variations in fluctuating exchange rates and thus help to preserve the normal flow of trade in products under the exceptional conditions temporarily created by the monetary situation.

Their object is to prevent the collapse of the intervention system set up under Community law in the Member State affected. These are not levies determined by Member States unilaterally, but Community measures which, bearing in mind the exceptional circumstances of the time, are permissible within the framework of the common agricultural policy.

In Case 9/73

Reference to the Court, under Article 177 of the EEC Treaty by the Finanzgericht of Baden-Württemberg for a preliminary ruling in the action pending before that court between

CARL SCHLÜTER, Osnabrück,

and

HAUPTZOLLAMT LÖRRACH,

on the interpretation of Articles 5 and 107 of the Treaty and of the Resolution of the Council of 22 March 1971 concerning the establishment in stages of an economic and monetary union within the Community (OJ C 28 of 27 March 1971, p. 1) as well as on the interpretation and validity of Regulation No 974/71 of the Council of 12 May 1971 concerning certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (OJ L 106 of 12 May 1971, p. 1) and of Regulations Nos 1013/71 (OJ L 110 of 18 May 1971, p. 8), 1014/71, (OJ L 110 of 18 May 1971, p. 10) and 501/72 (OJ L 60 of 11 March 1972, p. 1) of the Commission,

THE COURT

composed of:

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

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

The system of organization of the agricultural markets and, in particular, the fixing of target, threshold and intervention prices, from which are derived the computations of levies and refunds, is based upon fixed parities between the currencies of the various Member States relative to the unit of account.

During the course of the year 1971 the increasing influx of fugitive capital into certain Member States, particularly the Federal Republic and the Netherlands, led the Council in its Resolution of 9 May 1971 (OJ C 58 of 10 June 1971, p. 1) concerning the monetary position to indicate its understanding of the situation, 'so that, in certain cases these countries may, for a limited period, widen the margins of fluctuation of the rates of exchange of their currencies in relation to their present parities'; an operation referred to as 'floating' the currencies.

As, in order to set and calculate the level of prices within the framework of the organization of the agricultural markets, the former parities were maintained, even in respect of the Deutschmark and the guilder, the prices have remained in principle unchanged within the Community, at least in respect of products for which intervention prices are fixed and for products the price of which depends upon these. These prices, expressed in DM or in guilders have however been subject to a reduction corresponding to the effect of the actual revaluation of the said currencies.

As this situation gave rise to expectations of distortion of competition to the detriment of German and Dutch agricultural producers and disturbance in the exchange of agricultural products, the Council, in its Resolution of 9 May 1971, decided to enact 'without delay, the appropriate measures as provided for in Article 103 of the Treaty'.

In implementation of this Resolution the Council, by Regulation No 974/71, set up a system of compensatory amounts payable on imports and exports in respect both of exchanges between Member States and of exchanges with third countries with the aim of neutralizing the effect of monetary measures on the prices of basic products in respect of which provision is made for intervention measures.

The detailed rules for the application of this Regulation were enacted by the Commission in its Regulation No 1013/71 of 17 May 1971 (OJ L 110 of 18 May 1971, p. 8) whilst the compensatory amounts themselves were laid down by various Regulations, particularly, as regards the importation which gave rise to the main action, by Regulation No 501/72 of the Commission of 9 March 1972 (OJ L 60 of 11 March 1972, p. 1).

On the occasion of the importation into Germany on 15 March 1972 of 7 247 kilogrammes of Emmentaler and Gruyère cheese from Switzerland by the firm Carl Schlüter, plaintiff in the main action, these products were, in addition to the levy and the turn-over tax, subjected to the payment of a compensatory sum of 3 297·39 DM, that is to say, 45·50 DM per kilogramme.

The plaintiff in the main action, disputing the validity of Regulation No 974/71, started an action before the Finanzgericht of Baden-Württemberg for

the annulment of the demand for the compensatory duty, following which that tribunal, by an order of the 8 November 1972 referred the following questions to the Court:

1. Is Regulation (EEC) No 974/71 of the Council of 12 May 1971 valid in so far as it authorizes levying compensatory amounts on imports from third countries (Article 1)?

   As a subsidiary question;

2. Is Article 2 of Regulation (EEC) No 974/71 valid in so far as compensatory amounts are related solely to the relationship of the DM to the US dollar?

   As a subsidiary question;

3. Are Regulation (EEC) No 974/71 and implementing Regulations Nos 1013/71 and 1014/71 of the Commission of 17 May 1971 and No 501/72 valid in so far as they provide, in trade with third countries, for the levying of compensatory amounts on Emmentaler and Gruyère cheese of tariff No 04.04 which, together with the levy, exceed the bound maximum customs rates of GATT?

   As a subsidiary question;

4. Was the authority contained in Regulation (EEC) No 974/71 for levying compensatory amounts in trade with third countries in accordance with Article 8 (2) of this Regulation no longer effective on 15 March 1972 because

   (a) the Member States were once again applying the international rules on margins of exchange-rate fluctuation around official parity, or

   (b) at the latest since the Washington Currency Conference of 18 December 1971 it has been clear that the Member States would not return to the old parities?

   As a subsidiary question;

5. Were Member States on 15 March 1972, prohibited from having floating rates of exchange by reason of

   (a) Article 107 of the EEC Treaty

   (b) the Resolution of the Council of 22 March 1971, on the gradual establishment of an economic and monetary union within the Community

   (c) Article 5 of the EEC Treaty?

The Reference of 8 November 1971 was received at the Court Registry on 19 February 1973.

Upon hearing the preliminary report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided that there was no need for any preparatory inquiry.

The plaintiff in the main action, the German Government, the Commission and the Council submitted written observations.

The oral observations of the plaintiff in the main action, represented by Mr Ehle, of the Cologne Bar, of the Commission, represented by its legal adviser, Mr Gilsdorf, of the Council, represented by its Agent, Mr Lambers and of the German Government, represented by Mr Seidel, Regierungsdirektor, were made at the hearing on 27 June 1973.

The Advocate-General presented his opinion at the hearing on 11 July 1973.

II — Observations submitted under Article 20 of the Statute of the Court

The observations of the parties may be summarized as follows :

A — Observations of the plaintiff in the main action

On the first question

According to the plaintiff in the main

action, the compensatory amounts constitute prohibited customs duties or charges having an equivalent effect unless a provision of the Treaty or of the market organizations entitles the Council to take exceptional measures.

Such an exception could not, in this case, be based on Article 103 (2). The measure is not one of conjunctural policy, but is rather one intended to protect the uniformity of agricultural prices. Neither it is a 'matter of common concern' (Article 103 (1) but rather a measure protecting certain agricultural producers. Lastly, Article 103 (2) allows action to be taken only by means of directives or decisions as follows both from a literal interpretation and from its coordinatory function as regards the Member States in respect of 'their' conjunctural policies.

