

validity of Regulations No 649/73 and No 741/73 in so far as they were made applicable from 26 February 1973 and 5 March 1973 respectively.

2. Article 191 of the EEC Treaty must be interpreted to mean that, in the absence of evidence to the contrary, a regulation is to be regarded as published throughout the Community on the date borne by the issue of the Official Journal containing the text of that regulation.

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Delivered in open court in Luxembourg on 25 January 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 6 DECEMBER 1978 ¹

*Mr President,
Members of the Court,*

The two references for a preliminary ruling on both of which I am today giving a single opinion, because the problems they raise are very much the same, are concerned with the levying of monetary compensatory amounts on wine, in particular with the retroactive inclusion of certain types of wine in the monetary compensation system.

Until the beginning of 1973 the system of monetary compensatory amounts was

keyed to the movements of Member States' currencies against the US dollar. It was confined to monetary compensatory amounts being levied on imports and granted on exports in those countries where a revaluation had been effected.

At the beginning of 1973 there was another international currency crisis. The dollar came under so much pressure that on 12 February 1973 the American Government announced a 10% devaluation. The Italian authorities also suspended intervention as the lira

¹ — Translated from the German.

reached marginal values. On 12 and 13 February and also from 1 March to 19 March, the Foreign Exchange Markets were closed. At that time an international monetary conference of the Western industrial countries decided upon a 3% revaluation of the German mark and also upon the so-called block floating for the European currencies. In accordance with that decision Member States were obliged to maintain at all times in spot dealings a margin upwards or downwards of not more than 2.25% between their currencies. However, the pound sterling and the Italian lira remained outside the "currency snake".

In view of this development the system of monetary compensatory amounts was changed in such a way that in those countries whose exchange rates exceed the lower limit of fluctuation permitted by international rules, monetary compensatory amounts are levied on exports and granted on imports. The basic Regulation (EEC) No 974/71 of the Council of 12 May 1971 (Official Journal, English Special Edition 1971 (I), p. 257) was appropriately amended by Regulation No 509/73 of the Council of 22 February 1973 (Official Journal L 50 of 23 February 1973, p. 1) with effect from 1 February 1973. The Commission adopted in Regulation (EEC) No 648/73 of 1 March 1973 (Official Journal L 64 of 9 March 1973, p. 1) implementing provisions for this purpose which entered into force on the third day following their publication in the Official Journal of the European Communities; however, the amounts resulting from their application had already been effective since 26 February 1973.

The monetary compensatory amounts were fixed by Regulation (EEC) No 649/73 of the Commission of 1 March 1973 (Official Journal L 64 of 9 March 1973, p. 7) which was to enter into force on the day of its publication in the Official Journal. The Official Journal in which it was published bore the date 9 March 1973 but was not available at the sales office in Luxembourg until 12

March and at the German post office for official publications until 13 March. Nevertheless, it was provided that the monetary compensatory amounts which had been fixed should be levied as from 26 February 1973. Certain wines were included for the first time in the monetary compensation system as a result of that regulation and this is of special significance in this case. In so far as the monetary compensatory amounts are relevant in these cases, they were varied by Regulation (EEC) No 741/73 of 5 March 1973 (Official Journal L 71 of 19 March 1973, p. 1). That regulation was to enter into force on the day of its publication in the Official Journal, which occurred on 19 March 1973; however, the new amounts had already been applicable since 5 March 1973. A further alteration was made by Regulation (EEC) No 811/73 of 23 March 1973 (Official Journal L 79 of 27 March 1973, p. 1). That alteration was to enter into force on the day of its publication in the Official Journal, that is 27 March 1973, and was applicable from 26 March 1973.

The proceedings which gave rise to the reference to the Court for a preliminary ruling in Case 98/78 concern Yugoslav wines which according to the plaintiff are quality wines and which on the basis of orders dated November 1972 and January 1973 and of contracts which provided for payment of the purchase price in German marks had been imported into the Federal Republic of Germany in December 1972 and January 1973 and placed in a private customs warehouse (offenes Zollager). When those wines were taken out of that warehouse and put into free circulation between 9 and 30 March 1973, monetary compensation was levied on the ground that the wines in question came under tariff headings 22.05 C I and 22.05 C II and in application of the before-mentioned regulations.

