On those grounds,

THE COURT,

in answer to the questions submitted to it by the Finanzgericht Hamburg by order of 19 August 1977, hereby rules:

1. **Article 4 (3) of Regulation No 1380/75, read in conjunction with Regulation No 2101/75, must be interpreted as meaning that the export refund in the sugar sector, fixed in national currency for each exporter individually on the basis of a tender, is not to be multiplied by a monetary coefficient, fixed by the Commission, derived from the percentage used to calculate the monetary compensation.**

2. **Consideration of the second question has disclosed no factor of such a kind as to affect the validity of Article 4 (3) of Regulation No 1380/75.**

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 24 May 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 18 APRIL 1978

My Lords,

In this case the Court has to plunge, once again, into the complexities of the Community legislation on the organization of the sugar market and into those of the legislation on monetary compensatory amounts (or "mca's").

The case comes to the Court by way of a reference for a preliminary ruling made by the Finanzgericht of Hamburg.

The Plaintiff in the proceedings before the Finanzgericht is the Kommanditgesellschaft in Firma Hans-Otto Wagner GmbH, Agrarhandel, which carries on business in the Federal Republic of Germany. The Defendant is the Hauptzollamt Hamburg-Jonas.

By a contract dated 12 February 1976, which was in English and expressed to be subject to the rules of The Refined Sugar Association, London, the Plaintiff sold to Jean Lion & Cie SA of Paris 4 000 metric tons of West German white sugar. The price was stated to be DM 86.15 per 100 kgs net "freight paid onto border Passau". (Passau is on the German side of the frontier between Germany and Austria). The buyers undertook to deliver the sugar "to a third country (DDR excluded)". The contract provided that the "German compensatory amount" should be "for sellers' account", that the buyers should transfer to the sellers export licences with an average refund of DM 18.3981 per 100 kgs net and that the refund should be "for sellers' account". (See Annex 10 to the Plaintiff's written Observations).

The sugar was in fact exported from the Federal Republic to Bulgaria in a number of consignments between 1 and 25 March 1976. It was exported under nine licences, eight of which had been obtained by Jean Lion & Cie SA from the French intervention agency (the Fonds d'intervention et de régularisation du marché du sucre or "FIRS") and transferred to the Plaintiff pursuant to the contract; and one had been obtained by the Plaintiff itself from the German intervention agency (the Einfuhr- und Vorratsstelle für Zucker und Rohtabak or "EVSt-Z/R"). The licences issued by the FIRS showed the appropriate refunds as having been fixed at rates ranging from FF 28.11 to FF 29.80 per 100 kgs, whilst that issued by the EVSt-Z/R showed a rate of refund of DM 15.67 per 100 kgs. All the licences showed that those rates of refund had been fixed by tender pursuant to Regulation (EEC) No 2101/75. (See Annexes 1 to 9 to the Plaintiff's written Observations and the Defendant's "Einspruchsentscheidung" of 13 September 1976).

The dispute between the parties is as to whether it was or was not proper for the refunds so fixed to be reduced by the application of a "monetary coefficient" under Commission Regulation (EEC) No 1380/75 of 29 May 1975. In the proceedings before the Finanzgericht the Plaintiff challenges the validity of a decision of the Defendant (embodied in its Einspruchsentscheidung of 13 September 1975) to the effect that such a reduction should be made.

This is not the first case in which the Court has had to consider Regulation No 1380/75 and, in particular, the provisions of that Regulation about monetary coefficients. It had to do so recently in Case 79/77 *Firma Kühlhaus Zentrum AG* v *HZA Hamburg-Harburg* (9 March 1978, not yet reported). That was also a reference for a preliminary ruling by the Finanzgericht of Hamburg.

The genesis of those monetary coefficients is this.

Levies and refunds payable on imports into or exports from the Community of products covered by a common organization of the market are in general fixed in units of account. For application in any particular case they need to be converted into the national currency of the Member State concerned. Since the entry into force of Council Regulation (EEC) No 475/75 of 27 February 1975 (OJ No L 52 of 28. 2. 1975) "on the exchange rates to be applied in agriculture" that conversion has in every case been effected at the "representative rate" (the "green" rate) for that currency fixed from time to time by the Council. As is well-known the representative rates of Member

States' currencies as so fixed do not always correspond to their real values in the market.

