In Case 5/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof [Federal Finance Court] for a preliminary ruling in the proceedings pending before that court between

HAUPTZOLLAMT [Principal Customs Office] KREFELD

and

MAIZENA GMBH, Hamburg,

on the interpretation of Community regulations relating to production refunds for maize intended for the manufacture of starch, in particular the provisions thereof relating to the calculation of such refunds,

THE COURT (First Chamber)

composed of: A. O'Keeffe, President of Chamber, G. Bosco and T. Koopmans, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (Official Journal, English Special Edition 1967, p. 33) provided for a system of refunds for maize used in the manufacture of starch.

In Article 1 (1) of Regulation No 371/67/EEC of 25 July 1967 (Official

Journal, English Special Edition 1967, p. 219) the Council provided that as from 1 July 1967 the Member States were to grant a production refund on maize intended for the manufacture of starch equal to the difference per 100 kg between the threshold price of that product and 6.80 units of account. The latter figure was the supply price of maize guaranteed to Community producers of starch in order to ensure their competitiveness in relation to competitors in non-member countries and manufacturers of substitute products.

Regulation (EEC) No 1060/68 of the Commission of 24 July 1968 (Official Journal, English Special Edition 1968 (II), p. 352) introduced a system of advance payment of the refund. Article 1 thereof provides that the Member State responsible for granting the production refund for cereals used by the brewing industry or for the manufacture of starch is to advance the refund to the manufacturer in an amount not exceeding the difference, per 100 kg of cereals, between the threshold price at the start of the marketing year and 6.80 units of account, if the manufacturer applies for such advance and furnishes proof that the cereals in question are on his premises or under official supervision. The regulation contains, *inter alia*, a provision which does not merely govern the grant of an advance, but deals with the calculation of the refund itself. That provision is Article 3, according to which "the production refund shall be paid to the manufacturer, account being taken of the threshold price for the cereal valid for the month of its processing, within 30 days from the date on which he furnishes proof that the cereal has been processed or, in the case of maize groats or meal, that they have been used in the brewery".

Nevertheless, even after Regulation No 1060/68 had come into effect, the German authorities continued for several years to calculate the refund on the basis of the rates in force on the day of receipt of the request for official supervision, as required by a notice issued by the Federal Minister for Food, Agriculture and Forestry on 22 December 1967.

As has already been seen, the amount of the refund corresponds to the difference between the threshold price and the supply price of the cereal and it therefore varies in keeping with changes in those prices.

In July 1974 the threshold price for maize was 107.45 units of account per tonne and the supply price was 68.00 units of account per tonne, resulting in a refund of 39.45 units of account (equal to DM 144.39) per tonne.

The refund applicable from 1 August 1972 was to be calculated on the basis of a threshold price of 106.60 units of account per tonne, as a result of the combined provisions of Regulation (EEC) No 1125/74 of the Council of 29 April 1974 (Official Journal 1974, L 128, p. 12) and Regulation (EEC) No 1427/74 of the Council of 4 June 1974 (Official Journal 1974, L 151, p. 1), and a supply price of 82.00 units of account per tonne, as a result of Regulation (EEC) No 1132/74 of the Council of 29 April 1974 (Official Journal 1974, L 128, p. 24).

The difference between those two prices was 24.60 units of account (DM 90.04) per tonne.

By a notice dated 9 July 1974, published in the Bundesanzeiger [Federal Gazette] of 10 July 1974, relating to production refunds for maize, the Federal Minister for Food, Agriculture and Forestry stated that, for maize placed under supervision in the period from 11 to 31 July 1974

and not processed into starch by that date at the latest, the refund, fixed by virtue of the first sentence of paragraph VII (2) of the notice of 22 December 1967 "on the basis of the rate in force on the day of the request for official supervision", was reduced by DM 51.24 per tonne. That reduction corresponds more or less to the reduction required to achieve the refund laid down by the Community regulations from 1 August 1974. The notice dated 9 July 1974 also provided, in paragraph 2, that the refund should initially take the form of an advance and that the right to a refund arose at the time of processing.