Only Articles 40 and 43 of the Treaty in conjunction with Article 235, could have furnished a proper legal basis for the compensatory amounts, as the Council itself recognized, in basing among others, Regulation No 509/73 of 23 February 1973 (OJ L 50 of 23 February 1973, p. l.) amending Regulation No 974/71 upon Articles 28, 43 and 235 of the Treaty.

The plaintiff in the main action also rejects any possible reference to Article 113 of the Treaty, for the Regulation in dispute deals not with problems of commercial policy but with problems of rates of exchange, which under Article 107 fall basically within the powers of the Member States.

The plaintiff rejects also, as incompatible with Article 4 of the Treaty, the idea that, whenever the system of agricultural prices is in danger, it is possible to take the necessary measures by virtue of general principles of law, without having to rely upon any specific conferment of powers.

Although Regulation 974/71 merely quotes 'in particular' Article 103 — so that in principle it ought to be possible to secure a subsequent clarification of its legal basis by reference, *inter alia,* to the provisions of the Treaty relating to agriculture — recourse to such a procedure would, in the present case, be futile, as the consultation with the European Parliament required by the third subparagraph of Article 43 (2) did not take place.

In any event the very general wording used to indicate the legal basis of the Regulation in dispute does not meet the requirement of Article 190 of the Treaty that the reasons on which it is based shall be stated.

On the second question

According to the plaintiff in the main action, the exclusive use in Article 2 (1) of Regulation No 974/71 of the exchange ratio beween the Deutschmark and the American dollar, resulted, in respect of imports of cheese from Switzerland, in a surcharge of at least 12 %, the parity of the Swiss franc having changed only very little in relation to the Deutschmark.

The plaintiff claims that the collection of compensatory amounts of the order of 13 % at a time when the maximum difference between the Swiss franc and the Deutschmark amounted to 3 % infringes the prohibition of charges having an effect equivalent to customs duties, included in Article 19 of Regulation No 804/68 of the Council of 27 June 1968, establishing a common organization of the market in milk and milk products (OJ L 148 of 28 June 1968, p. 13).

Article 2 of Regulation No 974/71 also infringes the principle of proportionality in that it is not limited 'to the amounts strictly necessary to compensate the incidence of the monetary measures on the prices of basic products covered by intervention arrangements' as is however required by the last recital of the said Regulation.

There is an infringement of the foundations of the Treaty and in

particular of Articles 39, 40 and 110, in that possible protective measures could have been taken only in so far as they were necessary to achieve the objectives set out in Article 39. The aim of Regulation No 974/71 is the safeguarding of the single agricultural market for products subject to intervention, as well as the limitation of losses incurred by producers. Whilst compensatory amounts which are confined to neutralizing the effect of revaluation in relation to the currencies of third countries would have sufficed to protect Community producers, the system used, on the other hand, gives them additional protection, disturbs the operation of the common market, leads to excessive prices to the consumer, and infringes the aim of a liberal commercial policy conforming to the provisions of GATT.

The computation of the compensatory amounts imposed upon the cheese disregarded a certain number of factors, which, had they been taken into consideration, would have reduced the burden of these amounts and permitted their progressive elimination, which, particularly in respect of cheese, would have been achieved by the date of the importation in dispute (15 March 1972). The plaintiff in the main action quotes the reduction in the cost of production, the independence of cheese prices from the intervention prices for butter and skimmed-milk powder and the variations of market prices, which offset the monetary fluctuations.

With regard to the calculation of compensatory amounts, the plaintiff in the main action considers that it is not possible to justify the system adopted by invoking practical and administrative considerations. According to the plaintiff, account should have been taken of the fact that, for the types of cheese in question, there are no intervention prices and that it would be possible to determine specific compensatory amounts for the principal third States trading with the Community, or at the least, to take as a criterion the weighted average of the fluctuations of parities of the most representative third States. Lastly, it would always have been possible to apply corrections to those compensatory amounts which could not be fixed with accuracy.

On the third question

The rate of customs duty imposed upon Emmentaler and Gruyère cheese on importation has been bound within the framework of GATT (Annex II of Regulation (EEC) No 1/72 amending Regulation No 950/68 in respect of the Common Customs Tariff (OJ L 1 of 1 January 1972, p. 375)). In accordance with Article 14 (3) of Regulation No 804/68 the levy is therefore limited to the amount resulting from that binding. According to the plaintiff in the main action, the concept of 'bound duties' includes the compensatory amounts. The Court stated in its judgment of 15 October 1969 (Case 14/69, Markus and Walsh, Rec. 1969, p. 356) that the expressions 'binding' and 'bound duty' are often used 'in a broad sense to include all the tariff concessions carried into effect by the members of GATT and forming the subject of an obligation within the framework of that Agreement'. Both the practice of the Hauptzollamt, the defendant in the main action, (which refers to the compensatory amount as 'Angleichungszoll' (tariff adjustment)) and that of the Federal Government, which considered that the extension of compensatory amounts to all agricultural products infringed Article 12 of the Treaty, show the relationship between these amounts and customs duties. Representations were even made on the subject by the United States in accordance with Article XXIII, paragraph 2 of GATT, and these moreover led the Community to suppress the compensatory amounts in respect of many of the products covered by GATT, and eventually in April 1973 in respect of Emmentaler and Gruyère cheese also.

As to the question whether, contrary to the opinion of the Court making the Reference, the application of bound duties constitutes more than just an obligation of public international law, the plaintiff in the main action points out that the judgment of the Court of 12 December 1972 (joined cases 21 to 24/1972 International Fruit Cy., Rec. 1972) was not a mere pronouncement on the direct effect of a single provision (Article XI) of the General Agreement. Article II on the other hand, taken together with the list annexed to the Agreement, in which the duties were laid down, constitutes a clear and unreserved rule which can be invoked by interested parties independently of the reaction of the State concerned in this case, Switzerland.

In any case the binding of the duty in dispute arises from the list forming Annex II to the Common Customs Tariff (as set out in Regulation No 1/72). It consequently forms an intergral part of this Tariff and has the same direct effect.

Moreover, the plaintiff in the main action states, according to Article 14 (3) of Regulation No 804/68 on the common organization of the market in milk and milk products, levies cannot, for the products in respect of which the customs duty has been bound within the framework of GATT, exceed the total amount resulting from that binding. This provision applies to all the charges imposed upon the products referred to by this Regulation and consequently to the compensatory amounts.

On the fourth question

The plaintiff in the main action considers that Article 8 (2) of Regulation No 974/71 does not refer to the establishment by Member States of new parities but to the effective application of the international rules concerning margins of fluctuation for exchange rates. However, the Washington Agreements of 18 December 1971 fixed new margins, particularly for the Deutschmark, while requesting the Bundesbank to intervene in order to maintain parity within these new margins. The absence of notification of new parities is of no importance as far as the application of Article 8 of Regulation No 974/71 is concerned.

