In Case 146/73

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

RHEINMÜHLEN-DÜSSELDORF, Düsseldorf-Holthausen,

and

EINFUHR- UND VORRATSSTELLE FÜR GETREIDE UND FUTTERMITTEL, Frankfurt-on-Main,

on the interpretation of the second paragraph of Article 177 of the EEC Treaty and Articles 19 (2) and 20 (2) of Regulation No 19/62 of the Council of 4 April 1962 (OJ 1962, p. 933 et seq.), in conjunction with Articles 14 and 15 of Regulation No 141/64 of the Council of 21 October 1964 (OJ 1964, p. 2666),

THE COURT

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

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

The facts of the case, the subject matter of the request and the views of the parties may be summarized as follows:

I — Facts and procedure

During the period from 30 December 1964 to 16 December 1965, the plaintiff

in the main action exported pearl barley from the Federal Republic of Germany. As a result of the particulars given by the plaintiff, according to which the goods were being delivered to third countries, the defendant in the main action allowed it the refunds for exports to third countries. Subsequently the defendant withdrew these refunds on the grounds that the deliveries had not been made to third countries but to other Member States. After an unsuccessful administrative appeal the plaintiff issued a summons in the Hessisches Finanzgericht. This summons was dismissed and the plaintiff appealed on a point of law to the Bundesfinanzhof, which, by judgment dated 8 November 1972 — VII R 98/68, quashed the judgment of the Finanzgericht and sent the case back to it for reconsideration. The Bundesfinanzhof considered that the decision to make a refund could not be revoked except to the extent that the refund for third countries exceeded the refund for Member States. According to Paragraph 126 (5) of the Finanzgerichtsordnung (Rules of Procedure for the Finanzgerichte) of 6 October 1965 (BGBl. I — 1477) the Court to which the case is sent back is bound by the judgment of the Court which has sent the case back. However, the Hessisches Finanzgericht considered that the principle enunciated by the Bundesfinanzhof was not consistent with the system of refunds provided for by Regulation No 19/62, and by order dated 7 May 1973 stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Must the second paragraph of Article 177 of the Treaty establishing the European Economic Community of 25 March 1957 be interpreted as meaning that a court against whose decisions there is a judicial remedy under national law may refer a doubtful question of European law to the Court of Justice of the European Communities for a preliminary ruling only when the case comes before it for the first time, or is a reference also permissible when the case is being reconsidered after a judgment of a court of first instance has been quashed by a supreme court?

If so:

2. Must Articles 19 (2) and 20 (2) of Regulation No 19/62 EEC (Official Journal of the European Communities, 933/62), in conjunction with Articles 14 and 15 of Regulation No 141/64 EEC (Official Journal 2666/64), be interpreted as meaning that an exporter who claims a third country refund for the export of pearl barley to a specific third country, when this refund has been granted and received by him, is entitled to at least the member country refund if a subsequent investigation reveals that, contrary to his statements, he has exported the goods to a member country, or must he in such a case forego the refund?

3. Must Article 20 (2) of Regulation No 19/62 EEC, in conjunction with Article 15 of Regulation No 141/64 EEC, be interpreted as meaning that an exporter is entitled to the third country refund only if he exports the goods to the country mentioned in the application for a refund, or does it suffice for the grant of a refund that the goods are exported to any other third country whatsoever?'

The order for a preliminary ruling was filed at the Court Registry on 20 June 1973.

The plaintiff, represented by Mr Modest, of the Hamburg Bar, the defendant, represented by Mr Stockburger of the Frankfurt-on-Main Bar, and the Commission of the European Communities, represented by its legal adviser, Mr Gilsdorf, submitted their written observations in accordance with the provisions of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

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

I.I — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

1. First question

(a) The *plaintiff in the main action* maintains that Article 177 of the EEC Treaty should be interpreted as meaning that national courts, and in particular the final court, are bound to submit a case to the Court for a preliminary ruling only where there is objective doubt as to the validity or to the interpretation of the provision of Community law. When the final court feels no doubt as to the validity or the interpretation of a Community provision and applies it without referring the case to the Court for a preliminary ruling, the parties to the proceedings do not have any means of attacking the decision taken by the final court and having it annulled by means of Article 177 of the EEC Treaty. This argument is supported by two judgments of the Bundesverfassungsgericht (the German Constitutional Court), Bundesverfassungsgericht, E 29, 198 et seq. and E 29, 213 according to which an appeal to the Constitutional Court against a decision of a final court on the ground that the latter had not referred a case to the Court of Justice of the European Communities for a preliminary ruling is only possible if the final court arbitrarily failed to do so. The EEC Treaty has no provision permitting a case to be referred to the Court of Justice with the object of obtaining the revocation of a judgment given by a final national court which has the effect of *res judicata*.

