OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 22 SEPTEMBER 1971[1]

Mr President,
Members of the Court,

The matters giving rise to this case are as follows:

Rheinmühlen, a company which specializes in flour milling and in the dealing —especially on an international scale— in cereals and products processed therefrom, declared to the competent German authorities that during the period from 30 December 1964 to 16 December 1965 it had exported approximately 800 metric tons of hulled barely and 200 metric tons of cereal meal of durum wheat.

In the export declarations which it signed it stated as 'country of consumption' ('Verbrauchsland') various third countries: Portugal, Switzerland, Yugoslavia, etc.

After having produced these declarations it claimed in respect of the said exports the refunds which, in accordance with Article 20 of the basic regulation, Regulation No 19 on the progressive establishment of an organization of the markets in cereals, the Federal Republic of Germany had instituted in favour of German exports to third countries by a regulation on refunds applicable to cereals and rice ('Erstattungsverordnung Getreide und Reis') of 24 November 1974.

This was acceded to not by way of the grant of refunds in cash but as was allowed by the regulation then in force in the form of an authorization to import free of levy certain quantities of basic products.

But at the beginning of 1966 the competent German authorities entertained doubts whether there had really been any export to third countries and they instituted an investigation in Rheinmühlen's offices.

This resulted in findings of a disturbing nature. According to the German experts all the quantities in respect of which Rheinmühlen had declared a third country as the country of consumption had in fact been put into free circulation or consumed in one of the countries of the Community, that is to say, Luxembourg, Italy or Belgium.

Rheinmühlen admitted that it was aware of the fact that the cereal meal of durum wheat which, according to the consignment declarations was destined for Switzerland, had stopped at Echternach and had been put into free circulation and consumed in Luxembourg.

On the other hand, it denies that in any event the whole of the hulled barley remained in Belgium or Italy.

Moreover, in any case it maintains that the circumstances revealed by the investigation do not affect its right to obtain refunds since the changes of destination were solely the act of its customer and no certificate DD4 was ever demanded or obtained for the goods in question.

The German Import and Storage Agency for Cereals and Fodder (Einfuhr- und Vorratsstelle für Getreide und Futtermittel) did not accept this argument and by a decision of 7 December 1966 revoked its previous decision granting refunds to Rheinmühlen.

The latter firm thereupon appealed against the revocation to the Hessisches Finanzgericht but that court dismissed the appeal on 12 August 1968.

Relying on certain pronouncements in an earlier judgment of the Bundesfinanzhof, the Finanzgericht held on the one hand, that during the periods in question, the Member States could define, as had been done in the Federal Republic of Germany by various regulations, the conditions which exports

1 — Translated from the French.

had to fulfil in order to qualify for 'third-country' refunds and that on the other hand, according to these regulations, only exports resulting in the consumption of the product in the third country could be regarded as exports to a third country and qualify for a refund.

The case having been submitted to it by way of an appeal on a point of law, the Bundesfinanzhof seems to have certain doubts on the validity of this argument, although it could nevertheless be derived from several of its judgments.

It evidently wondered whether the German regulations were compatible with a certain Community concept of what were 'exports to third countries' and it has raised certain questions with regard to the validity of the system instituted by the Community Regulation No 162/64.

This is the essence of the questions referred to this court which are expressed as follows:

'(1) How is the concept of exports to third countries, appearing in the first sentence of Article 20 (2) of Regulation No 19/62 of the Council of 4 April 1962 (OJ 1962, p. 933 *et seq.*) to be interpreted, and how must this concept be defined in relation to the concept of exports to a Member State within the meaning of Article 19 (2) of that regulation?

Do exports to a third country presuppose in particular:

(a) that it is proved that the goods have reached third countries;

(b) that they have reached a third country determined in advance;

(c) that they have reached a third country directly, that is to say, that they have been transported there by virtue of a single freight document and have not remained in the countries of transit (Member States and third countries) or been the subject of legal transactions there other than in connexion with the transportation;

(d) that the goods are put into free circulation in the third country;

(e) that the goods are 'nationalized' there, that is to say, are used or consumed, treated or processed;

or is there export to a third country merely if:

(a) goods are exported without a movement certificate on form DD4 even to a Member State;

(b) they are not transported directly from one Member State to another Member State;

or by what other criteria must this concept be determined?