In July 1974 Maizena received a refund of DM 144.39 per tonne for a quantity of 63 172.11 tonnes of maize placed under customs supervision but not yet processed. It processed the maize after 31 July 1974 within the time-limit of 90 days provided for in Article 2 (3) of Regulation No 1060/68.

As a result of a check carried out at Maïzena's warehouses, the Hauptzollamt [Principal Customs Office] Krefeld determined that 31 190.025 tonnes of maize, being part of the quantity referred to above, had been placed under customs supervision in the period from 11 to 31 July 1974.

By a decision dated 12 September 1974, based on the notice of 9 July 1974, the Hauptzollamt therefore requested Maïzena to repay DM 51.24 per tonne. (It is clear that this figure is calculated by taking into account the threshold price in force until 31 July 1974, whereas if account had been taken of the threshold price in force in the month of processing the figure would have been DM 54.35. But this is of no importance in the present case because the Bundesfinanzhof's question relates only to the effects of changes in the supply price).

Maïzena objected to that decision and, after its objection had been rejected, commenced proceedings against the Hauptzollamt before the Finanzgericht [Finance Court] Düsseldorf. The case was brought on appeal before the Bundesfinanzhof, which by order of 24 November 1981 referred the following question to the Court of Justice:

How was the production refund to be calculated for maize which was placed under customs supervision before 1 August 1974 but was only afterwards processed into starch, within the time-limit laid down for processing?

The order making the reference was lodged at the Registry of the Court of Justice on 7 January 1982.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice written observations were submitted by Maïzena, represented by W. Kleinmann of Messrs. Gleiss, Lutz, Hootz, Hirsch and Partners, Rechtsanwälte, Stuttgart, and by the Commission of the European Communities, represented by Jörn Sack, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By order of 19 May 1982 the Court also decided to assign the case to the First Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

II — Written observations submitted to the Court

Maïzena observes that the purpose of the provision in Regulation No 120/67 which provides for a system of production refunds is, as the preamble thereto states, to ensure that manufacturers of starch obtain the basic products which they require at a lower price than would normally be the case. Similarly it is clear from the preamble to Regulation No 371/67 that the purpose of Article 1 (1) thereof, which provides the method of calculating the refund, is to bring down the price of maize intended for starch manufacture to 6.80 units of account per 100 kg, in other words to fix a supply price. The indissoluble link with the process of supply is therefore established beyond a shadow of a doubt.

According to the whole corpus of provisions previously referred to, it is sufficient — as is logical in order to ensure supply of basic products at advantageous prices — that the maize be intended for the manufacture of starch for the right to a refund to arise which is both determined and quantified within the framework of the process of supply of basic products. It is true that the maize must subsequently be processed into starch and that if this is not done there is no basis for a production refund, but the obligation to process the product has no effect on the level of the refund. The relevant time is therefore that of the supply of the maize for the purpose of producing starch. For reasons of supervision, however, account is taken of the moment when the basic product arrives officially and its destination can be verified objectively, that is to say the moment when it is placed under official supervision.

According to Maizena, the conclusions which it has arrived at on the basis of the provisions cited above are confirmed by the subsequent regulations.

Regulation No 1060/68 is concerned only with the possibility of granting a refund advance and therefore does not contain a general restriction on the rights previously granted by Regulations Nos 120 and 371/67. The rules which it lays down are too specific to be applied beyond the system of advance payments thereby created. In particular, the regulation should not be applied by analogy to determine the amount of a production refund.

Even if it were supposed that Regulation No 1060/68 applied generally to the calculation of a production refund, from its wording it would apply only to a change in the threshold price and not to a change in the supply price. That would be logical in so far as, on the one hand, the threshold price is subject to constant change and, on the other, the Commission has no power to make any modifications to the supply price, which has to be fixed by the Council, or to the applicability of that price.

The rule is therefore that the relevant time is the moment when the basic products are placed under official supervision and not the moment when they are processed.

Maïzena emphasizes that such a rule was introduced later by Regulation (EEC)

No 2012/74 of the Commission of 30 July 1974 (Official Journal 1974, L 209, p. 44), which is not relevant to the present case since it came into force after 1 August 1974.

