a basic amount is calculated for each Member State taking into account the internal level of prices and the necessary correction to avoid double imposition when the levy is made is effected by means of a coefficient which expresses the effect of revaluation in the case of imports into countries which have revalued their currencies. The calculation of the compensatory amount for cheese of sheep's milk was originally based on the compensatory amounts for butter and skimmed milk powder since intervention prices only exist in respect of products. Thus the monetary compensation for milk could be calculated taking into account the proportions of fat and skimmed milk. Since for the production of a certain quantity of cheese a certain amount of milk with a certain proportion of fat is necessary, it was possible — I am omitting the details which may be obtained from the written observations of the Commission — to obtain the monetary compensation applicable to cheese derived from that applicable to milk.

It may also be said this method of calculation is certainly in accordance with the concept laid down in Regulation No 974/71 whereby the monetary compensatory amount for

processed products is determined taking account of the incidence which the monetary measures have on the base product. Nor may objection be taken to the recourse to the intervention prices for butter and skimmed milk powder on the ground that the price of cheese of sheep's milk is not dependent on them. The plaintiff has already put forward this argument in Case 5/73 when it was not recognized as valid by the Court.

(b) My observations on the justification of the level of the compensatory amount at issue in the main action may also be relatively short.

The plaintiff expressed the view, in very general terms, that the amount was excessive and that in fixing it neither was the necessity to dismantle progressively the monetary compensatory system taken into account nor was it ensured that the customary trade channels were retained.

In answer to this the Commission in my opinion correctly argued that in applying

the compensatory system it merely has to comply with the basic rules of Regulation No 974/71. If a risk of disturbance cannot therefore be excluded, then with regard to processed products only the incidence of the monetary compensation on the basic product is to be considered. No provision is made on the other hand for the Commission to take into account economic factors in individual cases. Its discretion, which was described as being narrow in Case 5/73 with regard to the calculation of compensatory amounts, does not extend this far and in the interests of legal certainty this is certainly to be welcomed.

In view of all this and in view of the Commission's statement that there is no diminution in imports of cheese of sheep's milk from Bulgaria, it can only be concluded that no grounds have become apparent for objecting to the calculation of the compensatory amounts at issue in the main action.

3. I therefore propose that the following answer be given to the questions referred by the Finanzgericht Berlin:

Examination of the questions has revealed nothing capable of calling in question the validity of the fixing of a compensatory amount under Regulation No 974/71 for cheese of sheep's milk imported from Bulgaria on 25 April 1974. The same applies in respect of the level of the compensatory amount which is to be viewed in conjunction with the rules set out in Article 4 (3) of Regulation No 1463/73.