In the early days of mca's, that is from 1971 to 1973, the Commission used to fix different mca's for trade with third countries and for trade between Member States, in order to take into account the fact that in trade between Member States no levies or refunds are payable. Since 1973, however, for the sake of simplicity and to make the system more readily administrable, the Commission has fixed a single mca for each product and for each Member State in respect of which the conditions for the application of mca's laid down in Council Regulation (EEC) No 974/71 have been fulfilled. It has calculated the mca's by applying to Community prices the percentage prescribed by Article 2 (1) of that Regulation as amended by Council Regulation (EEC) No 1112/73, i.e., in the case of a currency "in the snake", which of course the DM is, the percentage difference between, so far as now relevant, its "representative rate" and its "central rate".

It follows that, in theory at least, in the case of an importation from or exportation to a third country on which a levy or refund is payable, the amount obtained by applying that percentage to the amount of the levy or refund would, in the absence of a corrective, be taken into account twice, once in the conversion of the levy or refund from units of account into national currency at the "representative" rate and once again in the mca, since the Community price by reference to which each mca is fixed in theory equals the world market price plus or minus the levy or refund (as the case may be). A corrective is therefore applied to the levy or refund, in the shape of a "coefficient" derived from the percentage used to calculate the mca. The coefficient is a figure by which the amount of the levy or refund is multiplied. The coefficients are fixed from time to time by Commission Regulations and, at the time here relevant (March 1976), that for the DM was 0.9. In other words the application of the coefficient to a levy or refund payable in DM led to its reduction to 90 % of its face value.

At that time the rules giving effect to that system were contained in Regulation No 1380/75 (OJ No L 139 of 30. 5. 1975) which is described in its title as "laying down detailed rules for the application of monetary compensatory amounts". Article 4 of that Regulation provides, so far as material, as follows:

"1. A monetary compensatory amount shall be fixed for each product and for each Member State in respect of which the conditions for the application of monetary amounts are fulfilled.

The monetary compensatory amount shall be calculated on the basis of the common price . . .

2. The amount fixed in accordance with the preceding paragraph shall apply in trade between the Member States and in trade with third countries.

3. However,

(a) in trade with a new Member State the accession compensatory amounts and the fixed components, and

(b) in trade with third countries the import charges and the export refunds and levies,

fixed in units of account" (those words must be emphasized) "applicable to the products referred to in paragraph 1 shall be multiplied by a coefficient. This coefficient shall be derived from the percentage used to calculate the monetary compensatory amount and shall be fixed by the Commission at the same time as that amount.

. . .

4. Where the levy or refund is to be increased or reduced, as the case may be, by accession and monetary compensatory amounts and multiplied by a coefficient, the calculation shall be made as follows:
   (a) the levy or refund shall be reduced or increased, as the case may be, by the accession compensatory amount;
   (b) the resulting amount shall be multiplied by the coefficient; and
   (c) the amount obtained after multiplication shall, after conversion into national currency, be reduced or increased, as the case may be, by the monetary compensatory amount."

The question in this case is whether the refunds shown in the export licences had been "fixed in units of account". If they had, the correct course was for them to have been multiplied by the coefficient (i.e. by 0.9), then converted into DM at the representative rate and lastly increased by the amount of the mca (increased because of course, the DM being an appreciated currency, mca's were granted on exports from the Federal Republic). There is no dispute about the relevant rate of mca. It was DM 10.90 per 100 kgs.

The Plaintiff's contention is, shortly stated, that the refunds were fixed by tender in national currencies (FF and DM) and not in units of account, so that no coefficient was applicable.

In order to see whether that contention is correct, it is necessary to examine in some detail the legislation under which those refunds were fixed by tender.

The basic Regulation on the common organization of the market in sugar is now Council Regulation (EEC) No 3330/74 of 19 December 1974, which replaced Council Regulation No 1009/67/EEC, whereby that organization was established. Regulation No 3330/74, like Regulation No 1009/67 before it, envisages that at times when sugar is scarce a levy may be charged on exports of sugar from the Community whilst at other times, when world market prices for sugar are lower than Community prices, a refund may be granted on such exports to cover the difference between those prices. The Regulation also envisages that refunds may either be fixed at regular intervals by measures adopted under the "Management Committee procedure" or be awarded by tender. (See Articles 17 and 19 of the Regulation). We were told by the Commission that in practice the "regular" refunds are fixed at low figures and that nowadays the refunds on most exports of sugar are awarded by tender.

The general rules for granting export refunds on sugar are contained in Council Regulation (EEC) No 766/68 of 18 June 1968 (OJ No L 143 of 25. 6. 1968, which was originally adopted under Regulation No 1009/67 and is continued in force by virtue of Article 44 (4) of Regulation No 3330/74.