Article 2 (1) of that regulation provides that the refund is payable provided that the person concerned furnishes proof that the basic product in question has been placed under official supervision. Paragraph 3 of the same article provides that account is to be taken of the threshold price in force on the day on which the product is placed under official supervision, subject to a limited adjustment for changes in the threshold price prior to the month during which processing takes place. There is no mention of changes in the supply price.

The possibility of adjusting the amount of the production refund in the case of a change in the supply price is mentioned for the first time, as is emphasized by Maizena, in Regulation (EEC) No 10/75 of the Commission of 31 December 1974 (Official Journal 1975, L 1, p. 24).

With regard to that regulation, Maizena points out that it did not enter into force until 1975 and does not, therefore, provide a proper legal basis for modifications and adjustments to the production refund decided upon *a posteriori* in 1974. It is clear, moreover, that that regulation modified the pre-existing legal situation. That it did produce changes is shown by the fact that its adoption would be incomprehensible if previously it had already been legally possible to adjust the refund in the light of an alteration in the supply price. Moreover, it is not possible to say that the measure was intended to clarify the existing situation since its title and preamble clearly show that the intention was to create a new legal situation.

Maizena contends that to determine the amount of the refund by reference to the day of processing would be contrary to the meaning and intent of the refund system. The decisive moment for calculating the refund should in fact be close to the moment of purchase of the basic product if the principle of supply at a reasonable price, which is the purpose of the refund, is to be respected. That principle would be disregarded if the relevant date were taken to be that of the subsequent processing.

Maizena takes the view that that conclusion is confirmed by the rules relating to production refunds for potato starch and sugar used in the chemical industry.

It is evident from the preamble to Regulation No 367/67 that refunds for the manufacture of cereal starch and potato starch should be at the same level in view of the interchangeability of those two products.

Since the starch manufacturer pays to the potato producer on delivery a price which includes the production refund, it follows that that refund, which can only be the refund in force at the time of delivery, cannot be at the same level as the refund for the manufacture of maize starch if the latter is calculated on the basis of rates in force at the time of processing. In the period in question the manufacturers of potato starch would have had an advantage over the manufacturers of maize starch owing to the fact that they would have benefited from the refund in force before 1 August 1974.

Such inequality of treatment would not only be contrary to Regulation No 371/67 but would also be in breach of the general principle of non-discrimination to be found in Article 40 of the EEC Treaty.

According to Maizena, the same considerations apply to production refunds for sugar used in the chemical industry for products which may equally well be made of starch glucose. In order to guarantee equal conditions for the basic products the supply price of the sugar is fixed by reference to the supply price of maize. The refund envisaged for the sugar nevertheless does not vary with any changes which may occur in the supply price of maize. Consequently, if the same rule did not also apply to maize this would constitute unequal treatment.

Maizena contends, furthermore, that the sudden departure from the practice which, the German authorities had followed until 9 July 1974 (a practice which, moreover, seems to have been considered proper by the Commission, which never thought it necessary to take action under Article 155 of the EEC Treaty) constitutes, in any event, a breach of the principle of the protection of legitimate expectation with regard to the undertakings concerned, which were not given sufficient time to adapt themselves to the new situation.

Finally, it points out that the Court has interpreted Regulation No 2012/74 in its decisions, in particular in its judgment of 12 July 1977 (Case 2/77 *Hoffmann's Stärkefabriken AG* v *Hauptzollamt Bielefeld* [1977] ECR 1375), to mean that the amount of the refund should be determined in accordance with the figures in force on the day when the basic product is placed under the official supervision of a Member State.

Regulation No 1060/68 — on the assumption that it applies to the present case — contains a similar provision so that the interpretation of the Court of Justice also applies to this case.

The *Commission of the European Communities* is of the opinion that, from 1967 and even before Regulation No 10/75 came into force, the refund for maize intended for the manufacture of starch had to be calculated on the basis of the supply price in force on the day on which it was processed.