According to the plaintiff, the second part of the fourth question must have sprung from a misinterpretation of Article 8 (2), which did not refer to a return to former parities.

On the fifth question

The freeing of rates of exchange infringed Articles 5 and 107 of the Treaty. The latter made provision only with respect to modifications of parity, floating being permitted by the practice of the IMF only for a short period.

The Resolution of the Council and of the Representatives of the Governments of the Member States of 22 March 1971 relative to the establishment in stages of an economic and monetary union within the Community included in paragraphs 6 and 7 of heading No III a prohibition of the freeing of currencies. This prohibition was binding on the Community and the Member States as from the very day the Resolution was passed. This applies in particular to the said heading No III where the Council and the Member States agreed to a series of steps to be taken during a first stage of three years.

B — On the observations of the Commission

On the first question

According to the Commission, Regulation No 974/71, devised as a short-term measure, accompanying the monetary measures taken by the Member States in agreement with the Community Institutions, fits within the framework of a conjunctural policy having agricultural aspects, but extending beyond them.

The powers conferred by Articles 103 (2) and 43 of the Treaty are cumulative. Thus the measures taken may legitimately constitute an obstacle to the free movement of goods, provided that they are taken in the common interest and left to the minimum necessary for the purpose. It is not possible to restrict the application of Article 103 by referring to the possibility of invoking the more specific provisions of Articles 39 to 46. Though it is true that Regulation No 974/71 could have been based on Article 43, as happened later, resort to Article 103 was justified at the time by the temporary nature of the system, by its financial consequences and by the need for quick action.

Article 103 did not in any way exclude the use of a Regulation as an instrument for introducing the measures referred to therein. The expression 'decide', in paragraph 2 has no specific meaning and the expression 'directives' in paragraph 3 applies to the method of giving effect to the measures decided upon. Article 155 of the Treaty refers expressly to the general powers for the implementation of its rules which the Council may confer upon the Commission.

On the second question

The choice of the American dollar, as a reference criterion for the rate of floating of Community currencies was in any case, justified and is probably the only feasible solution.

In view of the leading rôle of the dollar in international trade, resort either to the movements of the currency of any third country or to the average of these currencies would have been difficult to achieve in practice and, in short, unrealistic. In any case, in choosing this criterion the Council did not go beyond the margin of discretion with which, as a legislature, it was endowed, because the choice was based on relevant considerations. Thus there was no infringement of the prohibition of discrimination, of the principle of proportionality, of the objective of stabilizing markets (Article 39 (1) (c)), or finally of Article 110 of the Treaty.

On the third question

The Commission, on considering the compatibility of the compensatory amounts with the rules of GATT, takes the view that the question is more complex than the plaintiff in the main action thinks it to be.

Although Article II, paragraph 1 (b), of GATT forbids the collection of duties in excess of those which were laid down at the date of the Agreement, it is necessary to consider whether the compensatory amounts are affected by this provision and whether they are not covered by a provision exempting them.

The introduction of temporary measures of a monetary character or relating to the balance of payments is not entirely covered by the provision of GATT, although Articles XII and XVIII allow the imposition of quantitative restrictions of this nature.

The compensatory amounts may likewise fall within the provisions of the exception in Article II paragraph 2 (a) relating to charges 'equivalent to an internal tax imposed . . . in respect of the like domestic product'. It is necessary in this connexion to take account of the need to support the agricultural Common Market, which forms part of the customs union allowed by Article XXIV.

The Commission refers also to Article XIX which allows certain protective measures in case of a threat of serious injury ensuing from the importation of a product. On the other hand when, on 16 May 1972 it proposed that the products bound within the framework of GATT should be exempted from the compensatory amounts, this was not for reasons arising from the incompatibility of these amounts with the General Agreement, but for reasons of commercial policy.

The Commission does not believe that Article II, paragraph 1 (b) of the General

Agreement can have a direct effect. Although in its judgment of 12 December 1972 (joined cases 21 to 24/72, International Fruit Cy., Rec. 1972, 1219) the Court refused to admit a direct effect only in respect of Article XI of the General Agreement, the recitals to this judgment show clearly that this direct effect could not be accorded because of the overall legal construction of the General Agreement, because of its contractual aspects, because of the provisions for exemption which it contains and because of the absence of any legal sanctions.

The same solution thus applies equally to Article II, paragraph 1b. It is not possible, in assessing the direct effect of this provision, to apply the criteria which have been developed in respect of the direct applicability of Community law just as they stand, such, for example as the absence of enforcement measures to be taken by national authorities.

The Commission admits, nevertheless that the inclusion of duties bound within the framework of GATT among the annexes to the Common Customs Tariff (Regulation No 950/68, of the Council as amended by Regulation No 1/72) conferred a direct effect upon them. Interested parties were accordingly able to invoke them as against inconsistent subordinate Community provisions. But according to the Commission, the Regulation establishing the system of compensatory amounts is neither subordinate to, nor inconsistent with, the Common Customs Tariff.

It is not inconsistent because both by their function and by their legal basis the compensatory amounts are distinguishable from the customs duties properly so called, referred to in the Common Customs Tariff. They constitute at the very most, 'charges having equivalent effect' to customs duties, which, had it been desired to link them with the principle of compliance with the system of duties bound under GATT, would have had to be made the subject of a specific provision, (such as for example the third subparagraph of Article 14 (3) of Regulation No 804/68 concerning levies on milk products). Besides, the extension to 'charges of the same kind' of the prohibitions contained in the General Agreement which extension was enacted by Article II, paragraph 1 (b), of the said Agreement was not repeated in the Common Customs Tariff.

Moreover, Regulation No 974/71 is in no way a provision of a subordinate nature in relation to the Common Customs Tariff. Being *lex posterior* and *lex specialis* this Regulation derogates from the provisions of Regulation No 950/68. Had the Council wished in the implementing provisions to keep the Commission to the duties bound under GATT, an explicit clause to this effect would have had to appear in Regulation No 974/71.

In any event the Commission can always exempt products on the GATT list from payment of compensatory amounts. Regulation No 974/71 however, contains no general exemption clause.

On the fourth question

The Commission considers that the conditions in which the system of compensatory amounts was to cease to apply, as specified by Article 8 (2) of Regulation No 974/71, had not yet been fulfilled on 15 March 1972. Regulation No 974/71 attempts to offset the difference between the real and official parities because the latter, by virtue of Regulation No 129/62, determine the whole common agricultural policy.

On the 15 March 1972, the Member States had still not re-applied the international rules since neither the central rate nor the fluctuations due to floating were in conformity with them. The fact that it was clear that the Member States would not return to the former parities, has, according to the

Commission, no importance, as the 'international rules' mentioned in Article 8 of Regulation No 974/71 are directed towards the return to parities fixed within definite margins of fluctuation, and not a return to the former parities.