Article 4 of Regulation No 766/68 provides, so far as material:

"1. The refund on [in effect, sugar] may be fixed by tender. The purpose of the tender shall be to determine the amount of the refund.

2. The competent authorities of the Member States shall invite tenders in accordance with an instrument binding in law in all Member States. This instrument shall lay down the terms of the invitation to tender. These terms must guarantee equal access for all persons established within the Community.

3. The terms of the invitation to tender shall include a time limit for the submission of tenders. The maximum amount of the refund for the invitation in question shall be fixed in accordance with [in effect,

the Management Committee procedure] within three working days following the expiry of the time limit and in the light of the tenders received. When the maximum amount is being calculated, account shall be taken of the supply situation and prices within the Community, prices and potential outlets on the world market and costs incurred in exporting sugar.

...

4. ...

5. If the amount of the refund shown in a tender exceeds the maximum fixed, the competent authorities of the Member States shall reject that tender. If the amount of the refund shown in a tender does not exceed the maximum, those authorities shall fix the refund at an amount equal to the refund appearing in the tender in question."

Article 9 provides:

"Tenders submitted in response to an invitation shall not be considered unless a deposit is lodged.

The deposit shall be forfeited in whole or in part if tenderers have not fulfilled, or have only partially fulfilled, the obligations placed upon them."

On 11 August 1975 the Commission adopted Regulation (EEC) No 2101/75 (OJ No L 214 of 12. 8. 1975), which, Your Lordships remember, was referred to in each of the export licences in this case. The object of that Regulation was described in its title as being "a standing invitation to tender in order to determine a levy and/or refund on exports of white sugar". The reason for the alternative was of course that in August 1975 there was a scarcity of sugar, so that levies were then being charged on exports of it from the Community (see for instance Commission Regulation (EEC) No 2105/75, also of 11 August 1975).

The relevant provisions of Regulation No 2101/75 are these:

"Article 1

Member States shall issue a standing invitation to tender to determine an export levy and/or export refund on white sugar, and, during the period of validity of the standing invitation, they shall issue weekly partial invitations to tender.

Article 2

1. The standing invitation to tender and the partial invitations shall be conducted in accordance with Regulation (EEC) No 766/68 and with the following provisions. . . .

2. The standing invitation to tender shall remain open until a date to be determined subsequently.

Article 3

1. The Member States shall draw up a notice of invitation to tender. Such notice shall be published in the *Official Journal of the European Communities.* Member States may also publish the notice, or have it published, elsewhere.

2. The notice shall indicate in particular the terms of the invitation to tender."

Article 4 prescribed in detail the periods during which tenders were to be submitted in response to each partial invitation to tender. Then Article 5 provided:

"1. Tenders, which must be in writing, shall either be delivered by hand to the competent authority of a Member State or addressed to that authority by registered letter, telex or telegram.

2. The tender must indicate:

(a) the invitation to which the tender relates;

(b) the name and address of the tenderer;

(c) the quantity of white sugar to be exported;

(d) the amount of the export levy or, where applicable, of the export refund, per 100 kilogrammes of white sugar, expressed in the currency of the Member State where the tender is submitted.

...

6. Once submitted, a tender may not be withdrawn."

Pausing there, one can see the high-water mark of the Plaintiff's case. Article 4 (5) of Regulation No 766/68 provided, Your Lordships remember, that, if the amount of the refund shown in a tender did not exceed the maximum, the competent authorities of the Member State concerned should "fix the refund at an amount equal to the refund appearing in the tender in question" whilst Article 5 (2) (d) of Regulation No 2101/75 provided that the tender should indicate the amount of the refund "expressed in the currency of the Member State where the tender is submitted". If nothing other than a juxtaposition of the wording of those two provisions were relevant, the conclusion would be inevitable that a refund fixed by tender was fixed in the national currency of the Member State concerned and not in units of account.

One must, however, read on.

Article 6 of Regulation No 2101/75 dealt in detail with the security to be provided by tenderers (as envisaged by Article 9 of Regulation No 766/68).

Article 7 provided that tenders should be examined in private by "the competent authority concerned", meaning thereby the competent authority of the Member State where each tender had been lodged, and that they should be communicated to the Commission "without delay and in such manner that the names of the tenderers are not disclosed".

Article 8 is not here in point.

Article 9, omitting references to Article 10, which is not here in point, was in these terms:

"1. Account being taken of the current state and foreseeable development of the Community sugar market and of the world sugar market, there shall be fixed either:

— a minimum export levy, or

— a maximum export refund.

2. ... where a minimum export levy is fixed, a contract shall be awarded to every tenderer whose tender indicates a rate of levy equal to or greater than such minimum levy.