(2) Is Regulation No 162/64/EEC of the Commission of 29 October 1964 (OJ 1964, p. 2739) invalid in view of the fact that it restricts in the aggregate the refunds in trade between the Member States to certain percentages of the rates of refund permissible under Regulation No 141/64/EEC of the Council of 21 October 1964 (OJ 1964, p. 2666), whereas the refunds granted in trade with third countries could reach the full amount of the variable component of the levy applicable to imports?

(3) In the event of a negative reply to Question 2: in view of the limitation introduced by Regulation No 162/64/EEC on the amount of the refund applied in trade between Member States and of the aim pursued by this means (the protection of trade between Member States and of the markets of importing Member States against price distortions) must the concept of exports to third countries within the meaning of Regulation No 164/64/EEC of the Commission of 29 October 1964 (OJ 1964, p. 2743) be interpreted otherwise than in the cases mentioned in Question 1, in particular in a *narrower* sense, and must it be defined more *strictly*

than in these cases in relation to the concept of exports to a Member State?

I

The preliminary problem posed by the first question is whether a Community definition of exports to third countries existed during the period in question, that is to say, of exports which might have qualified for refunds as provided by Article 20 of Regulation No 19. Three arguments are advanced to you on this point:

(1) Rheinmühlen, the appellant in the main action, maintains that this concept was clearly and completely defined by the basic Regulation No 19 and the implementing provisions thereunder and that the national legislatures had no power to restrict or modify its scope, as the German legislature purported to do in the present case.

(2) The German intervention agency contends on the contrary that during the period in question it was essentially for the national authorities to define the conditions for the granting of refunds which they were free to institute or not as they pleased, and in particular to define the exports that qualified for refunds.

(3) Finally, the Commission maintains that for the definition of exports to third countries there was a sort of 'Community minimum' that Member States were obliged to observe, but that, on the other hand, there was nothing to prevent them from introducing conditions for the granting of 'third-country' refunds stricter than those necessarily ensuing from the 'Community minimum'.

I suggest that you adopt the Commission's argument which, moreover, differs only slightly from that of the German intervention agency.

A — The argument of the appellant in the main action that there was a complete Community definition of the concept of exports to third countries seems to me very difficult to sustain.

1. It is indisputable and moreover it is not disputed, even by Rheinmühlen, that this concept has never been the subject of an explicit definition before 1967, nor of a complete definition before 1969.

In view of the exhaustive nature of the information and of the analysis which appear in the report of the hearing of the provisions applicable between 21 April 1962, the date when the basic regulation, No 19, entered into force, and 1 July 1967, the date when Regulation No 120/67 of the Council, which repealed Regulation No 19, entered into force, I would ask you to excuse my not going into the details of these provisions again.

It will, I think, suffice to recall that during this period:

(a) Articles 19 and 20 of Regulation No 19 *permitted* the Member States to institute 'refunds' for exports from their economic territory either to Member States (Article 19) or to third countries (Article 20).

(b) In this respect the regulation granted the Member States only a *mere power*. The Community regulations were restricted during this period to fixing maximum amounts applicable to the refunds the principle of which was to be decided by the Member States and no definition of the conditions giving the trader the right to receive them was even outlined in the Community regulations.

(c) The financial cost of these refunds was originally entirely imposed on the Member States.

It has only been partially and progressively assumed by the Community from the financial year 1963/64.

(d) Throughout this period, the concept of the 'refund' involves a fundamental and, it seems, intentional ambiguity.

On the one hand, it is a 'refund' in the proper sense of this word, that is to say, a benefit intended to

compensate, in respect of a product imported from a third country and then processed in a Member State, for the cost of the levy imposed upon entry into the Member State in which the processing has taken place.

On the other hand, it is purely and simply a *subsidy* for the export to third countries of 'domestic' raw materials or products processed from 'domestic' raw materials.

(e) At that time there existed merely a transitional system intended to permit the progressive implementation of the machinery of the agricultural common market and which did not include, be it emphasized,

— threshold or intervention prices fixed by the Community for all the Member States,

— a uniform refund scheme for exports to third countries,

— a prohibition on the Member States against granting refunds for intra-Community trade.

2. As I have said, the appellant in the main action does not formally dispute any of these points.

However, it maintains that since Regulation No 19 and the measures adopted for its application defined quite precisely the concept of import by one Member State of goods from another Member State, a definition of the concept of export to third countries, impliedly, admittedly by reasoning from the converse, but necessarily follows from this.