The proceedings which gave rise to the reference to the Court for a preliminary ruling in Case 9/78 concern wine from Italy falling within tariff heading 22.05, which was cleared by customs and put into free circulation between 9 and 12 March 1973. Monetary compensation was also levied on this wine as provided for in the said regulations.

The attempts by the parties concerned to defeat this levy were of no avail whatsoever.

In the first case the Finanzgericht (Finance Court) Rheinland/Pfalz found that the fact that the contracts for the imports were expressed in German marks was immaterial. When the Commission fixed the monetary compensatory amounts for wine it did not exceed the discretion it has according to Regulation No 974/71. Nor is the retroactive fixing of the compensatory amounts invalid. As far as concerns Regulation No 649/73 which entered into force on 9 March 1973, the decisive fact is that the plaintiff had not removed any wine from its private customs warehouse before that date. With reference to the retroactive introduction of higher rates by Regulations Nos 741/73 and 811/73, it must be borne in mind that their application as from a later date might, because precipitate and voluminous imports were to be feared, have been detrimental to the Community and that on the basis of the exchange rates the parties concerned could have anticipated the date from which an alteration in compensatory amounts was to be expected.

In the second case the same Finanzgericht made an analogous decision in which it also pointed out that, as far as concerns the retroactive alteration of the rates of compensation by Regulation No 741/73, the business circles involved ought to have borne in mind that Regulation No 974/71 provides for the alteration of compensatory amounts if the difference between the recognized

parity of the national currency and the current rate of exchange as against the dollar changes by not less than one point.

At a later date the cases came before the Bundesfinanzhof (Federal Finance Court) on appeal on a point of law.

The appellant in the first case submitted that the prerequisite for monetary compensation is that, by reason of the change in the currency parity, a product might be imported at lower prices. That has not occurred in this case; since the contracts were expressed in German marks purchase at reduced prices is out of the question. Furthermore, under Regulation No 816/70 (Official Journal, English Special Edition 1970 (I), p. 234), when the offer price for imported wine is lower than the reference price, a special countervailing charge is imposed. However the reference price, the maintenance of which Yugoslavia has moreover guaranteed, is considerably higher than the activating price and it therefore provides increased protection for the intervention system. Accordingly it must be assumed that the intervention system of the common organization of the market in wine is protected by the system of reference prices and consequently cannot be thrown into confusion by imports from non-member countries. What is more, since the system of reference prices provides a system of intervention only for the protection of table wines, it is intended to cover only wine for immediate consumption. It is therefore not at all necessary to levy monetary compensation on *quality wines* from non-member countries. Finally, according to the existing statistics to which the plaintiff has access, the wine

market cannot be said to have been disturbed by imports from non-member countries. In each case the retroactive application of the regulations of the Commission on monetary compensation must be regarded as out of the question.

The appellant in the second case complained in particular of the retroactive application of Regulation No 741/73. It is of the opinion that it was entitled to rely on the fact that the wines which it imported were not subject to monetary compensation. There has also been no proof that the short term economic development in the wine sector was adversely affected. In particular, the fact in this connexion that by decisions of the Federal Ministry of Finance of 15 January 1975 and 24 February 1975 a partial refund of the monetary compensatory amounts levied on wine was ordered is relevant.