On the fifth question

The Commission considers that, even if it were admitted that floating parities could not in the long term be reconciled with the monetary concepts underlying the EEC Treaty, Article 107 contains no absolute prohibition preventing Member States from freeing their exchange rates. No such prohibition moreover is, included in the European Monetary Agreement of 5 August 1955 or in the Agreement relating to the IMF, the provisions of which have furthermore no direct effect.

It is true that the freeing of rates has unfortunate consequences for the agricultural policy, the latter being based as a matter of fact on a system of fixed parities. It could not, however be deduced from this that the system is unalterable. The objective of a single agricultural market has been achieved before that of the economic and monetary union. However even if the two objectives no longer coincide it is necessary to provide the necessary rectifications.

Neither is the Council Resolution of 22 March 1971 an obstacle to the freeing of rates. This Resolution has no binding force. In fact the monetary crisis upset the forecasts concerning the achievement of economic and monetary union and this fact led to a new Resolution of 21 March 1972.

The solution is no different if the second paragraph of Article 5 of the Treaty is considered. If the freeing of rates of exchange still remains one of the instruments of national monetary policies, it can not be regarded as incompatible with the obligations prescribed by Article 5 simply because it makes the achievement of the objects of the Treaty more difficult.

The Commission suggests a reply to the effect that an examination of the first two questions has not shown any factor calculated to call in question the validity of Regulation No 974/71 in so far, either, as it permits the collection of compensatory amounts payable or imports from third countries or uses the fluctuations of parity of the DM with reference to the dollar for fixing compensatory amounts.

Furthermore Regulation No 974/71 of the Council and Regulations Nos 1013/71 and 501/72 of the Commission are valid even if the compensatory amounts levied on imports from third countries exceed the customs duties bound within the framework of GATT (third question).

The reply to the fourth question ought to be that the authority for levying compensatory amounts contained in Regulation No 974/71 was still valid on 15 March 1972.

Lastly, on the fifth question, the Commission considers that neither Article 107 of the Treaty nor the Resolution of the 22 March 1971 nor Article 5 of the Treaty contain any prohibition of the freeing of rates of exchange.

C — Observations of the Council

On the first and second questions

The Council refers to its observations in case 5/73 (Balkan-Import-Export v Hauptzollamt Berlin-Packhof) and considers that nothing affects the validity of Regulation No 974/71 in so far as it allows the levying of compensatory amounts. The choice of the American dollar as a reference criterion does not affect the validity of Article 2 of Regulation No 974/71.

On the third question

Considering the validity of Regulation No 974/71 with reference to the tariff Agreement made on 6 October 1969

between the Community and Switzerland within the framework of Article XXVIII of GATT, the Council takes the view that the compensatory amounts may be considered not to form part of the duties in respect of which tariff concessions have been agreed. They are not a new tax but do no more than compensate for the reduction in the previous tax due to monetary fluctuations. Although certain products included in the lists of concessions under GATT have been exempted from the compensatory amounts, this has always been done in individual cases and in application of the last subparagraph of Article 1 (2) of Regulation No 974/71 which makes the fixing of compensatory amounts subject to there being disturbances in trade in agricultural products. No such exemption of a general nature has been brought into force as can be seen moreover from the Council's refusal to adopt the Commission's proposal of 16 May 1972 to that effect.

Moreover the Council considers that the considerations enunciated by the Court in joined cases 21 to 24/72 (Judgment of 12 December 1972, International Fruit Cy.), refusing to ascribe a direct effect to Article XI of GATT, are of a general nature and apply to the whole of the Agreement. The validity of Regulation No 974/71 cannot therefore be affected by Article II of GATT taken together with the tariff agreement of 6 October 1969.

The Council considers that the position is no different if Regulation No 974/71 is compared with the Common Customs Tariff (Council Regulation No 950/68, amended by Council Regulation No 1/72 of 20 December 1971) which repeated the concessions made within the framework of GATT.

In the first place the Council does not believe that the compensatory amounts fall within the provisions of the Common Customs Tariff. Their legal basis is different and as in the case of the levies, the mention of which in the Common Customs Tariff is only by way of information, there would have to be an express provision to link them to the bound tariffs.

In any event the Council was able by Regulation No 974/71 to make provision for exceptions to the subject matter of Regulation No 950/68 such provision as a *lex specialis* taking precedence over the latter Regulation.

On the fourth question

The Council refers to its observations in case 5/73.

D — Observations of the German Government

On the first question

According to the German Government the 'conjunctural policy' which is mentioned in Article 103 of the Treaty has as its specific purpose the safeguarding of general economic development by measures intended to control the periodic upward and downward movements occuring during the course of such economic development. Thus the intention of Regulation No 974/71 was to correct, in the interests of medium and long term development, the variations due to the freeing of parities, the effects of which were making themselves felt in the agricultural sector. It is quite correct, according to the German Government, that the Treaty provides in Article 38 *et seq.* for special powers in agricultural matters, but there is no limitation in these Articles to the powers available within the framework of Article 103. The expression 'without prejudice to any other procedure' in Article 103 (8) tends to show the existence of cumulative powers so that action based on Article 103 could apply to all sectors and the measures taken could be adapted to each individual case. This interpretation, underlying much Community legislation such as Regulation No 1586/69 of the

Council of 11 August 1969 (OJ L 202 of 12 August 1969, p. 1) authorizing France to levy compensatory amounts on exports, finds support in the Court's judgment of 13 June 1972 (joined cases 9 and 11/71, Cie d'Approvisionnement, Rec. 1972).

Neither is the system established by Regulation No 974/71 contrary to the common interest since it covers the greater part of the agricultural sector, and even prevents serious imbalances between the various Member States.

With regard to the form of this Regulation, the German Government recalls that under the terms of Article 103 of the Treaty, the Council was not bound to use either a decision or a directive. It appears clearly from Article 103 (2) that the Council can, besides having the power of coordination provided for in paragraph 3, take steps of a conjunctural nature and introduce a common conjunctural policy.

On the second question .

The German Government considers that the Council did not breach the principle of proportionality in making reference to the parity of the dollar in order to fix the compensatory amounts. It was the Council's duty to find a solution coinciding as closely as possible with the monetary fluctuations, and yet remaining practicable. This last requirement justified the choice of a comprehensive system rather than a system related to the fluctuations of each currency of third countries. As to an arithmetical average of the parities of the currencies of third countries, this solution would not have been practicable and would often not have sufficed to cover the actual margins of fluctuation.

The Council thus legitimately used its power of discretion in order to arrive at a system which offered the best guarantees of accuracy, efficiency and feasibility.

On the third question

The compensatory amounts cannot be regarded as customs duties within the meaning of Article II of GATT. It is more a matter of *sui generis* duties, influenced first by the freeing of rates of exchange, and secondly by the organizational structure of the agricultural markets.