In view of the unambiguous wording of Paragraph 126 (5) of the Finanzgerichtsordnung: 'The court to which the case is sent back for reconsideration shall take account in its decision of the view of the law given by the Bundesfinanzhof,' the decision sending a case back for reconsideration must be regarded as having the same binding force as that accorded to the decision of a final court. The Finanzgericht, the Bundesgerichtshof itself and also the parties to the proceedings are bound by such a decision sending a case back for reconsideration. The present order for a preliminary ruling aims at avoiding this effect of binding force provided for by Paragraph 126 (5) of the Finanzgerichtsordnung. Such an attempt is just as inadmissible as a direct application to the court to have a decision of a national court having the force of *res judicata* set aside.

As a result the plaintiff in the main action proposes that the Court should:

1. reject as inadmissible the application made by the Hessisches Finanzgericht for a preliminary ruling on the questions put;

2. Alternatively, reply to the first question:

   The second paragraph of Article 177 of the Treaty must be interpreted as meaning that a court of first instance may no longer apply to the Court for a preliminary ruling under the second paragraph of Article 177 of the EEC Treaty when the final court of the Member State has itself interpreted the provisions in question and this has a binding force similar to that of *res judicata*.

(b) The *defendant in the main action* supports without reservation the arguments developed by the Finanzgericht in its order for a preliminary ruling. The provisions of Article 177 of the EEC Treaty have as objective to guarantee the principle of uniform application of Community law in all the Member States. This principle would be infringed if it were accepted that national courts

were limited as regards the second paragraph of Article 177 by provisions of national procedure, provisions which are very diverse.

Further, the practice followed by the Hessisches Finanzgericht is in accordance with Paragraph 126 (5) of the Finanzgerichtsordnung. The object of this provision is to prevent useless protraction of the proceedings by the refusal of the lower court to accept the view of the law adopted by the superior court. In view of the fact that the very object of a preliminary question is to achieve a final decision on a legal problem, there is nothing to prevent the Court from being seised of the matter at the current stage of the proceedings before the national judge.

(c) The *Commission* argues that the first question in itself is to a certain extent superfluous since the Court is competent to consider of its own motion the admissibility of the second and third questions and, as a result, implicitly to reply also to the first question.

The Commission would nevertheless like the Court to define the extent of the application of Article 177 by replying expressly to the first question.

The following are the determining factors in replying to this question:

— The Hessisches Finanzgericht is a court competent to refer a case to the Court for a preliminary ruling within the meaning of the second paragraph of Article 177 of the Treaty. There is no provision of national law prohibiting an appeal when the case has been sent back by the superior court which has already given judgment. However, the provision of Paragraph 126 (5) of the Finanzgerichtsordnung limits the area of discretion of the court of first instance by stipulating that the latter must base its decision on the view of the law expressed by the Bundesfinanzhof in its judgment referring the matter back. But it is not possible to conclude from that that no other question may arise.

— The national judge is entitled under the second paragraph of Article 177 to refer a question to the Court for a preliminary ruling when he has doubts on the substance of a rule, or on the meaning or extent of a Community provision which he considers relevant. It is impossible for the Court to verify whether, as the result of national provisions, the national judge did not have a right to entertain these doubts, or had no ground for doing so. Thus the Court may be validly seised of a request for a preliminary ruling when the case is pending a second time before the court which refers it.

— The Commission recognizes that such an answer could have important consequences for the hierarchy of national courts. If the interpretation of the Community provisions by the Court were contrary to the view taken by the supreme court, the inferior court could find itself faced with two conflicting judgments. In the event of the inferior court basing its final decision on the interpretation given by the Court, this decision would necessarily differ from the judgment referring the case back given by the supreme court, which will be contrary to Paragraph 126 (5) of the Finanzgerichtsordnung. If on the other hand the view of the law adopted by the supreme court is followed, an infringement of Article 177 would be established. Such a dilemma could however be resolved by means of the principle of the priority of Community law.