In this respect, the appellant bases its argument essentially on the Commission's decision of 17 July 1962, that is to say, on the measure by which the Commission fixed the conditions for the issue of the so-called certificate 'DD4' which enables imports into one Member State from another Member State to benefit from the levy, still in existence but relatively small, applicable to intra-Community imports.

The reasoning on this point of the appellant in the main action is as follows: either traders have claimed and obtained the benefit of the advantages implied in the granting of a certificate DD4 or they have neither claimed nor obtained it.

In the first case, and only in this case, as the Court has decided in its judgment in the *Craeynest* case of 22 October 1970 [1970] ECR 905, the transaction must be regarded as a Community export-import transaction.

In the second case, since the transaction cannot be a Community export-import transaction, it must necessarily be an export-import transaction with third countries and therefore give rise as such to a right to the refunds instituted by the national authorities.

The reasoning is brilliant, but, in my opinion, somewhat specious.

The Commission has demonstrated to you at length and, in my opinion, very convincingly, why and how, both for technical reasons and in view of the clear intention of the draftsmen of the provisions applicable during this period, it is impossible to regard, as Rheinmühlen maintains, the system of exports to third countries as being 'the symmetrical equivalent of the levy' (this is the expression used by the plaintiff in the main action).

I fully agree on this point: one may indeed admit that the absence of the issue of a certificate DD4 is a *necessary* condition or at least a presumption in favour of an export's being accepted as an export to a third country, but in no case is it, in my opinion, a *sufficient* condition.

The example given by the Commission, which shows that, for certain processed products, there could be legally both the issue of a certificate DD4 and the granting of a 'third-country' refund, is significant. It shows the independence of the two systems.

In order to avoid the needless protraction of these observations I shall not repeat in detail the other points in the Commission's argument which, on this

question, I adopt entirely and I shall confine myself to one general observation.

At the basis of Rheinmühlen's arguments we find a concept which I have already had occasion to oppose before the Court: the idea that the sole object of the entire organization of the common agricultural market was to institute between the Community and the Member States on the one hand, and those specializing in the external trade in cereals on the other hand, a vast 'cat and mouse' game in which those engaged in the export-import trade could claim not only the profit resulting from their normal commercial activity but also a profit that might accrue to them through a defect in the Community legislation or a lack of coordination in the national provisions.

It is precisely on this that the appellant's argument really relies.

What does the firm fundamentally maintain in effect? During this difficult period when the agricultural common market was being set up, there may have been situations where importers or exporters were not interested in claiming the benefit of the relatively favourable rate of the levy applicable to intra-Community trade, but on the contrary, in obtaining the benefit of the relatively high refunds provided for exports to third countries, even if the goods were eventually to end up by being put into free circulation in one of the Member States.

It is claimed that this benefit accrues to the firms concerned as of right.

In my opinion, to concede them such a right would be to ignore all the objectives of the common agricultural policy which derive both from the provisions of the Treaty itself and from the interpretation which this Court has given them.

What are these objectives?

Article 39 lists them very clearly:

(1) to increase agricultural productivity and the promotion of technical progress;

(2) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(3) to stabilize markets;

(4) to assure the availability of supplies;

(5) to ensure that supplies reach consumers at reasonable prices.

One would look in vain in these provisions, or in the interpretations which the Court has given to them, for confirmation that the measures taken to put this agricultural common market into effect must also enable exporters and importers to be subsidized for transactions which are of no economic interest to the agricultural common market.

The appellant's representative began his oral observations to the Court by stressing that his clients were not defrauders and reproached the Commission's representatives for having brought up the dealings in which certain traders were able to indulge at certain times in view of the defects in Community and national provisions.

I take due note of his statements, but would remind him—and I shall return to this in a moment—that in addition to *fraud*, which the national criminal courts have the duty and the power to curb, there also exists what might be termed the 'abuse of the law' ('abus de droit')—one might even be tempted to call it 'legal fraud', as does the Commission in one of its reports—which all courts, and especially the Court of Justice of the Communities, have the duty to forestall and to prevent.

B — If the Court accepts, as I suggest, that the concept of exports to a third country had not been clearly defined in Community law until 1969, or in any event until 1967, it will have to decide whether this concept could be defined at the discretion of the Member States or whether they had not to observe in this definition a 'Community minimum', to adopt the expression used by the Commission.

On this point, the views of the German intervention agency and of the Commission really differ more with regard to the content of this 'Community minimum' than with regard to the principle of its existence.