Though it is true that the Community also is bound by the terms of the General Agreement on Tariffs and Trade, interested parties cannot, even so, pray in aid a possible breach of the said Agreement, since, in the view of the German Government, the Court's judgment of 12 December 1972 (joined cases 21 to 24/72, International Fruit Cy.) established that the Agreement created only obligations between States, without any direct effect in favour of the nationals of these States.

On the fourth question

According to the German Government, the Washington Decisions of 18 December 1971 did not end the necessity for the collection of compensatory amounts: the currency fluctuations within the new margins, although kept within narrower limits, still had to be the object of compensation since agricultural prices expressed in units of account continued to be converted on the basis of the former parities.

The central rates consequent upon the Washington Agreements are distinct from the official parities within the meaning of the Agreement setting up the International Monetary Fund. The renunciation of flexible exchange rates by Member States and the re-introduction of fixed parities did not, therefore, mean a return to the 'internation rules'. Thus the system of compensatory amounts should not be rescinded until new official parities have been fixed.

On the fifth question

The only limit on the powers of Member States as to their policies regarding rates

of exchange follow from the obligation to treat them as a problem of 'common concern'. By the terms of Article 107 (2) the powers of Member States to alter exchange rates are limited only indirectly, the Commission authorizing other Member States, in case of an improper use of the power of alteration, to take the necessary measures for a limited period.

Although the monetary system in force at the time was based in the main on fixed parities, this was not an unvarying principle as is shown by the many cases in which the IMF authorized the freeing of currencies.

As to the Council Resolution of 22 March 1971 'relating to the achievement in stages of an economic and monetary union within the Community' it has only a political aim and creates no legal obligations.

As the Member States did not wish to accept legal restraints on their independence concerning monetary policy, this Resolution was limited to trying to keep the fluctuations of the currency rates of the Member States within narrower margins 'by way of experiment'. That is what the second Council Regulation of 21 March 1972 (OJ L 38 of 18 April 1972, p. 3) attempted to bring into force.

As for Article 5, this likewise includes no prohibition of the freeing of rates. The first subparagraph requiring the Member States to take all appropriate measures to ensure fulfillment of the obligations arising out of the Treaty and to enact 'secondary' Community law, contains no prohibition. The second subparagraph which provides that the Member States 'shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty' could not limit the independence of Member States on questions of monetary policy since Article 107 includes no such prohibition.

Grounds of judgment

1 By Order dated 8 November 1972, lodged at the Registry on 19 February 1973, the Baden-Württemberg Finanzgericht referred to the Court for a preliminary ruling the question of the interpretation and validity of various provisions contained in Regulation No 974/71 of the Council of 12 May 1971, concerning certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (OJ L 106, 12. 5. 1971); also of Regulations of the Commission Nos 1013/71, 1014/71 (OJ L 110, 18. 5. 1971) and 501/72 (OJ L 60, 11. 3. 1972) implementing the former; and finally on the interpretation of Articles 5 and 107 of the EEC Treaty and the Resolution adopted by the Council and Government Representatives of the Member States of 22 March 1971 on the establishment in stages of an economic and monetary union within the Community (OJ C 28, 27. 3. 1971, p. 1).

2 On 15 March 1972 the plaintiff in the main action imported 7 247 kg of Emmentaler and Gruyère cheese from Switzerland into the Federal Republic of Germany and was charged, under Regulation No 974/71, compensatory amounts at the rate of 45·50 DM per 100 kg, a sum calculated, for products

under heading 04.04 of the Common Customs Tariff, by reference to the Annexes to Regulation No 501/72 of 9 March 1972 fixing the compensatory amounts applicable at the time of the importation in question.

The plaintiff brought an action in the Finanzgericht disputing the amounts charged, claiming that the system of compensatory amounts introduced by Regulation No 974/71 was incompatible with the Treaty.

Analysis of the compensatory amounts system

3 As a result of the increasing influx of foreign currency and short-term speculative capital in the early months of 1971 and the effects produced by this in some Member States, especially the Federal Republic of Germany and the Netherlands, the Council indicated in a Resolution of 9 May 1971 (OJ 58, 10. 6. 1971, p. 1) that it was prepared to envisage 'that, in certain cases, these countries might, for a limited period, widen the margins of fluctuation for the exchange rates of their currencies in relation to their (present) parities'.

In the same Resolution, the Council emphasized that under normal circumstances a system of floating currencies such as this would not be compatible with the proper functioning of the common market, and, 'so as to avoid resort to unilateral measures', decided that it was desirable for it to adopt 'immediately, in accordance with Article 103 of the Treaty . . .', appropriate measures in the agricultural sector.

4 The organization of agricultural markets is designed, *inter alia*, to ensure a fair standard of living for the agricultural community and to stabilize markets, in particular by means of a stable price system whereby target prices, threshold prices and intervention prices are determined on the basis of fixed parities for the currencies of the various Member States by reference to a single unit of account.

Since it was not possible to fix new parities while the DM and the guilder were floating, the price-levels considered to be appropriate continued to be determined and calculated, for products with fixed intervention prices and for products whose prices depend on the price of the first-mentioned products, on the basis of the parities previously declared to the IMF, even for the Netherlands and the Federal Republic.

But while these prices thus remained unaltered in theory, they were in fact reduced — particularly when they were expressed in DM — in proportion to the effects of the *de facto* revaluation of this currency, causing disturbances in agricultural trade detrimental to producers and capable of disrupting the intervention system established by Community legislation.

5 As a result, the Council decided that the measures to be taken immediately should consist in the introduction of a system of compensatory amounts which these Member States would be authorized to charge on imports and grant on exports in their trade both with other Member States and with third countries, with a view to offsetting the effects of the monetary measures on the price of basic products for which intervention prices have been imposed, and for agricultural products whose price depends on the price of those products.

6 Under Article 2 of Regulation No 974/71, the compensatory amounts are obtained by applying to the prices of agricultural products covered by intervention arrangements the percentage difference between the official parity and the true parity of the national currency in relation to the US dollar.

For the other products covered by Regulation No 974/71, the compensatory amounts are equal to the incidence, on the price of the products concerned, of the application of the compensatory amount to the price of the product on which they depend.

Moreover, according to the last sentence of Article 1 of the Regulation, compensatory amounts can be charged only where the monetary measures would lead to disturbances in trade in the agricultural products mentioned.

It is for the Commission, after obtaining an opinion from the management committees, to decide whether or not such a situation exists.

Finally, Article 8 of the above Regulation states that the latter shall cease to be applicable as soon as all the Member States concerned again apply the international rules on margins of exchange-rate fluctuation around official parity.

7 Owing to the deterioration of the monetary situation, particularly the suspension of the convertibility of the dollar on 15 August 1971 and the subsequent floating of Belgo-Luxembourg Economic Union currencies from 23 August 1971, the system of compensatory amounts was extended to a wider range of products and to the exports and imports of those Member States.