— Article 177 does not only invite the national court, which orders the reference, to base its decision on the interpretation given by the Court, but it gives the individual a right to require compliance by the national court. In this sense Article 177 must be regarded as a directly applicable

rule capable of creating direct rights for the individual which the national courts must protect. The monopoly of interpretation of the provisions of the EEC Treaty, which the Court has under Article 177, can achieve the objective of a uniform interpretation of the Treaty only if preliminary rulings have a binding effect of which at least the parties to the main action can avail themselves.

The Commission concludes that the interpretation given by the Court to a Community provision has in any case priority over the view of the law of the national supreme court. If it were otherwise the uniform application of Community law would be compromised.

2. On the second question

The *plaintiff* refers to the Court's decisions in Cases 6/71, *Rheinmühlen*, Rec. 1971, p. 823 and 85/71, *Kampffmeyer*, Rec. 1972, p. 213, according to which it is necessary to draw a clear distinction between the system of levies and that of refunds, such as had been provided for by Regulation No 19/62. As regards refunds the Court deduced that, since Member States were free to forego making any grant, *a fortiori* they were entitled to add further conditions to the minimum conditions for a grant provided for by the Community rules. As regards the sphere covered by Regulation No 19/62 there was no Community provision on the procedure to be followed on the grant of refunds either as to the form of the application for refunds or as to the period for lodging them. The task of laying down the procedure as regards the grant of refunds was left to the Member States themselves. It thus followed that the Member States could equally provide for and invoke, as they understood it, the right of revoking a refund.

Such an interpretation is at the basis of the judgment of the Bundesfinanzhof and binds the Finanzgericht by virtue of Paragraph 126 (5) of the Finanzgerichtsordnung. If it is found that the goods have been put into free circulation in a particular Member State, the plaintiff ought at least to have the 'Member State' refund, which it would have been able to claim under the national provisions governing the system of refunds.

The Court could reply to the second question in the following manner:

The question whether and to what extent repayment shall be required of a refund provided for by Regulation No 19/62 and paid without due reason depends on the internal law of the Member States and is for their national courts to decide. The Member States and the national courts must nevertheless see that the maximum limits provided for as regards refunds by Regulation No 141/64 and by other implementing provisions of Community institutions are not exceeded and that the amount of the refund paid without due reason which has to be repaid is fixed in such a way as to re-establish equilibrium in the market organization.

The *defendant* stresses that the provisions of Articles 19 (2) and 20 (2) of Regulation No 19/62, of Articles 14 (1) and 15 of Regulation No 141/64 as well as Article 1 of Regulation No 162/64 of the Council of 29 October 1964 (OJ 1964, p. 2739) provided only maximum limits for the grant of refunds.

In the judgments in Cases 6/71 and 85/71 the Court referred to the differences between third country refunds on the one hand and Member States refunds on the other. In particular the criteria for the calculation of the maximum refunds are different in relation to the objectives pursued by the two categories of refunds. The objective of refunds in intracommunity trade is to assimilate the prices of raw material in the Community so that the purchasing conditions of the processing undertakings should be the same. As regards trade with third countries the sole object of refunds is to reduce the differences between the level of prices in the

exporting Member States and that of prices on the world market. The abovementioned provisions reflect perfectly this fundamental distinction between the two categories of refunds. The defendant refers again to Regulation No 92/62 of the Commission of 25 July 1962 (OJ 1962, p. 1906) according to which Member States were entitled to grant third country refunds in the form of authorizations issued for imports of equivalent value of basic products free from levy. This possibility was very tempting for exporters, who could await the most favourable moment for imports free from levy. For this reason there was a great temptation to declare exports to Member States as being to third countries.

In the light of these facts the Court has decided that the absence of a certificate of movement of goods DD 4 is not sufficient proof to show the origin or destination of goods. The case law of the Court is based on the view that national rules made in implementation of the system of refunds provided for by Regulation No 19 cannot open the door to abuse.