For my part, I think that if the Member States had a very wide latitude in this field during the period in question, they nevertheless had to observe certain basic Community principles.

The wide latitude which must, in my opinion, be allowed to the Member States is quite obviously derived:

— on the one hand, from the fact that they were free to institute or not to institute, as they pleased, the refunds provided by Articles 19 and 20 of Regulation No 19;

— on the other hand, from the fact that the financial cost resulting directly or indirectly from these refunds was, during this period, either totally, or subsequently partially, charged on the national budgets.

Conversely, the obligation for the Member States to observe, during this period, certain common principles regarding the definition of the concept of exports to third countries is in my opinion derived:

(a) from the fact that Regulation No 19 distinguishes very clearly between the refunds which may be paid on an intra-Community transaction and those that may be instituted for trade with third countries, which necessarily implies a definite Community conception with regard to the distinction between these two categories of transactions.

(b) If the Member States were free to institute or refrain from instituting the refunds provided for by Articles 19 and 20, it was solely within the limits of maxima determined by the Community authorities which have been the subject of a large number of implementing regulations, as the Court has established from the report of the hearing. It is obvious that these maxima would not have much meaning without a certain number of common concepts.

(c) At least one of the aims of the provisional organization of a common agricultural market is the institution of a certain equilibrium between the supply of and the demand for agricultural products within the common market, which implies, with regard to external trade, the institution of certain means of channelling trade in the form of a subsidy for the export of surpluses.

The refund is obviously the principal instrument amongst these means and therefore the conditions on which it is granted could not be left entirely to the discretion of the Member States.

(d) Finally, as I mentioned a moment ago, the cost of the refunds has been fairly quickly taken over, at least partially, by the Community budget and this is a further argument in favour of the recognition of a 'Community minimum' in the conditions for granting those refunds.

In view of these various considerations, I think therefore that the Court should indicate to the Bundesfinanzhof that during the period in question, although the Member States were entitled to define the conditions upon which the refunds which they had the power to institute for exports to third countries were to be granted, this definition had nevertheless to observe certain minimum Community requirements.

C — If the Court shares my views on this point, it will then have to determine what were these minimum Community requirements which the Member States had to observe in their definition of exports to third countries.

The Commission has suggested to the Court that this Community minimum should be defined as follows: there must have been an *effective export transaction verifiable according to objective criteria.*

For my part, I would suggest to the Court a more precise definition of this 'Community minimum'.

I agree entirely with the Commission when it says that the first minimum Community condition to constitute export to a third country is that the goods should have left the territory of the exporting Member State.

This is obvious, for otherwise there could not be any export at all.

However, I part company with the Commission on the following point.

The Commission considers in fact that during this period, one could not at *Community level* require that in order to constitute export to a third country the goods *exported should have entered the customs territory* of the third country.

The States could decide this but were not obliged to do so.

On the contrary, I think that this requirement constitutes one of the very foundations of the Community concept of export to a third country.

1. None of the arguments which the Commission puts forward against contention seems to me decisive.

(a) The first of these arguments is derived from an interpretation of the provisions.

The French version of Article 19 of Regulation No 19, dealing with intra-Community trade, uses the expression 'exportation *à destination* d'un État membre', whereas Article 20 uses the expression 'exportation *vers* un pays tiers', which would seem to indicate, according to the Commission, that in the first case the Community draftsmen intended to require that the goods should have arrived in the Member country of destination but that in the second case the fact that the goods were destined for importation into a third country was accepted as sufficient.

This argument need scarcely detain us, for this disparity in the terminology exists only in the French version, since in the German, Italian and Dutch versions the term used in Articles 19 and 20 is identical: export 'nach', 'verso' and 'naar' a Member country or a third country.

Obviously more disturbing is the second argument based on interpretation of the provisions and put forward by the Commission to the effect that the draftsmen of Regulation No 19, by using the terms 'vers', 'nach', 'verso' and 'naar' (English: 'to'), merely intended to convey the idea of *'country of destination'* and not *'country of arrival'* of the goods.

However, I think that on this point one should not engage in a purely exegetical interpretation of texts which are fairly well drafted, but rather, as I shall try to do in a moment, in a teleological interpretation of those texts.

(b) Secondly, the Commission invokes the wording of certain provisions, in particular of a Regulation No 90/62, relating to cases where a higher refund than that normally applicable could be granted.