At the Washington Conference on 18 December 1971 the rates of exchange were closely re-defined in relation to the dollar in the form of central rates, the margins of fluctuation remaining, however, wider than those authorized under the Bretton Woods Agreements.

Nevertheless, since no official change of parities followed these Decisions, and the monetary system was still in disarray, the compensatory amounts scheme was extended to France and Italy and to all the agricultural products mentioned in Article 1 of Regulation No 974/71.

8 Subsequently to the facts giving rise to the action the Council, by Regulation No 2746/72 of December 1972, made the compensatory amounts scheme compulsory and 'incorporated' it into the framework of the common agricultural policy, giving Articles 28, 43 and 235 of the Treaty as its basis.

9 The circumstances outlined above and their continuing development must be borne in mind in considering the intervention made by the Council and the Commission.

I — Question one

10 The first question asks whether Regulation No 974/71 is valid in so far as it authorizes the charging of compensatory amounts on imports from third countries.

(a) The legal basis of Regulation No 974/71

11 This question concerns, first, whether the validity of the above Regulation could be affected by the fact that it is based on Article 103 of the Treaty, which does not touch on the common agricultural policy, the latter being governed by the specific provisions of Articles 38 to 47 of the Treaty, and that in any case, the said Article 103 authorizes only the adoption of conjunctural measures, which the disputed measures are not.

12 Article 40 of the Treaty states that Member States shall bring the common agricultural policy into force by the end of the transitional period at the latest and that, in order to attain the objectives set out in Article 39 a common organization of agricultural markets is to be established.

The same Article provides that this common organization may include any measures required and in particular regulation of prices, aids for production and marketing, storage and carry-over arrangements and common machinery for stabilizing imports and exports.

By virtue of the third paragraph of Article 43 (2), the Council shall, on a proposal from the Commission and after consulting the Assembly, acting, after the end of the second stage of the transitional period, by a qualified majority, make regulations, issue directives, or take decisions in this sphere.

It is evident from these provisions that the powers conferred for implementing the common agricultural policy do not relate merely to possible structural measures but extend equally to any immediate short-term economic intervention required in this area of production, and that the Council is

empowered to resort to them in accordance with the decision-making procedures there set out.

13 On the other hand, Article 103 refers to Member States' conjunctural policies, which they must regard as a matter of common concern.

Consequently it does not relate to those areas already subject to common rules, as is the organization of agricultural markets.

The real object envisaged by Article 103 is the coordination of Member States' conjunctural policies, and, according to the terms of paragraph 2 of that Article, the adoption of common measures appropriate to the situation.

14 The floating of the exchange rates for the German and Dutch currencies, deemed essential if the wave of speculative capital into the Federal Republic and the Netherlands was to be checked, imperilled the unity of the common market and made measures designed to safeguard the machinery and objectives of the common agricultural policy imperative.

The introduction of compensatory amounts was not intended to provide extra protection, but to maintain uniform prices, the foundation of the present organization of the markets, despite the temporary departure from fixed parities, thus preventing the collapse of the intervention-price system and preserving the normal flow of trade in agricultural products both within the Community and with third countries.

These measures, intended to compensate temporarily for the harmful effects of national monetary measures, so that the process of economic integration may meanwhile continue its progress, are of an essentially transitory nature, and would normally have had to be adopted by virtue of the powers conferred on the Council by Articles 40 and 43 and in accordance with the procedures set out therein, in particular after consulting the Assembly.

15 However, owing to the time needed to give effect to the procedures laid down in Articles 40 and 43, a certain amount of trade might then have passed free of the Regulations, and this could jeopardize the relevant common organizations of the market.

There being no adequate provision in the common agricultural policy for adoption of the urgent measures necessary to counteract the monetary situation described above, it is reasonable to suppose that the Council was justified in making interim use of the powers conferred on it by Article 103 of the Treaty.

Consequently, while the suddenness of the events with which the Council was faced, the urgency of the measures to be adopted, the seriousness of the situation and the fact that these measures were adopted in an area intimately connected with the monetary policies of Member States, the effects of which they had partially to offset, all prompted the Council to have recourse to Article 103, Regulation No 2746/72 shows that this state of affairs was only a temporary one, since the legal basis for the measures was eventually found in other provisions of the Treaty.

(b) The form in which the disputed measure was adopted

16 The next question is whether Regulation No 974/71 is invalid on the ground that Article 103 of the Treaty, notably in paragraph 3, authorizes the adoption of measures only in the form of a directive or decision, not in the form of a regulation.

It is alleged that such an interpretation is borne out by the wording of Article 103 and is justified in view of the fact that in the realm of conjunctural policy no more than a coordinating rôle has been given to the Institutions.

17 Although by Article 103 (1) Member States are bound to regard their conjunctural policies as a matter of common concern, the wording does not preclude Community Institutions from having power to lay down themselves, without prejudice to other procedures set out in the Treaty, conjunctural measures on matters within the spheres of their competence.

On the contrary, Article 103 (2), by declaring that the Council may, 'acting unanimously... decide upon the measures appropriate to the situation', confers on that body — subject to the condition referred to above — the powers necessary to adopt, in principle, any conjunctural measures which may appear to be needed in order to safeguard the objectives of the Treaty.

Without some such faculty, the natural concomitant of any kind of economic administration, the Institutions of the Community would find it impossible to accomplish the tasks entrusted to them in this field.

18 The phrase 'measures appropriate to the situation' in Article 103 (2) means that as regards form too, the Council may choose whichever seems best suited to the case in hand.

Subject to the requirement of a unanimous decision, Article 103 (2) refers to the general procedures whereby the Council may exercise its powers, described in Articles 145, 155 and 189, including therefore its right to delegate to the Commission the implementation of Regulations it has laid down.

Article 103 (3) differs from Article 103 (2) in that, as the use of the phrase 'where required' shows, it envisages the possibility that the Council might not be able to reach the unanimity required to carry into effect the rules for the application of the conjunctural measures decided on.

In that circumstance only, these rules would be binding on Member States as far as they concerned the result to be obtained, but would have to leave to the national authorities the choice of form and method.

II — Question two

19 The next question is whether the validity of Regulation No 974/71 can be questioned on the ground that the sole criterion adopted for the fixing of the compensatory amounts is the exchange rate between the DM and the American dollar.

20 According to the final paragraph of the preamble to Regulation No 974/71, the amounts adopted should be limited to those strictly necessary to compensate the incidence of the monetary measures.

It is not disputed that, owing to the fact that a single overall criterion was selected, imports into Germany from countries whose currencies are fluctuating in relation to the DM to an extent different from that of the dollar, are affected by compensatory amounts which do not always correspond precisely to the effects in the monetary field of the revaluation of the DM.

The plaintiff in the main action claims that the Council ought either to have varied the compensatory amounts in accordance with the rates of exchange against the dollar of the different currencies of countries importing from or exporting to the Federal Republic and the Netherlands, or to have computed them on the basis of a set weighted average dependent on the volume of trade.