The 'difference' theory developed by the Bundesfinanzhof is incompatible with the legal concepts of the Court. By threatening legal certainty and encouraging wrongful application for refunds, this theory is contrary to the principles of the Community rule in question.

The defendant concludes that an exporter having applied for and obtained the grant of a third country refund is not entitled to claim a Member State refund if it appears subsequently that contrary to his declaration he has exported the goods to a Member State.

The *Commission* refers to the relevant Community rules. As regards the delimitation of jurisdiction between the Community and the Member States it arrives at the same conclusions as the plaintiff and the defendant in the main action.

The reply to the second question depends on the interpretation to be given to the concept 'export to another Member State'. It is necessary to refer to the definition of the concept of 'export to third countries' given by the Court in Case 6/71. According to the Court, export to third countries assumed at least that goods had been or would be put into free circulation in a third country. This definition is not very clear. The significance of the conditional '*would be*' could, in particular, be queried. Did the Court wish simply to refer to the preliminary assessment which the authority responsible for the refund had necessarily to make, or did it mean to stress the requirement that the exporter had to have done everything to ensure that the goods were put into free circulation in the third country?

If the use of the conditional did not lessen the force of the term employed then the definition given by the Court went much further than those proposed by the Community and national authorities responsible for the implementation of the system of refunds at the time when Regulation No 19 was in force.

In so far as the present Community law provides for refunds varying according to the third countries, such a definition is not practicable either in view of the difficulty of control. This is why the Commission is asking the Court to define in the judgment that is to be given what is meant by 'put into free circulation in another Member State'. For the court which has ordered the present reference, it could be useful to know whether under Community law the grant of a refund is dependent on compliance, in the importing Member State, with all the conditions necessary for the definitive import of the goods.

As regards the question of the proof of export to a Member State, the Commission maintains that the possession of a DD 4 certificate could not constitute a prior condition for the grant of a Member State refund. Nor did the grant of this refund depend on

the submission of a valid export certificate. Under Article 16 (1) of Regulation No 19/62 the submission of such a certificate was required for all exports destined for Member States in order to allow the competent authorities to obtain a correct picture of the position of the market. In view of the differences between the system of certificates and the system of refunds on export it is not possible to relate them.

The Commission concluded that the Community provisions then in force did not prevent an exporter from being able to obtain a refund for exports to other Member States, even if he had at first declared that he intended to export the goods to a third country.

3. On the third question

The *plaintiff in the main action* asserts that it does not matter into which third country the goods were imported. On the contrary, the determining factor is that exported goods have been put into free circulation in some third country. In this event the objectives which the common agricultural policy sought to attain by the grant of a third country refund were realized.

The plaintiff in the main action proposes the following reply to the third question:

For the purpose of claiming third country refunds under the basic Regulation No 19/62 and the provisions taken for its implementation it sufficed that the goods were put into free circulation in a third country. It did not matter to which third country the goods had been exported since the amount of the refund was the same in all cases.

The *defendant in the main action* observes that the Member States were generally entitled to fix different rates for third country refunds. However, they had to remain within the maximum limits provided for by the Community rules. In view of the fact that under Articles 5 and 5a of Regulation No 90/62 Member States were entitled to exceed the maximum limits in certain cases, the Community legislature needed to see that exporters completed their transactions in accordance with the information which they had furnished beforehand.

Consequently the first hypothesis of the third question should be adopted:

the exporter can claim the benefit of the third country refund only if he exports the goods to the consumer country named in the documents relating to the refund.

The *Commission* refers to the argument developed in reply to the second question and comes to the conclusion that the provisions of Community law in force at the time did not prevent an exporter from claiming a third country refund, if the other conditions were fulfilled, even if the goods were exported to a third country other than that indicated in the documents relating to the refund.

The oral hearing took place on 7 November 1973.

The Advocate-General delivered his opinion at the hearing on 12 December 1973.

Grounds of judgment

1 By Order dated 7 May 1973, filed at the Registry on 20 June 1973, the Hessisches Finanzgericht referred to the Court under Article 177 of the EEC Treaty three questions relating respectively to the interpretation of Article 177

of the Treaty and to that of the provisions of EEC Regulation No 19/62 of the Council (OJ 933/62).

