OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 16 SEPTEMBER 1982

My Lords,

The Bundesfinanzhof has referred to the Court under Article 177 of the EEC Treaty the question "How was the production refund to the 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 question arises in this way. Council Regulation No 120/67 EEC of 13 June 1967 (Official Journal, English Special Edition 1967, p. 33) made provision, *inter alia*, for the establishment of target, threshold and intervention prices in relation to the common organization of the market in cereals, including maize. It recited that because of the special situation in the market in starches, and in particular the need for that industry to keep prices competitive with substitute products, it was necessary "to ensure by means of a production refund that the basic products used by the industry are made available to it at a lower price than that which would result from applying the system of levies and common prices".

Article 11 provided that a production refund "shall be granted: (a) for maize ... used by the starch industry for the manufacture of starch" and required the Council to "adopt rules for the application of this article and fix the amount of the production refund". The Council did so by Regulation No 371/67 of 25 July 1967 (Official Journal, English Special Edition 1967, p. 219). By Article 1 of that regulation, Member States were required from 1 July 1967 to grant a production refund on maize for the manufacture of starch equal to the difference per 100 kg between the threshold price for maize and 6.80 units of account. The intention was thus that, until altered, the effective or net cost of maize to the manufacturer of starch should be 6.80 units of account. Both these regulations provided for a production refund in respect of starch made from potatoes, though on a different basis and subject to different rules.

By Article 5 of the latter regulation detailed rules were to be adopted by the Commission for the application of the regulation in accordance with the procedure prescribed.

The Commission did adopt detailed rules by Regulation (EEC) No 1060/68 of 24 July 1968 (Official Journal, English Special Edition 1968, II, p. 352). Since a system of advance payments of the production refund had been introduced in respect of potato starch, it was deemed right to provide for an advance payment to be made in respect of the production refund covering cereals (including maize) made into starch. The

advance was required to be paid where the manufacturer of starch, holding maize for the manufacture of starch, asked for it and furnished proof that he had the maize on his premises or that it was under official supervision. The amount of the advance was not to exceed the difference per 100 kg of maize between the threshold price for maize at the start of the "marketing year" and 6.80 units of account. The manufacturer was limited to submitting one application a month for any relevant advances, and required to lodge a deposit (equal to 105% of the advance requested) guaranteeing the processing of the maize into starch. That deposit was to be released when he had proved that the maize had been processed into starch not later than 90 days following the date of payment of the advance. Articles 1 and 2 of the regulation deal only with the advance payment. Article 3 deals not with that but with the production refund itself. "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 . . ."

"The marketing year", fixed by Article 3 of Regulation No 120/67 as running from 1 August to 31 July, was changed so far as maize was concerned by Commission Regulation (EEC) No 1125/74 of 29 April 1974 (Official Journal L 128, 10. 5. 1974, p. 12). The 1974—75 marketing year for maize was to begin on 1 August 1974 and to end on 30 September 1975 after which the marketing year would begin on 1 October. For the 1974—75 marketing year the monthly increases in the threshold price (required to be made by Article 6 of Regulation No 120/67) were fixed by Regulation (EEC) No 1127/74 of 29 April 1974 (Official Journal L 128, 10. 5. 1974, p. 15). A third regulation made by the Council on the same day, Regulation (EEC) No 1132/74 (Official Journal L 128, 10. 5. 1974, p. 24) introduced other changes and repealed Regulation No 371/67. The production refund on maize for the manufacture of starch was to be the difference between the threshold price per 100 kg. and 8.20 units of account. Accordingly, if the threshold price remained the same or rose, the production refund would be lower than hitherto. That regulation came into force on 1 August 1974.

Detailed rules for the application of Regulation No 1132/74 were made by the Commission in Regulation (EEC) No 2012/74 of 30 July 1974 (Official Journal L 209, 31. 7. 1974, p. 44). By Article 2 thereof the production refund was to be paid to producers of starch from maize provided that they furnished proof that the maize had been placed under supervision by the competent authority of the Member State, and 3: "It shall be calculated by reference to the threshold price applicable on the day on which the application for the basic product to be placed under official supervision was accepted and shall be paid within 30 days following acceptance of such an application. It shall, where necessary, be adjusted *a posteriori* by reference to the threshold price valid for one month during which processing takes place" on the basis prescribed. Article 4 made the grant of a refund conditional on the lodging of a security guaranteeing the processing of the maize.. The security was not to be released until it was shown that 96% of

the quantity of the maize placed under supervision had been processed not later than 90 days following acceptance of the application for official supervision.

The system of advance payments is thus replaced.