As the orders making the references state, this reasoning raises various problems for the Bundesfinanzhof. On the one hand they relate, in the first case, to the question whether the fact that imported goods are subject to a levy is material and to the question whether the classification of the wines — either as wines for immediate consumption or quality wines — is relevant. On the other hand — and this applies to both cases — they relate to the question of the time when a Community regulation is to be regarded as published and whether the retroactive application of a regulation by which specific goods have been included for the first time in the monetary compensation system can be regarded as lawful. Therefore by order of 21 March 1978 the Bundesfinanzhof stayed proceedings and referred the following questions to the Court of Justice pursuant to Article 177 of the EEC Treaty for a preliminary ruling:

In Case 98/78

1. Are Regulations (EEC) Nos 649/73 of 1 March 1973, 741/73 of 5 March

1973 and 811/73 of 23 March 1973 of the Commission valid even in so far as they each fix in Annex I, No 6, monetary compensatory amounts for imported red and white wines under tariff subheadings 22.05 C I and C II without making any distinction between the two?

In both cases

2. Is a regulation to be regarded as published within the meaning of Article 191 of the Treaty establishing the European Economic Community:
 - (a) on the date borne by the Official Journal in question;
 - (b) at the time when the Official Journal in question is in fact available at the Office for Official Publications of the European Communities; or
 - (c) at the time when the Official Journal in question is actually available on the territory of the particular Member State?
3. Was Regulation (EEC) No 741/73 of the Commission of 5 March 1973 also applicable to wine which was first made subject to monetary compensatory amounts by Regulation (EEC) No 649/73 of the Commission of 1 March 1973 and which was removed from a private customs warehouse before the last-mentioned regulation was in fact published?
4. If Question 3 is answered in the negative: was Regulation (EEC) No 649/73 of the Commission of 1 March 1973 applicable to the said wine?

My views on these questions are as follows:

1. The question to be examined first only relates to Case 98/78. The validity of Regulations (EEC) Nos 649/73, 741/73 and 811/73 has to be considered with reference to the fact that they fixed compensatory amounts on wines without making any distinction between them. The specific problems which arise in this connexion are expressed in the grounds of the appeal judgment and the appellant's submissions during the oral procedure before this Court.

(a) The appellant's reference to the fact that the contracts concluded for the imports were expressed in a revalued currency and that those imports could not therefore have been effected at lower prices for technical reasons relating to foreign exchange must first of all be considered.

In my view it cannot be denied that this fact cannot be taken into account under the system of monetary compensation. On this point the Commission has rightly asserted that the large number of the movements of goods under consideration rules out the possibility of deciding on the question whether in any particular case a currency profit has been made or not. Furthermore, it is conceivable that in the case of contracts of this kind, currency trends would already have been taken into consideration but this can likewise not be verified. In addition, in connexion with this problem reference can be made to the relevant decided cases of the Court of Justice. Thus the Court in its judgment of 24 October 1973 in Case 5/73, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof* ([1973] ECR 1091), stressed that the levying of monetary compensatory amounts cannot be dependent upon any profit made by the importer on the rate of exchange and that it must on the contrary depend upon the use of uniform and generally applicable criteria. Accordingly, the Court in its judgment of 7 July 1976 in Case 7/76, *IRCA*

v Amministrazione delle Finanze dello Stato ([1976] ECR 1213), held that compensatory amounts are not calculated on the basis of the prices in fact paid for the goods; the value of the specific goods cannot be taken into account when making that calculation. We should abide by this rule in this case.

(b) The appellant in the main action has also submitted that the intervention system for the common organization of the market in wine is adequately protected by the system of reference prices from imports from non-member countries. The reference prices, the maintenance of which has, moreover, been guaranteed by Yugoslavia and which give rise to levies if the offer prices fall below them, are in fact much higher than the activating prices which are relevant for intervention. For that reason disturbances of the intervention system could in no circumstances be caused by imports from non-member countries.

In this connexion the Commission has with good reason emphasized that the fact that the reference prices and the levies connected therewith, on the one hand, and monetary compensation, on the other hand, have different functions and are subject to different conditions, ought not to be overlooked. It is of special importance that reference prices are intended to raise prices for wine from non-member countries to the Community level, whereas the aim of monetary compensatory amounts was to provide compensation for the differences in actual agricultural prices in national currency due to variations in exchange rates. Furthermore, monetary compensation is not merely based on the

notion that disturbances of the intervention system are to be avoided. On the contrary, it is concerned rather with the elimination of market disturbances altogether. However, the question whether the Commission's forecast at that time may be called in question on this point remains to be considered later.