This regulation provided that Member States which granted these somewhat exceptional refunds should, in the case of a sale by tender, take 'all necessary measures to ensure that cereals exported under these arrangements are in fact exported to third countries'. According to the Commission, if Regulation No 90/62 imposed this special condition for certain transactions it was because it did not exist in the normal cases.

This is very doubtful, for it may on the contrary be maintained that here the Commission was merely explicitly bringing forward again or confirming a general principle following from the aims pursued in Regulation No 19.

(c) Thirdly, the Commission maintains that although in most cases, in practice, proof of the existence of what it calls an 'effective export transaction' to a third country will result from the entry of the goods into the third country, the concept of an export to a third country cannot, during the period in question, be restricted at Community level to this case alone.

Although it does not formally say so, the Commission is obviously impressed by the fact that, in view of the deficiencies in, and in some cases even the absence of, Community implementing provisions throughout this period, too strict a delimitation of the concept of export to a third country would have presented complex practical problems for the national economic and customs authorities.

Perhaps it has in mind cases like those which Rheinmühlen's representative suggested to you at the hearing: that of a ship sinking with a cargo consigned to a third country which has actually been loaded but will never reach the country of destination, or that of an exporter in good faith who cannot be made responsible for the decisions of his buyer who is a national of a third country.

2. However, these objections—some of which may moreover, in my opinion, be overcome without much difficulty by invoking the general concept of *force majeure*—seem to me after all to be a secondary aspect of the question when one examines the fundamental economic objectives which have led to the institution of refunds for exports to third countries. ,

What is in fact involved?

— On the one hand, to dispose of as much as possible of the surpluses existing in the countries of the Community as a whole on the world market.

— On the other hand, to facilitate such exports by demanding a financial sacrifice from the tax-payers in the Member States to cover the difference which exists in general between the price of agricultural commodities within the common market and their world price.

What happens if the goods do not in fact reach the third country?

(1) They continue to overload the internal market of the Community and thus the transaction covering them does not contribute in any way to reabsorbing surpluses.

(2) The amounts which the taxpayers of the Member States have paid in order to permit the sale of these goods at a competitive price on the world market are diverted from their true purpose and serve, not to rationalize the Community market, but to 'subsidize' in some way a transaction which is of no economic interest to the Community as a whole.

In the end the transaction contributes to distorting the forecasts on the basis of which the regulators of the common market in agriculture—the threshold price, the intervention price, levies, etc. —are manipulated by the Member States or the Community authorities.

Finally, although, as I have said in other cases, the good faith of exporters cannot *a priori* be called in question, the possibility cannot be ruled out, and unfortunately the facts are there to prove it, that a seller and a buyer in a third country may agree to share the profit arising on a particular transaction by reason of there being, at a given time, a particularly low levy and a particularly high refund.

Apart from purely fraudulent transactions, a certain number of traders were in a position to use, and unfortunately have used, the relevant provisions *legally* in order to obtain substantial benefits to the detriment of the Member States or the Community. I have already referred to this just now when reminding the Court of the fact that in its reports to the Council the Commission had spoken of 'legal fraud'.

Obviously it cannot be expected that a definition, at Community level, of exports to a third country, requiring the actual entry of the goods into the third country, will suffice to make any transactions of this kind impossible, but in my opinion, such a definition is at least capable of impeding this kind of operation to a considerable extent and

this is essentially the reason why I recommend it to the Court.

Is it necessary to go further and require at Community level not only entry into the third country but also either the putting into free circulation, or the 'nationalization', or the consumption of the goods?

I do not think so, and on this point I share the Commission's view that, at the time in question, that is to say, at a time when the coordination of the customs legislation of the Member States was still very inadequate, it was not possible at Community level to go into such details, for which, as the Commission stresses, not even the present regulations provide.

At this time in particular, it was therefore for each of the Member States to spell out such details, if it considered them necessary, in the light of its own legislation.

I therefore suggest that the first question asked by the Bundesfinanzhof be answered as follows:

Although during the period in question the Member States were entitled to determine the conditions for the granting of the refunds which, by virtue of Article 20 of Regulation No 19, they had the power to institute for exports to third countries, they were bound to require as a minimum, that, in order to qualify for those refunds, the goods involved in the export transaction in question should have left the customs territory of the exporting Member State and, save in cases of *force majeure*, after or without any transit through the territory of another Member State, have entered the customs territory of a third country.