... where a maximum export refund is fixed, a contract shall be awarded to every tenderer whose tender indicates a rate of refund equal to or less than such maximum refund and to every tenderer who has tendered for an export levy."

It is noticeable that Article 9 did not prescribe how the minimum levy or maximum refund should be expressed. It is however common ground that it has always been fixed in units of account.

Article 11 was in these terms:

"1. The competent authority of the Member State concerned shall immediately notify all applicants of the result of their participation in the invitation to tender. In addition, that authority shall send successful tenderers a statement of award.

2. The statement of award shall indicate:

(a) the invitation to which the tender relates;

(b) the quantity of white sugar to be exported;

(c) the export levy to be charged, or where applicable the export refund to be granted, per 100 kilogrammes of white sugar of the quantity referred to in (b)."

There again it is important to observe that Article 11 (2) (c) did not state how the amount of the levy or refund was to be expressed. It left it open whether it should be in the currency of the Member State or in units of account.

The last provision of Regulation No 2101/75 to which I need refer is Article 12 which was, so far as relevant, in these terms:

"Every successful tenderer shall have:

(a) the right to be issued, in respect of the quantity awarded, with an export licence indicating as appropriate the export levy or the export refund quoted in the tender;

(b) the obligation to apply, within 10 days following the day of expiry of the period for the submission of tenders, for an export licence for that quantity; . . . "

Two observations are, I think, called for as regards that Article.

The first is that, as Your Lordships will hardly need to be reminded, an application for an export licence entails, under the rules governing the common organizations of agricultural markets (in the case of the market in sugar, by virtue of Article 12 of Regulation No 3330/74), the lodging of security guaranteeing that the exportation covered by the licence will be effected. So Article 12 (b) of Regulation No 2101/75 had the indirect effect of placing the successful tenderer under an obligation to ensure that the exportation proposed in his tender was carried out.

Secondly, and perhaps more importantly, the reference in Article 12 (a) to "the export levy or the export refund quoted in the tender" is, taken in conjunction with Article 5 (2) (d), enough to explain why, in the present case, the refunds were expressed in the export licences in FF and DM respectively. So it cannot be deduced from the mere fact that the refunds were so expressed in the licences that they had not been "fixed" in units of account.

On 14 August 1975 there was published in the Official Journal of the European Communities (No C 185/23) on behalf of the Commisson and of the intervention agencies of all the Member States the Notice of a standing invitation to tender (No 9/1975) that had been foreshadowed by Article 3 of Regulation No 2101/75.

For the most part that Notice reproduced the provisions of Regulation No 2101/75, including, as paragraph III (3), those of Article 5 (2) and, as paragraph V (7), those of Article 11. It contained however, in addition, an important provision, paragrah V (8), which was in these terms:

"In order to achieve comparability between tenders and for the award of contracts by Member States, the amount proposed for the export levy or refund, expressed in a national currency, will be converted into units of account by applying the conversion rates applicable for the purposes of the common agricultural policy."

It appears to me that the only way in which that provision could be denied legal effect would be by holding that it was inconsistent with Article 4 (5) of Regulation No 766/68. But the authors of that Regulation can hardly have envisaged that "the refund appearing in the tender in question" could never, for any purpose, be expressed in anything but the currency of the Member State where the tender was lodged. This very case illustrates the fact that, where there is a transfer of a right to a refund, its amount may have to be converted into the currency of another Member State. Moreover, in 1968, when the Regulation was adopted, fixed parities were the rule so that no difficulty could be caused by any need to convert sums expressed in the currency of one Member State into that of another or into units of account; it was natural

therefore for the authors of the Regulation to refrain from legislating expressly about it.

On behalf of the Plaintiff it was submitted that, under the procedure for fixing refunds by tender, it was only the maximum amount of refund that was to be fixed in units of account. But that submission seems to me inconsistent with paragraph V (8) which refers, as purposes for which conversion into units of account is to be effected, to "comparability between tenders" and to "the award of contracts by Member States".

In the result, although attracted at first by the Plaintiff's argument, I have come to the conclusion that the refunds here must be held to have been fixed in units of account and therefore to have been subject to the application of monetary coefficients.

The Commission, emphasizing a point canvassed by the Finanzgericht in its Order for Reference ("Grounds", para. II (2)), submitted that any other conclusion would lead to unfairness as between traders in Member States with appreciated currencies (where mca's are granted on exports) and traders in Member States with depreciated currencies (where mca's are charged on exports). There is of course a third category, namely traders in any Member State whose currency is "in the snake" and the "representative rate" of which is equal to its "central rate": there mca's are neither granted nor charged. It so happened that that was the position in France when the relevant events in the present case occurred.