This regulation, too, was to come into force on 1 August 1974 but, by Article 7 paragraph 2, "without prejudice to the amount of the production refund, Member States may during a transitional period lasting until 31 December 1974 continue to apply the provisions of", *inter alia*, Regulation No 1060/68.

Between 1967 and 1974, the German authorities did not implement precisely the scheme laid down in the earlier regulations. On 22 December 1967 the responsible Federal Minister gave notice that the refund would be fixed after the goods were put under supervision and calculated on the basis of the rate applying on the date when the maize was placed under supervision or a prescribed notice was given, subject to repayment if the maize was not processed into starch. The date of processing and the real difference between an advance payment and the production refund were, it seems, ignored.

On 9 July 1974 the Federal Minister gave a further notice that for maize, the subject matter of an application for supervision made between 11 and 31 July 1974, which was not processed before 31 July 1974, the refund would be reduced by DM 51.24 per tonne, this apparently intending to take into account the adjustment of the effective cost from 6.80 to 8.20 units of account per 100 kg. The refund was to be paid, first, by way of an advance, it being stated that the right to the refund arose only on the date of processing, and manufacturers were required to reimburse by 19 August 1974 DM 51.24 per tonne for any maize which was not processed before 31 July.

Firma Maizena GmbH of Hamburg had placed stocks of maize under supervision before 31 July 1974 and received a sum calculated on the basis of 6.80 units of account 63 172.11 tonnes of maize were not processed by 31 July, and, of these, 31 190.025 tonnes had been placed under supervision between 11 and 31 July 1974. The authorities (the Hauptzollamt Krefeld) demanded reimbursement of the sum of DM 51.24 per tonne in respect of this latter quantity. As the Commission points out, *prima facie*, the calculation itself seems erroneous since the wrong threshold figure was taken. The demand of the Hauptzollamt was set aside by the Finanzgericht at Düsseldorf and the former applied for that decision to be reviewed by the Bundesfinanzhof. That court came to the conclusion that it was necessary for the question concerned to be decided by the Court of Justice.

It seems to me that the first and indeed, the essential question of Community law to be decided is whether in July 1974 in respect of the quantities accepted for official supervision, the company had acquired a right to the refund at the rates applicable in that month.

The company contends that the primary object of the earlier regulations was to ensure that the manufacturer got his raw material at a price lower than the normal

price for maize in the Community, and that everything is geared to the time when he obtains (or puts under supervision) that raw material, so long as it is intended for, and eventually used to make, starch. That date governs both the right to the refund and the amount of the refund, as the Basic Regulations Nos 120/67 and 371/67 make clear. Even if Regulation No 1060/68 permits an adjustment in respect of the threshold price on the date of processing, there is no provision for an adjustment of the effective cost price, if that is subsequently changed by regulation. The same applies to the provisions of Regulation No 2012/74 even though that regulation is not applicable since it only came into force after the goods had been put under supervision. Not until Regulation No 10/75 dated 31 December 1974 (Official Journal L 1, 3. 1. 1975, p. 24) was it provided that account should be taken of a change in the effective cost.

The fact that the intention of the scheme is to provide maize for starch makers at a favourable price to enable them to compete in the starch market is, in my view, a slender or neutral indication. There is force in the argument that the refund should relate to the price paid which is or is likely to be fixed at the earlier rather than at the later of the two dates contended for. On the other hand it is clear from Article 11 that the refund (which is called a "production refund") is for starch actually used, and the counterbalancing argument that the refund should be fixed as at the date of processing has weight, since the question of how competitive starch prices are really arises at that stage. It is not, however, what is the more appropriate course to take, but what has actually been done on a proper reading of the regulation which matters.

Apart from indicating that the intention of the regulation is to provide a favourable price and that the refund is for starch actually used, Regulation No 120/67 is not conclusive in answering the question, although it points to any right to a refund accruing at the date of user rather than earlier. The second recital in Regulation No 371/67 states that the price of maize used is to be brought down to 6.80 units of account and this, it can be said, treats processing as a precondition of the right to a refund. Article 1 of the regulation however, in my view, does not assist either way in answering the present question.

On the other hand, Regulation No 1060/68 quite plainly treats the right to an advance (if the necessary conditions are satisfied) as something different from the right to a refund. The former accrues when the goods are under official supervision. The production refund, on the other hand, is to be paid within 30 days of proof of processing. Processing is a precondition of the right to a refund, and the right cannot arise earlier than that date. It is true that Article 3 expressly requires account to be taken

only of the threshold price at the month of processing (rather than the threshold price at the beginning of the marketing year, so that the amount of the refund will be higher as the year progresses and the threshold price increases) and does not refer to the relevant affective cost in force during the month of processing. It does not seem to me, however that it was necessary to refer to the effective cost price in force during that month. There is only one price — 6.80 units of account which is laid down by Regulation No 371/67. As long as Article 1 of that regulation remains in force, that is the figure to be taken during any month of processing. If Article 1 of Regulation No 371/67 is repealed or amended that regulation is *pro tanto* no longer in force unless kept in being for transitional purposes in respect of maize already under supervision. Any new rate introduced by an amending regulation will become the effective rate to take.