21 Faced with the necessity of drawing up measures of immediate effect and applicable to all imports and exports of the products concerned, in a situation developing constantly and more or less unpredictably, the Council contrived to make an overall assessment of the advantages and disadvantages of the system to be introduced.

It was able to conclude that to vary the compensatory amounts according to the geographical origin of the products would have prejudiced the practicability of the scheme, largely because of the multiplicity of individual situations, such as those which might arise from the multiple-rate systems employed in some countries, or from the special characteristics of State-trading countries.

A system of this kind might in any case have tended to provoke diversions of trade, which would be difficult to regulate otherwise than by means of systems involving certificates of origin or by controlling the movements of goods in such a way as to inhibit their free circulation.

Furthermore, the choice of contractual currency made by the parties could have rendered the system nugatory.

By determining the size of the compensatory amounts, for each Member State authorized to introduce them, on the basis of a comparison between the official and the true parity of the national currency as against the dollar, the Council sought to take into account the fact that on imports made into Member States, a significant proportion of the dealing is expressed in dollars, and that for exports, particularly to third countries, this was so at the time in the large majority of cases.

22 Moreover, a weighted system, because of its flat-rate nature, would bring the same disadvantages as those criticized, yet without supplying the complete protection deemed necessary in relation to the world's leading exporter of agricultural produce.

Since one of the aims of the conjunctural measures planned was to provide a short-term remedy for the consequences of the revaluation of the DM which might place in jeopardy the goal of a fair standard of living for the agricultural community, it was reasonable to contemplate the necessity of allowing a maximum corrective factor.

In exercising their powers, the Institutions must ensure that the amounts which commercial operators are charged are no greater than is required to

achieve the aim which the authorities are to accomplish; however, it does not necessarily follow that that obligation must be measured in relation to the individual situation of any one particular group of operators.

Given the multiplicity and complexity of economic circumstances, such an evaluation would not only be impossible to achieve, but would also create perpetual uncertainty in the law.

An overall assessment of the advantages and disadvantages of the measures contemplated was justified, in this case, by the exceptionally pressing need for practicability in economic measures which are designed to exert an immediate corrective influence; and this need had to be taken into account in balancing the opposing interests.

23 The Court is not satisfied, then, that in weighing up the advantages and disadvantages of the system linking compensatory amounts to the relationship with the dollar of the national currency of each Member State concerned, and in opting for the system in force, the Council imposed burdens on traders which were manifestly out of proportion to the object in view.

III — Question three

24 The third question is whether the validity of Regulation No 974/71 and of the Regulations implementing it can be questioned on the ground that the disputed compensatory amount, plus the levy, exceeds in total the amount of bound duty for tariff heading 04.04, under the General Agreement on Tariffs and Trade (GATT), hereinafter referred to as the 'General Agreement'.

25 The customs duties applicable to imports of Emmentaler and Gruyère (heading 04.04 AI a ex 2) were bound at the rate of 7·5 u.a. per 100 kg under a tariff concession resulting from an Agreement concluded by the Community and Switzerland on 6 October 1969 in accordance with Article XXVIII of the General Agreement (OJ L 257, 13. 10. 1969, p. 3) and this rate is included under 'agreed duty rates' in Annex II of the Common Customs Tariff in force when the disputed imports were made (Regulation No 950/68 of the Council of 28. 6. 1968) amended by Regulation No 1/72 of the Council of 20. 12. 1971 (OJ L 1/72).

26 That the total of the compensatory amount plus that of the levy charged on the same products exceeds the bound rate of 7·5 u.a. per 100 kg, is not disputed.

The plaintiff in the main action maintains that, to the extent of that excess, the compensatory levy was established in breach of both Article II of the General Agreement and the provisions of the Common Customs Tariff.

27 The validity of acts of the Institutions, within the meaning of Article 177 of the Treaty, cannot be tested against a rule of international law unless that rule is binding on the Community and capable of creating rights of which interested parties may avail themselves in a court of law.

28 The tariff concession which concerns us here is binding on the Community to the extent envisaged by Article II of the General Agreement.

It is therefore pertinent to see whether the provisions of the General Agreement, and Article II in particular, create rights for Community subjects which they may invoke in proceedings contesting the validity of a Community disposition.

For this, one must bear in mind the meaning, the structure, and the wording of the General Agreement.

29 A particular feature of this Agreement, founded — according to the preamble — on the principle of negotiations undertaken on 'a reciprocal and mutually advantageous basis', is the broad flexibility of its provisions, especially those concerning deviations from general rules, measures which may be taken in cases of exceptional difficulty, and the settling of differences between the contracting parties.

For settling disputes, these measures comprise, as the case requires, written arguments or proposals which are 'to be accorded sympathetic consideration', inquiries to be followed up, if necessary, by recommendations, consultations or decisions by the contracting parties, including any authorizing certain contracting parties to suspend the application to others, of any concession or other obligation derived from the General Agreement, and lastly, where such a suspension occurs, an option given to the affected party to withdraw from the Agreement.

Finally, where as a result of some obligation assumed under the General Agreement or of a concession with respect to a preference, serious injury is caused or threatened to certain producers, Article XIX grants an opportunity for one of the contracting parties to suspend the obligation unilaterally, or to withdraw or modify the concession, either after consulting all the contracting parties, or even, in the absence of agreement between the contracting parties concerned, if there is urgency in the matter and by way of a temporary measure, without prior consultation.

30 These details suffice to show that in such a context Article II of the General Agreement cannot confer on parties within the Community a right to invoke it in a court of law.

31 The fact that certain tariff headings have been the subject of bilateral agreements concluded under Article XXVIII of the General Agreement, modifying or withdrawing previous tariff concessions, cannot alter the nature of the obligations assumed by the Community with respect thereto.

Consequently, no provision in the General Agreement or in Agreements made under Article XVIII thereof can affect the validity of Regulation No 974/71 and its implementing Regulations.

32 This bound duty however, was included under the heading of 'agreed duties' in the Common Customs Tariff.

Accordingly this provision, having been incorporated into a Community Regulation, is capable of giving rise to rights of which parties may avail themselves in a court of law.

It is itself clear and precise, and does not leave any margin of discretion to the authorities by whom it is to be applied.

We must therefore now see whether the compensatory amounts in question are compatible with the Common Customs Tariff.

33 Although the compensatory amounts do constitute a partitioning of the market, here they have a corrective influence on the variations in fluctuating exchange rates which, in a system of market organization for agricultural

products based on uniform prices, might cause disturbances in trade in these products.

Diversion of trade caused solely by the monetary situation can be considered more damaging to the common interest, bearing in mind the aims of the common agricultural policy, than the disadvantages of the measures in dispute.