In its opinion the wording of Article 11 of Regulation No 120/67 and of Article 1 of Regulation No 371/67 make it clear that the refund is given on (and for) the production of starch from maize. It is therefore perfectly logical for the right to the refund to arise at the moment of processing and for it to be determined according to the rate applicable on that day.

Although it may be possible to envisage other solutions it is clear from Regulation No 1060/68 that no other solution has been adopted. That regulation contains implementing provisions which the Commission was, without any doubt, authorized to take by virtue of Article 5 of Regulation No 371/67 of the Council.

It follows from the corpus of provisions contained in that regulation that the manufacturer receives only an advance on the day on which the basic product is placed under official supervision and that the right to the refund does not arise until the day on which it is processed. In those circumstances reference must be made to the supply price in force on the day of processing. Changes in the supply price are not expressly referred to in Regulation No 1060/68 principally because, by comparison with the monthly variations in the threshold price, changes in the supply price are considered to be relatively rare. However, that does not imply that account should not be taken of such changes since under the rules for Community production refunds the right

to a refund does not arise until the product is processed and consequently it should clearly be determined on the basis of the supply price in force at that time.

The position did not alter appreciably after 31 July 1974. Regulation No 1132/74, which modified the supply price with effect from 1 August 1974, did not in fact contain any transitional provisions aimed at subjecting cereals which were under supervision to the old supply price. Nor was any change effected by Regulation No 2012/74, although Article 2 thereof does to a certain extent seem to be at variance with the Commission's view. The conclusion might be drawn from the wording of that article that henceforth the right to a refund was to arise once the basic product was placed under supervision. The subsequent articles show, however, that the legislature did not intend to make any fundamental alterations to the system in force until that time and that the only change of any practical importance was that henceforth the refund advance was to be calculated by reference to the threshold price in force on the day on which the request that the product be placed under official supervision was accepted.

The Commission then considers the *Hoffmann* case, cited above, and maintains that, whilst the Court stated in that case, as a subsidiary point, that the amount of the refund was determined when the person claiming it furnished proof that the basic product had been placed under official supervision, this was an incidental statement, to which was appended, moreover, the qualification that the traders concerned were therefore able to qualify in large measure for "an unreduced refund". The Court too therefore considered that the right to a refund was not acquired once and for all at the time when the product was placed under supervision.

Even if it were accepted that Regulation No 2012/74 was intended to alter the rules previously applicable, the fact remains that the regulation did not come into effect with regard to maize until 1 August 1974 and could not therefore be relied upon in relation to consignments of that product deposited in warehouses before that date without attributing to it retroactive effect not given to it by the legislature.

In support of its opinion the Commission adds that the actual price at which the starch producer purchases the basic product is normally the market price, which is set approximately at the threshold price. When the Council undertakes a change in the supply price, this will necessarily take effect a little late in relation to the movement of cereal prices on the world market. At such time the starch producers will already have been receiving for some time a refund slightly higher than is actually necessary, since competitors will already be obliged to buy the basic product at higher prices on the world market. It is certainly not necessary therefore for this advantage to be retained during the period of processing.

The Commission is of the opinion that if the refund is adjusted in keeping with the threshold price it must *a fortiori* be adjusted in keeping with changes in the supply price, since the starch producer will normally purchase the basic product

at the threshold price valid for the month during which the product is placed under supervision. If the producer cannot be certain that the refund will vary in keeping with changes in the threshold price, on which he bases his commercial decisions, *a fortiori* he will have no certainty regarding the movement of the supply price which alone guarantees the application to him of the principle of equal treatment as regards competition.

The Commission states finally that, in relation to production refunds in this sector, there is no system for fixing them in advance, which means that the person claiming a refund is not sure how much it will be before his right to it actually arises.

On the basis of the considerations referred to above the Commission submits that the following reply be given to the questions referred to the Court by the Bundesfinanzhof:

"Article 11 of Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals, in conjunction with Regulation No 371/67 of the Council of 25 July 1967 and Regulation No 1132/74 of the Council of 29 April 1974 and also Regulation No 1060/68 of the Commission of 24 July 1968 and Regulation No 2012/74 of the Commission of 30 July 1974, should be interpreted in such a way that, in calculating the production refund for maize starch, the increased supply price laid down by Regulation No 1132/74, in force from 1 August 1974, was to be taken into account even in relation to maize which was placed under official supervision before 1 August 1974 but was processed into starch only afterwards, yet within the time-limit laid down."