During the oral procedure the appellant in this connexion also raised the question why monetary compensation was not made unnecessary by the raising of reference prices, since in any case the prices of most wines from non-member countries are above their level; the Commission observed on this point with good reason that such a criticism of the system of reference prices is inappropriate to an examination of monetary compensation. It is precisely in connexion with monetary compensation that reference should be made to the way in which such a pricing system is administered (see the judgment of the Court of 22 January 1976 in Case 55/75, *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof* ([1976] ECR 19), which was concerned with milk products). Furthermore, attention is drawn to the need for a uniform application of the system of monetary compensation, which also applies of course to intra-Community trade, which is not affected by reference prices.

(c) Thirdly, the appellant has pointed out that the intervention system for the common organization of the market in wines only serves to protect the market in table wines and does not apply to quality wines. Accordingly, within the Community, monetary compensation also only applies to table wines. In accordance with that situation, therefore, there appears to be no justification for applying monetary compensation to *quality wines* from non-member countries — such wines being involved in the main action — for it cannot be assumed that they have repercussions on

the market in table wines; in any case, this aspect of the matter has not been examined.

As far as this point is concerned it is in the first place certain that Community products may be classified either as table wines or as quality wines. In fact the relevant provisions of Regulation (EEC) No 817/70 of the Council (Official Journal, English Special Edition 1970 (I), p. 252), to which reference is made in Article 1 (5) of Regulation (EEC) No 816/70 of the Council — they deal with the supervision of production and of regions under cultivation — are clearly tailored to the characteristics of wines from the Member States. On the other hand, there is no indication of a principle of Community law to the effect that goods from non-member countries are to be placed on the same footing in every respect as Community products; on the contrary, we must proceed on the assumption that in relation to non-member countries the Community has extensive freedom in setting the pattern for trade relations.

However, in so far as mention is also made, within the context of the common organization of the market in wines, of quality wines coming from non-member countries, as for example in the third subparagraph of Article 9 (3) of Regulation No 816/70, according to which a decision may be taken not to levy all or part of the countervailing charge on imports of certain quality wines produced in third countries, the fact that the appellant has not claimed that the wines which it has imported were covered by that provision, which clearly, if I have been correctly instructed, has until now been applied only to certain southern wines, is not to be disregarded. Nor, furthermore, can the appellant support its view with reference to the

later Regulation (EEC) No 2133/74 of the Council laying down general rules for the description and presentation of wines and grape musts (Official Journal 1974, L 227, p. 1) or to Commission Regulation (EEC) No 1608/76 laying down detailed rules for the description and presentation of wines and grape musts (Official Journal 1976, L 183, p. 1). The important fact is that in this case even with reference to quality wines produced in third countries the only legal questions relate to classification. As far as prices are concerned no special provisions apply to such wines; they too are subject to the rules relating to reference prices. This means however that such quality wines — and this is of importance in the case of monetary compensation — fall within a common organization of the market. It is also important that their price is aligned on the price of products for which intervention measures have been provided. That can be said because the second subparagraph of Article 9 (1) of Regulation (EEC) No 816/70 provides that reference prices shall be fixed on the basis of the guide prices for the types of red and white table wine most representative of Community production, that is, on the basis of prices for products in favour of which intervention measures have been provided.

(d) Finally, the appellant has criticised the assumption that there was a risk of disturbances which is the precondition for monetary compensation under Regulation (EEC) No 974/71.