II

The second question asked by the Bundesfinanzhof relates to the validity of Regulation No 162/64 of the Commission of 29 October 1964 which restricted until 31 March 1965 the maximum amount of the refund applicable to exports to Member States of certain products processed from cereals or rice.

In this respect let me at once emphasize one of the difficulties of this case.

The Bundesfinanzhof has submitted to the Court a problem relating to the validity of this regulation.

The appellant in the main action has used this as a pretext to present the Court with another *entirely different problem* though admittedly also relating to the validity of that regulation, and, as I shall explain in a moment, I entertain very considerable doubts whether the Court is obliged to decide on this second problem of validity.

A — Be that as it may, let us for a moment examine the problem of validity raised by the Bundesfinanzhof.

The court wonders whether the Commission was competent to do what it has done by the regulation in question in limiting in the aggregate the amount of the refunds which may be granted in intra-Community trade to a certain percentage of the refunds resulting from the application of a more general measure, Regulation No 141/64 of the Council, when, in application of this latter regulation, the refunds granted in trade with third countries could reach a much higher amount, namely the whole of the variable component of the levy applicable to imports from third countries.

The origin of the doubts harboured by the Bundesfinanzhof as regards the validity of Regulation No 162/64 on this point must be sought in a definite conception of 'Community preference', even more clearly expressed than in the present case because the circumstances were more appropriate, in an order for a stay of execution made by that court on 30 March 1971 in a case relating to the market in dairy products during the period in question.

At the time, in fact, the Italian threshold price of powdered milk was lower than that in force in the Federal Republic of Germany.

However, Germany did not then grant any refund for exports of dairy products to Italy, which had the effect of making direct exports of powdered milk from Germany to Italy impossible.
Nevertheless, at the same time, the refund granted in Germany for exports to Switzerland was higher than the levy applicable in Italy to imports of milk products from Switzerland.
In the opinion of the Bundesfinanzhof, this whole system was therefore contrary to the principle of Community preference, whereby the exports of one Member State to another Member State must be favoured as against the exports of the Member States to third countries.
The Bundesfinanzhof considered that Regulation No 162/64 could at least in principle lead to results of the same kind and would thus be vitiated by the same defect of violation of the principle of Community preference as the system applicable to milk.
The reasoning is subtle but I do not find it convincing.
1. The anomalies to which the Bundesfinanzhof refers, with regard to both powdered milk and products processed from cereals, do not in my opinion derive from the measures adopted for the implementation of Regulation No 19 but rather from one of the principles upon which it is based: the progressive nature of implementing a common organization of the agricultural markets, which meant that throughout a certain period the Member States retained the power to fix the threshold price and, apart from certain limitations, the refunds and the levies.
It is the absence of coordination and uniformity of the threshold prices, and not the provisions governing refunds, which lies at the root of the kind of situation that has caused concern to the Bundesfinanzhof.
However, it is obvious that at this stage of European construction this lack of coordination and uniformity was inevitable if it was desired to make headway immediately.
Moreover, the Court has recognized this on many occasions and particularly in the series of judgments delivered on 17 December 1970 (Cases 11, 25, 26 and 30/70).
The facility for granting refunds in intra-Community trade was merely a transitional measure and was to be abolished, as actually happened, as soon as it was possible to arrange for the fixing, according to uniform rules, of single prices in all the Member States.
It would therefore be somewhat paradoxical to reproach the Commission for having prepared for the abolition of these refunds by progressively reducing their level.
2. Above all, the conception which the Bundesfinanzhof seems to have of *'Community preference'* appears to me to go far beyond the scope which this concept should have in Community law.
It is true that Article 44 of the Treaty mentions, in relation to minimum agricultural prices, the 'development of a natural preference between Member States'.
Similarly, the preamble to and the text of Regulation No 19, particularly Article 9 (1), certainly seem to refer to this idea of a 'natural preference'.
However, the only precise consequential obligation which this regulation imposes is that the Member States must have a higher threshold price for imports from third countries than for imports from the other Member States.
Even if one has a wide conception of this idea of a 'natural preference', in my opinion it merely implies that when a demand exists in a Member State which cannot be satisfied by the national production, that State must seek to remedy this situation by favouring imports from Member States which have surplus production rather than imports from third countries.
On the other hand, in my view, it has never meant that a Member State with a surplus must seek at any price to flood the market of another Member State with it, regardless of the situation

in that market and in the markets of the Member States as a whole.