III — Oral procedure

Maizena, represented by Werner Kleinmann of the Stuttgart Bar, and the Commission of the European Communities, represented by Jörn Sack, a member of its Legal Department, acting as Agent, presented oral argument at the sitting on 1 July 1982.

The Advocate General delivered his opinion at the sitting on 16 September 1982.

Decision

1 By order of 24 November 1981, which was received at the Court on 7 January 1982, the Bundesfinanzhof [Federal Finance Court] referred the following question to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty: "How was the production refund to be calculated for maize which was placed under customs supervision before 1 August 1974 but was only afterwards processed into starch, within the time-limit laid down for processing?"

2 That question was raised in the course of proceedings pending before the Bundesfinanzhof between the Hauptzollamt [Principal Customs Office] Krefeld and Maizena GmbH, Hamburg, concerning a decision of the Hauptzollamt dated 12 September 1974, whereby it had demanded from Maizena a repayment of DM 51.24 per tonne of the amount received by way of refund on 31 190.025 tonnes of maize placed under official supervision in the period from 11 to 31 July 1974 but not processed until after that date.

3 The Hauptzollamt's decision, which is contested by Maizena, was based on a notice of the Federal Minister for Food, Agriculture and Forestry dated 9 July 1974 and published in the Bundesanzeiger [Federal Gazette] of 10 July 1974; the notice was intended to modify the established practice of the German authorities of taking into account in calculating refunds the threshold price and the guaranteed supply price in force at the time when the maize was placed under customs supervision.

4 The Community rules relating to production refunds for starch made from maize are based on Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals (Official Journal, English Special Edition 1967, p. 33), which provided for the principle of refunds.

5 That principle was put into effect for the first time by Regulation No 371/67 of the Council of 25 July 1967 fixing production refunds on starches and quellmehl (Official Journal, English Special Edition 1967, p. 219) and by Regulation No 1060/68 of the Commission of 24 July 1968 adopting certain detailed rules for the application of Regulations Nos 367/67 and 371/67 regarding production refunds on maize processed into groats and meal and on maize and common wheat processed into starch and quellmehl (Official Journal, English Special Edition 1968 (II), p. 352). Article 1 (1) of Regulation No 371/67 provided that the refund to be paid in respect of maize was to be equal to the difference per 100 kg of maize between the threshold price and a guaranteed supply price of 6.80 units of account. According to Regulation No 1060/68 (Articles 1 and 2 (4)) a refund advance calculated by reference to the threshold price in force at the start of the marketing year was to be paid not later than 30 days from the date on which the starch manufacturer requested it and furnished proof that the maize intended for

the manufacture of starch had been placed under customs supervision, whereas the refund (Article 3) was to be calculated by reference to the threshold price in force when the maize was processed into starch and was to be paid within 30 days from the date on which the manufacturer furnished proof that the cereal had been processed. The system provided for in the regulations cited above applied until 31 July 1974 and was replaced with effect from 1 August 1974 by the system provided for in Regulations Nos 1132/74 and 2012/74.

6 Regulation No 1132/74 of the Council of 29 April 1974 on production refunds in the cereals and rice sector (Official Journal 1974, L 128, p. 24) departed from Regulation No 371/67 inasmuch as it provided that henceforth the refund was to be equal to the difference per 100 kg of maize between the threshold price and a guaranteed supply price fixed at 8.20 units of account. Regulation No 2012/74 of the Commission of 30 July 1974 laying down detailed rules for the application of Regulation No 1132/74 as regards production refunds on starches (Official Journal 1974, L 209, p. 44) modified the rules for operating the refunds by abolishing the system of advance payments and provided, in Article 2, that the refund was to be calculated by reference to the threshold price in force at the time when the product was placed under customs supervision, subject to an adjustment where there was a change in that price before the maize was processed into starch.