On this point the Court has repeatedly held in its decided cases that the Commission and the Management Committee have a wide discretion in this field and judicial review must accordingly be confined to the question whether there has been a manifest error or misuse of powers or whether the margin of discretion has manifestly been exceeded. In this connexion currency

factors and market conditions are also material (see the judgment of the Court of 14 May 1975 in Case 74/74 *Comptoir Nationale Technique Agricole v Commission of the European Communities* [1975] ECR 533 and the judgment of the Court in Case 136/77 *Frima A. Racke v Hauptzollamt Mainz* [1978] ECR 1245). Since in addition the measures must be speedily implemented, evaluations of a general nature which cannot take account of every product and every exporting country are unavoidable (see the judgment of the Court of 7 July 1976 in Case 7/76 *IRCA v Amministrazione delle Finanze dello Stato* [1976] ECR 1213 and the judgment of the Court of 20 October 1977 in Case 29/77 *S.A. Roquette Frères v French State-Administration des Douanes* [1977] ECR 1835). It is especially worthy of note that the Court held in its judgment in Case 29/77 that there might be said to be a risk of disturbances merely on the basis of an appreciable fall in the rate of exchange of a currency.

In the view of the appellant these decided cases come up against objections relating to the rule of law. It is convinced that to limit judicial review to cases where discretionary powers have manifestly been exceeded is unacceptable. On the contrary, care must be taken — and this was not done in this case — to ensure that the facts on which the discretionary evaluation is based are adequately established. In any case a variation in the rate of exchange does not of itself suffice for accepting that there is a risk of disturbance.

As far as this problem is concerned and contrary to the appellant's view, I see no reason for a fundamental modification of

the case-law. Even if the provisions which have been quoted may perhaps appear to be somewhat widely drawn their meaning is clear and it can hardly be faulted. Monetary compensation involves the examination of complicated situations in which a great variety of factors are at play; if monetary compensation is to be effective this examination must take place very quickly and this means that evaluations of a non-differentiated nature are unavoidable. It follows that the Court cannot go into every detail of such evaluations and is not competent to substitute its own appreciation for the detailed assessment of the various factors which is absolutely essential when making an evaluation of a non-differentiated nature.

If that is taken to be correct it must be borne in mind in this case that the extent of the currency crisis at the beginning of 1973 with all the particulars mentioned above made it necessary to act very promptly. This meant that a thorough examination of every aspect of the market and for each Member State, in particular with reference to the effects on the market in table wines and the need for it to be protected, was undoubtedly impossible. To this was added the fact that that period saw the first application of the new system introduced by means of Regulation (EEC) No 509/73, experience of which had yet to be gained. In this situation and in view of the heavy fall of the lira, accompanied by the revaluation of the German mark, it was bound to seem likely that a reduction in the price of agricultural exports from Italy and as a result a disturbance of the French and German markets in wine was to be feared. This was a legitimate reason for extending monetary compensation within the Community to all types of table wine. At the same time, however, because of the existing price relationship between table wine and wine produced by non-member countries, the need to include the latter

as well also had to be accepted. To leave that wine out of account could only have meant acquiescing in Italian wines being placed at a competitive disadvantage.

I am convinced that this is sufficient to justify the monetary compensatory amounts at issue in this case. There is in fact no reason for calling in question the forecasts made by the Commission relating to a disturbance of the market and for criticising the fact that at an early stage all wines produced in non-member countries were included in the monetary compensation system without making any distinction based on the price-range of the wines and the countries into which they were imported.

(e) Accordingly, in answer to the first question it can only be stated that none of the views put forward by the appellants provide any grounds for doubting the validity of the regulations mentioned in the question in so far as according to those regulations monetary compensation had to be levied on imports of wine from non-member countries.

2. The next question which has to be considered is common to both references. It asks for a ruling as to when Community regulations are to be considered as published.

On this question the Commission has expressed the opinion that in cases where the presumption that the date of a particular copy of the Official Journal is the same as the date when it was available at the Office for Official Publications can be rebutted, the later date should prevail; in my opinion that view is correct.

In fact, in support of the view that the date of the Official Journal is not determinative if it does not coincide with

the actual issue of the Official Journal, reference has only to be made to the judgment of the Court of 31 March 1977 in Case 88/76 *Société pour l'Exportation des Sucres SA v Commission of the European Communities* ([1977] ECR 709), a case which turned specifically on the date of publication and in which the Court took the date of actual publication and not the date of the Official Journal as being decisive.