In my opinion, this would in reality be contrary to another fundamental principle of the entire common organization of the agricultural markets whereby the countries of the Community as a whole must seek, with the aid of refunds, to dispose of the total Community surplus on the world market.

Thus Regulation No 162/64 would in my opinion be contrary to the principles of the Community, in so far as it has reduced the amount of the refunds alowable in intra-Community trade compared to that allowable on exports to third countries, solely if it were shown that in the Community as a whole the supply of the relevant products fell short of the demand.

No attempt has ever been made to show this and in my opinion it would probably be impossible to do so.

I think, therefore, that the Court will have to decide that an examination of the question submitted by the Bundesfinanzhof relating to the validity of Regulation No 162/64 has not revealed any factor capable of affecting the validity of this regulation.

B — Let us now turn to the problem of the validity of Regulation No 162/64 raised not by the Bundesfinanzhof but by the appellant in the main action in its observations before the Court.

This problem is entirely different from that posed by the Bundesfinanzhof and the challenge made by Rheinmühlen in its argument against the validity of Regulation No 162/64 rests on a *legal ground* different from that invoked by the Bundesfinanzhof.

The appellant in the main action claims in fact that the regulation which it is challenging established a connexion between on the one hand the threshold price and on the other the rate of processing of cereals.

It contends:

— first, that the reasons for the establishment of such a connexion should have been explained in the preamble to the regulation, something which was not done;

— secondly, that this connexion, as established, is contrary to both economic reality and to common sense, in so far as the regulation assumes in principle that in countries in which the threshold price is the highest the processing rate is the best and conversely that in those in which the threshold price is the lowest the processing rate is the least satisfactory.

1. We must first ask ourselves whether the Court needs to examine and answer the question put forward.

I do not think so, for three reasons:

(a) All the Court's case-law to date has tended towards preventing individuals from availing themselves of Article 177 of the Treaty in order to circumvent the provisions of Article 173 which narrowly limit their facilities for contesting the legality of a Community regulation by way of an application for annulment.

This is why in particular the Court has refused:

— to allow anyone at all to intervene in a case which has been referred to it under Article 177 of the Treaty (Order of 3 June 1964 in Case 6/64, [1964] ECR 614),

— to answer a question of interpretation other than that which has been submitted to it by the national court (Order of 16 May 1968 in Case 13/67, [1968] ECR 196),

— to examine a question of validity when the national court has merely referred to it a question of interpretation (9 December 1965, *Hessische Knappschaft,* Case 44/65, [1966] ECR 965).

To the extent that a party to national proceedings who, in a case under Article 177 is not a party to the case before this Court, raises a question of validity different from that which is raised by the court referring the matter, even if the measure the validity of which is contested is the same, that

party is in fact seeking to get this Court to decide a question which has not been referred to it under Article 177 of the Treaty and to accede to such a request would, therefore, in my opinion mean jeopardizing that equilibrium which the Court has always been able to maintain between the provisions of Article 177 and those of Articles 173, 175 and 184 of the Treaty.

(b) In my view, it would also mean jeopardizing the character of that 'court-to-court dialogue' which, as has often been stressed by this Court, is one of the foundations, one of the innovations and one of the true values of the system instituted by Article 177 of the Treaty.

From this principle it in fact follows that where a case has been referred to this Court under Article 177, it should enlighten the national court on the problems of Community law with which it is faced, sometimes even by interpreting its own judgment, but that it cannot and will not in any circumstances *take the place* of the national court.

If the Court allows a party to the national proceedings to raise before it a problem relating to the validity of a Community regulation other than that which the national court has referred to it there is a danger that it will very often appear to be taking the place of the national court.

I think that the present case provides a good example of this.

It is impossible to ascertain whether or not the problem of validity raised before this Court by Rheinmühlen was submitted to the Bundesfinanzhof.

However, let us take various hypotheses.

If it was submitted and if the Bundesfinanzhof expressly rejected it, would the Court consider itself obliged impliedly to criticize the order of that court by examining this question which it had deliberately refused to refer?

If it was submitted, are you going to examine it solely because the Bundesfinanzhof has not explicitly rejected it but has done so only by implication in not referring it to you?

Finally, if this problem was not raised before the Bundesfinanzhof, will you allow this Court to become a forum for a dispute differing considerably from that with which the appropriate national court was dealing and in respect of which it asks the question?