On the first question

2 The first question asks whether a court against whose decisions there is a judicial remedy under national law may refer a doubtful question of European law to the Court of Justice of the European Communities for a preliminary ruling only when the case comes before it for the first time, or whether a reference is also permissible when the case is being reconsidered after a judgment given by such a court sitting at first instance has been quashed by a supreme court.

3 This question is substantially the same as a preliminary question put in the same case by the Bundesfinanzhof, which was the subject of the judgment by the Court given on 16 January 1974 in Case 166/73, to which reference should be made.

According to this judgment a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot on this ground alone deprive the inferior courts of their power, provided for under Article 177, to refer questions to the Court for a preliminary ruling.

However, in the case of a court against whose decisions there is a judicial remedy under national law, Article 177 does not preclude a decision of such a court referring a question to this Court for a preliminary ruling from remaining subject to the remedies normally available under national law.

Nevertheless, in the interests of clarity and legal certainty, this Court must abide by the decision to refer, which must have its full effect so long as it has not been revoked.

On the second and third questions

4 The second question asks whether Articles 19 (2) and 20 (2) of Regulation No 19/62 in conjunction with Articles 14 and 15 of Regulation No 141/64 (OJ 2666/64) must be interpreted as meaning that an exporter who has claimed and obtained a third country refund for the export of pearl barley to a specific

third country is entitled to at least the member country refund if a subsequent investigation reveals that, contrary to his statements, he has exported the goods to a member country, or whether in such a case the refund must be refused him.

5 The third question asks whether Article 20 (2) of Regulation No 19/62 in conjunction with Article 15 of Regulation No 141/64 must be interpreted as meaning that an exporter is entitled to the third country refund only if he exports the goods to the country mentioned in the application for a refund, or whether it suffices for the grant of a refund that the goods are exported to any other third country whatsoever.

6 Regulation No 19/62 and the measures for its implementation, in particular Regulations Nos 55/62 (OJ 1583/62) and 141/64, leave the Member States a discretion as to whether or not to grant refunds for the export of agricultural products.

However in fixing the conditions for the grant of these refunds and their amounts, the Member States were required to adhere to the maximum limits laid down by the Community and the rules necessary for the application of the general system provided for by Regulation No 19/62.

On the other hand, it was open to them, in particular as regards exports to third countries, to adopt criteria more restrictive than those provided for by the Community rules.

7 As regards refunds on export Member States were consequently bound to take into consideration the country of destination and in particular whether this was a third country or another Member State.

However, in the case where the country of destination was not a third country but another Member State, the authorities were obliged at the very least to reduce the refund so that it dit not exceed the limit laid down for export to the Member State in question.

It was the same in the case where the country of destination was a third country other than that shown documents relating to the refund.

Subject to this obligation, it was for the authorities of the Member States to decide according to their national law the further consequences of such an occurrence.

8 It must therefore be concluded that in the case where the country of destination of the goods did not correspond with the particulars given in the export documents:

(a) Article 20 (2) of Regulation No 19/62 required the national authorities to reduce the refund granted so that it did not exceed the maximum limits provided for such country of destination;

(b) Subject to this obligation, it was for them to decide according to their national law the necessary further consequences.

Costs

9 The costs incurred by the Commission of the European Communities, which has 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 observations of the plaintiff in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to EEC Regulation No 19/62 of the Council of 4 April 1962, especially Article 20;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Hessisches Finanzgericht by order of that court dated 7 May 1973, hereby rules:

1. **The existence of a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot on this ground alone deprive the inferior courts of their power, provided for under Article 177, to refer questions to the Court of Justice of the European Communities for a preliminary ruling;**

2. **In the case where the country of destination of the goods does not correspond with the particulars given in the export documents:**

   (a) **Article 20 (2) of Regulation No 19/62 required the national authorities to reduce the refund granted so that it did not exceed the maximum limits provided for such country of destination;**

   (b) **Subject to this obligation, it was for them to decide according to their national law the necessary further consequences.**

Lecourt Donner Sørensen

Mertens de Wilmars Pescatore Kutscher Ó Dálaigh

Delivered in open court in Luxembourg on 12 February 1974.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL WARNER

(See Case 166/73, p. 40)