If, on the basis of this assumption, one goes on to ask whether the availability of the Official Journal at the Office for Official Publications in Luxembourg or its availability in the Member States is to be considered to be determinative there is undoubtedly more to be said for the first mentioned alternative.

There is no doubt that the objection drawn from the principle of legal certainty, namely that the relevant date cannot be ascertained for certain, cannot be raised against this solution. According to the statements of the Office for Official Publications, as soon as the versions in all the languages are available there, notice is immediately given and a record of this is entered on a register. At all events this obligation to register and the duty to provide appropriate information appears to have been in existence since 1974. Further, not only is care evidently taken to ensure that the exact date of availability to the public can be ascertained in this way but it also appears that provision has been made for guaranteeing access to the Official Journal as from that date and even at night.

On the other hand, reference can be made in support of the Commission's view to the important fact that a uniform date of publication is thereby ensured for the entire Community; this could not be guaranteed even by the very best distributive organization if availability in the Member States were taken. Nor must it be forgotten that there would otherwise

be considerable delays in publication which would be intolerable in the case of urgent decisions and that the possibility, which has also been acknowledged in the case-law of the Court (judgment of 13 December 1967 in Case 17/67 *Firma Max Neumann v Hauptzollamt Hof/Saale* ([1967] ECR 441) and the judgment in Case 74/74), of permitting regulations to enter into force on the day of publication in the Official Journal would be considerably reduced. Furthermore, the view is probably material that when the Official Journal is published in Luxembourg the legislature, since details thereof are available to any person making the appropriate arrangements, loses all power of control over the published text at least in this sense that a position of legitimate expectation is thereby established. Finally, it is of interest too that under the legal system of several Member States publication at a central office is also sufficient; where this is not the case, as for instance in France, there is nevertheless as an alternative the possibility of posting regulations on notice boards, which is ruled out under Community law — Article 191 of the EEC Treaty.

This view, if adopted, means that in this case Regulation No 649/73 is to be regarded as having been published on 12 March 1973 and that as far as concerns Regulations Nos 741/73 and 811/73, in the case of which the issue of the Official Journal was not delayed, the dates of the Official Journals (19 March and 27 March) are the dates of publication.

3. The next two questions to which I now turn are also in substance the same in both cases. They relate to the retroactive application of Regulations Nos 649/73 and 741/73 to the wines included

for the first time in the monetary compensation system by Regulation No 649/73. In this connexion all that has to be taken into consideration is the fact that in the first case the wines in question were removed from a private customs warehouse before Regulation No 649/73 was actually published and that in the second case they had been directly imported before that date.

(a) As the court making the reference has correctly assumed the application of the said regulations from the actual date of publication of Regulation No 649/73, that is 12 March 1973, raises no problems. From that moment Regulation No 649/73, by which certain wines were for the first time included in the monetary compensation system, cannot be said to have retroactive effect. It is true that Regulation No 741/73 appears to have retroactive effect — if the date of publication is compared with the date of its applicability. However in this connexion, since only an adjustment of the monetary compensatory amounts was involved, reference may be made to the judgment in Case 7/76. That judgment makes it clear that in such circumstances, that is to say where certain goods have already been included in the monetary compensation system — and this applies to wines as from 12 March 1973 — and where the monetary compensatory amounts are merely adjusted in accordance with the currency trend, there cannot be said to have been any actual retroactive effect.

(b) On the other hand, in so far as the regulations in question were intended to be applied before 12 March 1973, which is true of Regulation No 649/73 as from 26 February 1973 and of Regulation No 741/73 as from 5 March 1973, there was a genuine retroactive effect. However, since the removals from the private customs warehouse and the imports at issue in the main action were effected

only as from 9 March 1973 the question of the extent to which that retroaction was lawful need now only be examined in relation to that date, that is with reference to a relatively short period of time.