7 As the Commission has emphasized, both Article 3 of Regulation No 1060/68 and Article 2 of Regulation No 2012/74 do in fact refer to the same date for the determination of the threshold price which must be taken into account when calculating the refund. Since Article 2 (3) of Regulation No 2012/74 provides that the refund "shall, where necessary, be adjusted *a posteriori* by reference to the threshold price valid for one month during which processing takes place", that article too attaches paramount importance to the threshold price in force at the date of processing.

8 As regards the supply price, the Commission has rightly pointed out that, whilst before the entry into force of Regulation No 10/75 of the Commission of 31 December 1974, amending Regulation No 2012/74 laying down detailed rules as regards production refunds in the cereals and rice sectors (Official Journal 1975, L 1, p. 24), Community law did not expressly deal with the problem of the practical effects of changes in that price

occurring between the time when the maize was placed under supervision and the time when it was processed, it nevertheless follows from the corpus of provisions on the production refund for starch in force since 1967 that the refund was to be calculated on the basis of the rates valid on the day of processing. Unlike the threshold price, which changes monthly and in respect of which it was therefore necessary to make provision for adjustment, in Regulation No 2012/74 the supply price is fixed by the Council for an indefinite period and remains unchanged until the Council decides to alter it. In the absence of any express provision concerning the supply price to be used when calculating the refund, that price must obviously be determined by reference to the same date as that taken into account in determining the threshold price.

9 Maizena contended first that the inference to be drawn from the Court's judgment of 12 July 1977 (Case 2/77 *Hoffmann's Stärkefabriken AG* v *Hauptzollamt Bielefeld* [1977] ECR 1375) was that the date which had to be taken into account in calculating the refund was necessarily the date at which the product was placed under customs supervision.

10 However, in the passage of the judgment to which Maizena refers, the Court merely states that according to Article 2 (1) and (3) of Regulation No 2012/74 the production refund is to be paid and calculated at the moment when the person entitled thereto furnishes proof that the basic product has been placed under official supervision. Having regard to the reservation contained in the same article permitting adjustment of the refund, it is not possible to find in that passage any support for the view that the date of processing is not to be the date which determines the amount of the refund.

11 Nor is it possible to accept the argument concerning Regulation No 10/75, cited above, namely that it was not until the adoption of that regulation that a new requirement was introduced that account be taken of changes in the supply price occurring before the processing of the maize. As the Commission has rightly stressed, such a requirement was by implication contained in the previous provisions.

12 Maizena also contended that only the use of the price applicable at the time at which the maize is placed under official supervision would be consistent with the purpose of the refund, which is to guarantee to starch producers a supply price which enables them to remain competitive in relation to their commercial rivals, namely starch producers in non-member countries and manufacturers of substitute products. However, the requirement that equal conditions of competition be maintained clearly applies at the time of supply, which means that in order to achieve its purpose the refund must necessarily be calculated by reference to the rates in force at that time.

13 As regards the aim of maintaining equal conditions of competition between Community manufacturers of starch and manufacturers in non-member countries, it is necessary to consider whether the taking into account of the threshold and supply prices applicable at the date when the maize is processed would jeopardize the attainment of that objective.

14 As regards the threshold price, the application, for refund purposes, of the price applicable at the time at which the maize is processed should not normally involve any disadvantage for Community producers of starch because the regulations adopted by the Commission on this matter provide, at the start of each marketing year, for a series of monthly price increases, and therefore, if anything, Community starch manufacturers are placed at an advantage in relation to their competitors established in non-member countries.

15 As regards the supply price, it should be borne in mind that, as was rightly pointed out by the Commission, price fluctuations on the world market can be reflected in the Community rules only after some considerable delay. Consequently, to apply the supply price in force at the time at which the maize is processed, which is *ex hypothesi* higher than the supply price in force at the time at which it is placed under official supervision, does not cause unwarranted damage to Community producers of maize starch, but merely deprives them of an advantage which they would have if the refund were calculated by reference to a supply price which, even at the date at which the maize was placed under official supervision, did not correspond any longer to the actual prices on the world market.