I think that to go this far would mean departing from the wise principles thanks to which the Court has been able to build up a close collaboration between national courts and itself.

(c) Moreover, I think that the formulae adopted in the Court's most recent judgments implicitly but necessarily settle this question.

Whereas for a long time the Court has used in the operative part of its judgments on questions of validity the formula 'examination of Regulation No X has not revealed any factor capable of affecting its validity', a formula which perhaps suggested a certain ambiguity with regard to the conditions of the reference to the Court, its most recent judgments, on the other hand, employ a formula which eliminates all ambiguity in this respect: the formula 'examination of the question referred by the . . . (name of the court) relating to the validity of Regulation No X does not reveal any factor etc. . . .' (Cf. for example the Court's judgments in Cases 37/70 of 11 February 1971 and 38/70 of 10 March 1971.

Indeed, the problem may one day arise as to whether there are certain questions of illegalities which the Court ought to raise *of its own motion*, but they could only be questions of illegalities which compromise the institutional equilibrium established by the Treaty and the problem does not arise in the present case.

In these circumstances I would emphatically ask the Court to refuse to examine the problem of validity of Regulation No 162/64 raised before it by Rheinmühlen and not referred to it by the Bundesfinanzhof.

2. If, contrary to my view, the Court considers that it must do justice fully to the parties concerned on this point, it

will have to settle some difficult questions.

In fact, it would be extremely difficult to find even a trace of any statement of reasons for the regulation on the point contested, but it must be said that if one wishes to be hypercritical, the lack or insufficiency of such a statement could constitute a defect which would vitiate not only Regulation No 162/64 but all the provisions of the Community regulations which, until 1967, dealt with refunds.

With regard to the substance, the problem is also very delicate.

The Commission does not deny that in certain Member States with a very low threshold price there existed very modern processing industries working with a very high processing rate and that conversely out-of-date processing industries could exist even in countries with a high threshold price.

However, it maintains that it was in fact obliged to find a criterion, however imperfect it might be, which would permit the reconciliation of the conflicting interests of the national processing industries and establish a balance between, on the one hand, the utilization of Community primary products for the purposes of exporting processed products to third countries and, on the other hand, the utilization of the products of these countries allowed in for the processing industry.

The problem is in fact to ascertain whether as a whole and ignoring specific situations, the processing industries in countries with a relatively low threshold price were less well equipped and less modern than those in countries with a higher threshold price.

In my opinion, only experts could enlighten the Court on this point. However, as I have said, I do not think that the Court has to concern itself with this problem and I consider that it ought to confine itself to declaring that the examination of the question referred by the Bundesfinanzhof relating to the validity of Regulation No 162/64 has not revealed any factor capable of affecting the validity of that regulation.

III

The third question referred by the Bundesfinanzhof will take up less time.

The Bundesfinanzhof asks in fact whether the principles evolved by the Court in its reply to the first question for the definition of the concept of exports to a third country are also valid for the application of Regulations Nos 162/64 and 164/64.

Practical reasons alone would ordain uniformity of interpretation.

There is one further reason in law: Regulations Nos 162/64 and 164/64 are regulations of the Commission adopted for the implementation of a basic regulation, Regulation No 19 of the Council.

In my opinion, therefore, it would be legally impossible to give a different meaning to the concepts to which the implementing regulations refer from that which these same concepts have in the basic regulation.

I would therefore suggest that the Court's reply to the third question submitted by the Bundesfinanzhof be that the concept of exports to a third country must, for the application of Regulations Nos 162/64 and 164/64, be interpreted as set out in the answer to Question 1.

I would therefore suggest that the Court answer the questions referred to it by the Bundesfinanzhof as follows:

1. Although during the period in question the Member States were entitled to determine the condition for the granting of the refunds which, by virtue of Article 20 of Regulation No 19, they had the power to institute for

exports to third countries, they were bound to require that, as a minimum qualification for these refunds, the goods, in the course of the export transaction in question, should have left the customs territory of the exporting Member State and, save in cases of *force majeure*, after or without any transit through the territory of another Member State, have entered the customs territory of a third country.

2. The examination of the question referred by the Bundesfinanzhof relating to the validity of Regulation No 162/64 has not revealed any factor capable of affecting the validity of that regulation.

3. The concept of exports to a third country must, for the purposes of applying Regulations Nos 162/64 and 164/64, be interpreted as set out in answer to Question 1.