As the Court is aware, the Commission has endeavoured to dispel doubts which might compel consideration in this connexion from the standpoint of the rule of law and I also believe — if I may say so at once — that it succeeded convincingly in so doing.

(aa) Thus it is important to note that under Community law retroactive effect is not in principle ruled out, as can be inferred from those of the Court's decided cases which are mentioned on page 14 of the Commission's observations. This is in keeping with national law and Mr Advocate General Warner adduced evidence of this in his Opinion in Case 7/76 ([1976] ECR 1230). This applies under German law — a quite recent judgment of 15 February 1978 of the Federal Constitutional Court was cited on this point during the oral procedure — in so far at least as there is no legitimate expectation.

(bb) Furthermore, the Commission has rightly pointed out that it is precisely in the field of monetary compensation, with its special requirements, that measures having retroactive effect are to a certain extent permissible. Thus it should be borne in mind that pursuant to Article 3 of Regulation No 974/71 monetary compensation is intended in principle to become effective as from the event which activates it. It is also evident that a rapid increase in speculation may suddenly

have repercussions on groups of products which have not so far been subject thereto and actuate the corresponding patterns of trade which, if the measures that cannot always be adopted immediately are not made retroactive, might lead to unwarranted advantages which are not to be regarded as deserving of protection. It should be mentioned in a quite general way that in principle the legitimate expectation is subject in this field to considerable limitations, but that since the adoption of Regulation No 974/71 it has in general to be accepted that if there are significant alterations in the currency structure new groups of products will also be covered by the monetary compensation system. Moreover, this applies particularly since the modification of the system by Regulation No 509/73. Thus an extension to other products, to be precise to those, such as Italian wine, which as a result of the rapid decline in the rate of exchange of the lira in February and March 1973 became "sensitive", was certainly to be anticipated.

(cc) However, the Commission has rightly not been content with such reasoning, with specific reference to the fact that the inclusion of new products in the monetary compensation system nevertheless requires a discretionary decision of the Community authorities. Under such circumstances it considers that additional factors are necessary to justify retroactive effect. It would however be regarded as sufficient in each case that relevant information was supplied in good time by other means or that reference was made in good time to a previous decision, together with a statement of its essential content. I believe that this view can be accepted and I also believe that the Commission has demonstrated to the Court that in this respect at the relevant time everything necessary was done in connexion with the regulations with which we are concerned in these two cases.

If we are to confine ourselves for the time being to *Regulation No 649/73*, reference must first be made to certain information which was published in the news service "Vereinigte Wirtschaftsdienste" of 20 and 21 February 1973. Attention was there drawn to the floating of the exchange rate of the lira and the pound sterling, Regulation No 974/71 as amended was published and the need to introduce monetary compensatory amounts with retroactive effect was mentioned.

It is also significant that immediately after the monetary compensatory amounts were fixed (on 26 February 1973) an appropriate notice was displayed by the spokesman's group in Brussels. There is no doubt that many undertakings make arrangements to receive information of such announcements. Specialist business services also arrange for further rapid circulation thereof. On this aspect of the matter reference can again be made to the "Vereinigte Wirtschaftsdienste", this time to statements in the issue of 28 February 1973 to the effect that the monetary compensatory amounts applicable from 26 February 1973 had already been circulated for several days by professional and trade organizations.

It also appears to be relevant that a telex message containing the monetary compensatory amounts fixed by Regulation No 649/73 was sent on 26 February 1973 to the administrations of the Member States, and this in connexion with the statements of the representatives of the Member States on the Management Committee that the rates could be applied as from 26 February 1973. This meant that appropriate information could be sought from the competent authorities and that the amounts were immediately applied to import transactions which were effected

from that day onwards, and consequently were not levied retroactively. It is true that the same does not apply to removal from a private customs warehouse in which the customs administration is not directly involved. However, as the Commission has justly observed, as far as that is concerned probably no other view is tenable and the reason for this is not only that undertakings which maintain such warehouses also regularly effect direct imports but also that the keeping of customs warehouses constitutes an advantage which for the parties concerned — as far as the protection of a legitimate expectation is concerned — is naturally not permitted to lead to any improvement in their position.