Consequently these compensatory amounts are conducive to the maintenance of a normal flow of trade under the exceptional circumstances created temporarily by the monetary situation.

They are also intended to prevent the disruption in the Member State concerned of the intervention system set up under Community Regulations.

Furthermore, these are not levies introduced by some Member States unilaterally, but Community measures which, bearing in mind the exceptional circumstances of the time, are permissible within the framework of the common agricultural policy.

By adopting them the Council has not contravened the provisions of the Common Customs Tariff.

34 The response to the third question must therefore be that examination of it has not revealed any elements capable of affecting the validity of Regulation No 974/71, nor that of Regulations Nos 1013/71, 1014/71 and 501/72 by reason of the fact that when added to the levy, the compensatory amounts in question exceed the maximum total of the duty bound under GATT in relation to tariff heading 04.04.

IV — Question four

35 The fourth question asks whether the authorization to charge compensatory amounts was no longer valid on 15 March 1972 — the date of the importation in question — in view of Article 8 (2) of Regulation No 974/71.

The point raised by this question is whether or not the conditions imposed by Article 8 of Regulation No 974/71 for its ceasing to be applicable had been

met on that date by reason of the fact that, after the Washington Agreement of 18 December 1971, Member States had decided not to float their currencies, while accepting a margin of fluctuation for exchange around a rate, known as a central rate, greater than that permitted by the Bretton Woods Agreements.

36 Article 8 of Regulation No 974/71 provides that it shall cease to be applicable as soon as all the Member States concerned again apply the international rules on margins of exchange-rate fluctuation around official parity.

This provision envisages the abolition of compensatory amounts as soon as all the Member States have decided to observe again the original parities, or new parities declared to the IMF.

37 The Agreement of 18 December 1971 did not meet those requirements.

Far from restoring fixed parities, the countries concerned merely agreed that they would maintain, as far as possible, central rates, which were subject to alteration; the Agreement also allowed margins of fluctuation around these rates of 2·25% above and below, sometimes equalling the very fluctuations which had prompted the introduction of compensatory amounts.

Moreover, even after the Agreement mentioned, the trend towards the revaluation of certain currencies in the Community continued within the scope of the widened margins of fluctuation; at the time of the disputed imports, the difference between the DM and its old official parity had reached 13 %, where it remained until the devaluation of the dollar on 8 May 1972.

Finally, the fact that it was certain that the Member States concerned would not go back to the old parities against the dollar was not relevant, since the international rules mentioned in Article 8 do not provide for one set parity but for a system of fixed parities.

V — Question five

38 The fifth question asks whether Articles 5 and 107 of the Treaty, and the Resolution adopted by the Council and Government Representatives of the Member States of 22 March 1971 on the establishment by stages of an

economic and monetary union should be interpreted as prohibiting Member States, at the time of the importation in dispute, from 'freeing their rates of exchange', that is, from floating their currencies.

39 One of the cardinal aims of the Treaty is to create a single economic region, free from internal restrictions, in which economic and customs union may be progressively achieved.

This requires the parities between the currencies of the various Member States to remain fixed; as soon as this requirements ceases to be met, the process of integration envisaged by the Treaty will be retarded or prejudiced.

It is therefore the duty of the Community Institutions and of Member States to cooperate in and to ensure the creation and maintenance of these conditions.

To that end, Article 3 (g) provides for the procedures to be followed in order to coordinate the economic policies of Member States and to remedy any disequilibria in their balances of payments.

But until the procedures envisaged by this provision have been put into operation, Articles 5 and 107 allow Member States, despite the duty imposed on each of them to regard its policy on rates of exchange as a matter of common concern, such freedom of decision that the obligation contained in these Articles 5 and 107 cannot confer on interested parties rights which the national courts would be bound to protect.

40 Moreover, the Council Resolution of 22 March 1971, which is primarily an expression of the policy favoured by the Council and Government Representatives of the Member States concerning the establishment of an economic and monetary union within the next ten years following 1 January 1971, cannot for its part, either, by reason of its content, create legal consequences of which parties might avail themselves in court.

Costs

41 The costs incurred by the Government of the Federal Republic of Germany, the Council and the Commission of the European Communities, which have

submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before a national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the plaintiff in the main action, the Government of the Federal Republic of Germany, the Council and the Commission;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 3, 5, 38 to 47, 103, 107, 110 and 177;
Having regard to the General Agreement on Tariffs and Trade, especially Articles II and XXVIII;
Having regard to the Agreement concluded between the European Economic Community and Switzerland on 6 October 1969;
Having regard to Regulations of the Council Nos 804/68 of 27 June 1968, 823/68 of 28 June 1968, 974/71 of 12 May 1971, 1/72 of 20 December 1971 and 2746/72 of 19 December 1972;
Having regard to Regulations of the Commission Nos 1013/71 and 1014/71 of 18 May 1971 and 501/72 of 9 March 1972;

THE COURT

in answer to the questions referred to it by the Finanzgericht of Baden-Württemberg by an order of that court dated 8 November 1972, hereby rules:

1. **Examination of the questions referred has not revealed any elements capable of affecting the validity of Regulation No 974/71 of the Council nor that of Regulations Nos 979/72 and 980/72 of the Commission fixing the compensatory amounts applicable during the period indicated in the questions referred.**

2. **Neither Articles 5 and 107 of the Treaty, nor the Resolution adopted by the Council and Government Representatives of the Member States of 22 March 1971 on the establishment in stages of an economic and**

monetary union, can be interpreted as in themselves imposing on Member States a prohibition against altering the parity of the rates of exchange for their currency otherwise than by establishing a new fixed parity, which might be invoked by interested parties in the national courts.

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

Delivered in open court in Luxembourg on 23 October 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 11 JULY 1973 [1]

Mr President,
Members of the Court,

The two joined cases referred for preliminary ruling by the Finanzgericht Baden-Württemberg (Cases 9/73 and 10/73) on 19 February 1973 were argued on 27 June in what might be called a single oral proceeding. For this reason and also because the content of the cases is in part indentical, in part closely related in their subject matter, I can permit myself to deal with the submissions in one combined opinion. Moreover as the problems of the cases now before us correspond in part with those of Case 5/73, it appears to me superfluous to specify the legal matters at issue in my indroduction. On these I refer to the opinion I gave on 26 June in Case 5/73.

I need only say now that the firms of Schlüter and Rewe-Zentral, the plaintiffs in the main actions were affected by the system of compensatory amounts introduced, after the floating of the exchange rates of the German mark and Dutch guilder, by Regulation No 974/71 (OJ 1971, L 106). Accordingly the firm of Schlüter, on importing Emmentaler and Gruyère cheese from Switzerland into the Federal Republic of Germany on 15 March 1972, had to pay a compensatory amount of DM 45·50 per 100 kg of cheese under Regulation No 501/72 (OJ 1972, L 60) of the Commission in force at the time. The same applied to the firm of

1 — Translated from the German.