In general the question of equal treatment of traders in those three categories does not arise because their situations are not comparable. But here the invitation to tender was addressed to all traders in the Community and it was therefore necessary to ensure that they competed on equal terms. That acceptance of the Plaintiff's contention would lead to their not being able so to compete may be illustrated by the facts of this very case. The refunds here were all fixed as a result of the 16th partial invitation to tender under the standing invitation in question. The maximum export refund for that partial invitation was fixed by Commission Decision 76/234/EEC of 11 February 1976 at 5.29 units of account per 100 kgs. Converted into FF at the representative rate for the FF, that produced a figure of FF 29.80, which is in fact the figure one finds in one of the export licences obtained by Jean Lion & Cie. S.A. Since mca's were not at the time applicable in France, it represents the whole amount that a French trader whose tender coincided with the maximum would obtain. Converted into DM at the representative rate for that currency, the same 5.29 u.a. would produce a figure of DM 18.93, in addition to which a German trader would receive an mca of DM 10.90. If his refund were not reduced by application of the coefficient, the German trader would, for the reasons that I outlined at the outset, receive twice the amount reflecting the percentage difference between the representative rate and the central rate of the DM as applied to the refund. As compared with a trader in a Member State with a depreciated currency his position would be even more favourable.

It was submitted on half of the Plaintiff that, whatever his position might be in theory, a trader tendering for a refund was concerned only with the amount he would receive in national currency; that he would fix his tender accordingly; and that it was unfair to reduce the amount of his tender by applying a monetary coefficient. That submission seemed to me to lie oddly in the mouth of the Plaintiff, which, for the most part, had acquired its rights to refunds by transfer from a trader in another Member State. But, in any case, the submission, in my opinion, loses much

of its force if one bears in mind that, in working out how much he will receive in cash, a trader must take into account not only the refund but also the possible incidence of mca's; and, if mca's, why not also monetary coefficients? I was impressed, moreover, by a point made on behalf of the Commission to the effect that, so far as it knew, monetary coefficients had always in practice been applied to refunds fixed by tender and that, again so far as it knew, the Plaintiff was the first trader ever to have objected to the process.

The Commission, prompted, probably, by some observations of the Finanzgericht in the Order for Reference and by the content of one of the questions referred to this Court by that Order, went so far as to submit that, if the Court felt bound to accept the Plaintiff's contentions as to the interpretation of the relevant legislation, it should hold Regulation No 1380/75 pro tanto invalid, on the ground that it conflicted with the provisions of the Treaty against discrimination. On the view I take that problem does not of course arise, but I think it right to say, first, that, if there is any flaw in the legislation it must in my opinion lie, not in Regulation No 1380/75, but in the provisions relating to the fixing of refunds by tender, and, secondly, that, if those provisions contain a flaw, the remedy cannot be for this Court to make a declaration of partial invalidity, thus, in effect, inviting the Commission to legislate retroactively to the detriment of the Plaintiff.

I turn to the actual questions referred to the Court by the Finanzgericht. They are these:

"1. Is Article 4 (3) of Regulation (EEC) No 1380/75 of the Commission read in conjunction with Regulation (EEC) No 2101/75 of the Commission to be interpreted as meaning that the export refund, which in the sugar sector is determined separately for each exporter in national currency on the basis of an invitation to tender, is to be multiplied by the montary coefficient fixed by the Commission, which is derived from the percentage used to calculate the monetary compensation?

2. If the answer to Question 1 is in the negative:

   Is Article 4 (3) of Regulation (EEC) No 1380/75 of the Commission invalid in so far as in the cases mentioned in Question 1 it does not provide for the multiplication of the export refund determined in national currency by the monetary coefficient?

3. If the answer to Question 2 is in the affirmative:

   What are the effects of the partial invalidity of Article 4 (3) of Regulation (EEC) No 1380/75 of the Commission?"

If I am right, the Finanzgericht was of course mistaken in thinking that a refund determined on the basis of an invitation to tender (at all events under the provisions here relevant) should be regarded as having been fixed in national currency.

In my opinion, Your Lordships should, in answer to Question 1, rule that Article 4 (3) of Regulation No 1380/75, read in conjunction with Regulation No. 2101/75 and with Notice No 9/1975, is to be interpreted as meaning that an export refund fixed on the basis of a tender lodged in response to that Notice is to be multiplied by the monetary coefficient.

On that footing, Questions 2 and 3 do not call for any answer.