Finally, the Commission was also right to point out that the way the question of retroactive effect, as so far stated, is dealt with cannot be affected by the fact that by a measure of 29 March 1973 the Federal Ministry of Finance arranged that during the period from 26 February to 8 March 1973 the increased monetary compensatory amounts were not to be levied on goods which had been included for the first time in the monetary compensation system; it also correctly stated that the fact that the extent of the retroactive effect had been slightly increased by the delayed issue of the Official Journal is of no significance. The said measure, which obviously came into being without the Commission's being consulted, in fact provided in any event for the full application of monetary compensation as from 9 March with the result that as from that date there could no longer be said to be a legitimate expectation in respect of the conduct of the German authorities. Furthermore, to the initiated the delay in issuing the Official Journal came as no surprise, for it was no secret that in the months of February and March 1973 the Office for Official Publications was for various reasons — because of the publication of

a large number of documents on the occasion of the accession of three new Member States as well as the currency crisis — in a full state of emergency.

If however this argument is held to be able to justify the retroactive effect of Regulation No 649/73, then the same reasoning also applies to *Regulation No 741/73* which altered the compensatory amounts with effect from 5 March 1973.

In this connexion it is important that the preconditions for a change in the monetary compensatory amounts existed as from 5 March 1973.

It is also of interest that the "Vereinigte Wirtschaftsdienste" of 28 February 1973 drew attention to the fact that the Commission, even before the notification of the rates applicable as from 26 February, had announced another alteration and that the new rates were to be applied as from 5 March but that it was doubtful whether any notification would be made in time. In addition, the deviations from parity with the dollar, on the basis of which the monetary compensatory amounts could at least be estimated, were also made public in that announcement.

Those figures were also notified by telex on 5 March 1973 to the administrations of the Member States and a reference to the change in the monetary compensatory amounts was published in part C of the Official Journal of 5 March 1973.

On the other hand, I must agree with the Commission that the fact that Regulation No 649/73, the rates whereof were to be altered by Regulation No 741/73, was not published until after the date from which the amended rates were to be applied, is to be regarded as unimportant. In my view the Commission has convincingly explained how this unusual situation arose. When

the change in the rates due to the currency trend proved to be necessary, Regulation No 649/73 was already being printed; in order to avoid further delays, especially as it was impossible to say when publication in the Official Journal was to be expected, an immediate amendment of the regulation was abandoned. In fact under these circumstances the publication of Regulation No 649/73 cannot be said to have created a legitimate expectation, since well before the publication of the Official Journal of 9 March 1973 attention was drawn in

the beforementioned Official Journal of 5 March 1973 to the changes in the compensatory amounts which had become necessary.

I would therefore express the view that there is no reason why Regulations Nos 649/73 and 741/73 should not also be applied to wines which were made subject to monetary compensation for the first time by Regulation No 649/73 and which had been removed from a private customs warehouse or imported before the publication of that regulation.

4. Accordingly I am of the opinion that the questions raised by the Federal Finance Court should be answered as follows:

- (a) In Case 98/78 there should be a declaration that those proceedings have not brought to light any factor such as to invalidate Regulations Nos 649/73, 741/73 and 811/73 in so far as those regulations fixed compensatory amounts for imported red and white wines under tariff subheadings 22.05 C I and C II without making any distinction between the two.
- (b) In connexion with the further questions referred to the Court in both cases, the following declaration should be made:
 - On the question when a regulation is to be regarded as published within the meaning of Article 191 of the EEC Treaty, the decisive date is that on which the Official Journal in question is in fact available at the Office for Official Publications of the European Communities.
 - Regulations Nos 649/73 and 741/73 were also applicable to wines which were first made subject to monetary compensation by Regulation No 649/73 and which were imported or removed from a private customs warehouse before the last-mentioned regulation was in fact published.