16 Nor is it possible to accept Maizena's assertion that the interpretation adopted of the wording of the provisions in question leads to a difference in the treatment of producers of maize starch and producers of potato starch which is contrary to the principle of non-discrimination contained in the second subparagraph of Article 40 (3) of the EEC Treaty and is incompatible with the requirement, laid down in the preambles to Regulations Nos 120/67 and 371/67, that the maize-starch and potato-starch industries be given the opportunity of maintaining competitive prices as compared with the prices of substitute products and with the requirement, laid down in the third recital in the preamble to Regulation No 1132/74, that the refunds for maize starch and potato starch be fixed at the same level.

17 In fact in the judgment in the *Hoffmann* case, cited above, the Court, taking into account the different features of the maize-starch refund as compared with the potato-starch refund, in particular the different basis for the calculation thereof and the fact that the potato-starch refund was not paid to producers unless they furnished proof that the refund had been paid to the potato producers, who, unlike the majority of maize producers, operated largely within the Community, held that there were objective grounds for the difference between the treatment accorded to potato-starch producers and that accorded to maize-starch producers, and rejected any requirement that the amount of the refunds be the same.

18 Maizena also contended that in the light of the first recital in the preamble to Regulation No 371/67, which declares the need for the starch industry to keep its prices competitive with those for substitute products, the treatment accorded to starch may not be any less favourable than that accorded to a product such as saccharose which can be used instead of starch in the manufacture of certain chemical products. Yet Regulation No 2478/74 of the Commission of 30 September 1974 (Official Journal 1974, L 264, p. 72), by extending the period of validity of refund certificates for saccharose for which applications had been lodged before 20 September 1974, enabled users of saccharose to obtain for a limited period a refund which had not been reduced despite the changes in the supply price of sugar which occurred at the end of 1974. According to Maizena, starch producers, on the other hand, would be the subject of discrimination contrary to Community law if they had to accept the consequences of a change in the supply price for maize.

19 The Commission replied that it must not be forgotten that, pursuant to Article 1 of Regulation No 2477/74 of the Council of 30 September 1974 (Official Journal 1974, L 264, p. 71), according to which "production refunds shall be fixed only if the total quantity of surplus sugar available for the Community chemical industry and the economic aspects of the proposed fixing are such as to justify such fixing", no further refund was granted for saccharose for a long period from October 1974, whereas the starch refund was never made dependent either on the existence of a production surplus or on the amount of that surplus.

20 In the light of the Commission's explanation of the background to these regulations, it can be seen that Regulation No 2478/74 was intended to compensate to some extent for the disadvantages arising solely for users of saccharose from the application of Regulation No 2477/74 and that equal conditions of competition were, in substance, maintained.

21 It follows from the foregoing that to calculate the refund on the basis of the prices applicable on the day on which the maize is processed does not constitute a breach of the principle of non-discrimination.

22 Finally, it is not possible to accept Maïzena's argument that there was a breach of the principle of the protection of legitimate expectation inasmuch as the Federal Republic of Germany suddenly departed from the practice which it had followed for several years and which had not been challenged by the Commission. A practice of a Member State which does not conform to Community rules may never give rise to legal situations protected by Community law and this is so even where the Commission has failed to take the necessary action to ensure that the State in question correctly applies the Community rules.

23 It follows from the foregoing that consideration of the question raised has disclosed no factor of such a kind as to indicate that calculation of the refund by reference to the prices in force at the time at which the maize is processed is contrary to any rule of Community law.

24 Consequently, the reply to be given to the question put by the Bundesfinanzhof is that, both under the Community rules in force until 31 July 1974 and under those in force after that date, the production refund for maize processed into starch must be equal to the difference between the threshold and supply prices applicable at the date at which the maize is processed.

Costs

25 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the question submitted to it by the Bundesfinanzhof, by an order dated 24 November 1981, hereby rules:

Both under the Community rules in force until 31 July 1974 and under those in force after that date, the production refund for maize processed into starch must be equal to the difference between the threshold and supply prices applicable at the date at which the maize is processed.

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 15 December 1982.

J. A. Pompe
Deputy Registrar

A. O'Keeffe
President of the First Chamber