Article 1 of Regulation No 1132/74 introduced a new rate of 8.20 units of account and Regulation No 371/67 was repealed with effect from 1 August 1974. It did not expressly, or in my view by necessary implication, preserve the old rate for goods already under official supervision. Accordingly, if Regulation No 1060/68 had remained in being there would be no difficulty in substituting the figure of 8.20 for 6.80 units of account.

However Regulation No 2012/74 was made and this raises more difficulties. Subject to the provisions of Article 7 (2), Article 6 of that regulation repealed Regulation No 1060/68 with effect from 1 August 1974. The provisions of Article 3 of the latter, which indicate that the right to payment of the refund only arises on processing, have therefore gone as from 1 August 1974. Under the new provisions of Regulation No 2012/74 there is a right to be paid within 30 days of acceptance of the application to be placed under official supervision, and the amount is to be calculated by reference to the threshold price on the day on which the application was accepted, subject to adjustment *a posteriori*.

Article 6 of Regulation No 2012/74 does not refer to maize already placed under supervision before 1 August 1974. No doubt for this reason Member States were given by Article 7 (2) the power to continue to apply the provisions of Regulation No 1060/68 "without prejudice to the amount of the production refund" for a transitional period. The effect of this in my view is that, if the option is exercised by a Member State, the threshold price indicated by Article 6 of Regulation No 2012/74 and the effective cost price prescribed by Regulation No 1132/74 (the only one in force after 1 August since no power is given to continue to apply Regulation No 371/67) must be taken, and the right to payment only accrues under Article 3 of Regulation No 1060/68 on processing.

If a Member State did not, however, elect under Article 7 (2) to continue to apply Regulation No 1060/68, then Regulation No 2012/74 has to be applied with Regulation No 1132/74.

As a matter of ordinary construction, in the absence of a contrary indication, Regulation No 2012/74 would only apply to goods placed under supervision after it came into force. That would create a gap which clearly cannot have been intended. It cannot have been considered that starch manufacturers who had placed their maize under supervision before 1 August 1974 (so that they were entitled to an advance payment), but who had not processed it by that date, when Regulation No 1060/68 giving right to payment of the refund on processing was repealed, should lose their right. The dificulty arises because of the change of time when the right accrues and because the transitional arangements were not made obligatory. In my opinion, such a manufacturer of starch has a right to a refund by virtue of Regulations No 120/67 and No 1132/74 made by the Council and Article 2 (3) of Regulation No 2012/74 must be read as applying to maize placed under supervision, but not processed, before 1 August 1974. If as in the present case the maize was apparently accepted under official supervision between 11 and 31 July 1974, the refund fell to be paid within 30 days of the relevant date, subject to adjustment of the threshold price valid for the month of processing. If any such maize was accepted before 1 July then the right to payment must in my view be treated as accruing on 1 August 1974.

Accordingly whether or not Regulation No 1060/68 was as a matter of option applied by the German authorities, the relevant net cost price was that prescribed by Regulation No 1132/74, namely 8.20 units of account, and the threshold price was that contained in Regulation No 1427/74. This seems to me to be the case whether the maize was processed before or after 7 October 1974 when Council Regulation No 2496/74 of 2 October 1974 (Official Journal L 268, 3. 10. 1974, p. 1) changed the prices, since Article 1 (2) of that regulation appears to have intended that the production refund should continue at the same level. This is not, however, a matter on which detailed argument has been advanced before the Court.

The company contends that such a conclusion is precluded by the decision of the Court in Case 2/77, *Hofmann's Stärkefabriken* v *HZA Bielefeld* [1977] ECR 1375 and in particular with the third paragraph on page 1395. In my opinion, the Court was there not faced with the issue in the present case, and did not decide it. The position stated was plainly factually correct on the basis that the regulation there under consideration (Regulation No 2012/74 which was different from Regulation No 1060/74 in relevant respects) remained in force.

Then it is said that the result for which the Hauptzollamt contends in the present case produces an inconsistent treatment between those who produce starch from maize and those who produce starch from potatoes; as these are dealt with in the same Regulation No 371/67, such an inconsistency must be avoided. I do not agree with this contention. As the Court has already pointed out in the *Hoffmann's Stärkefabriken* case (supra) at pp. 1395/6, there

are objective grounds for the difference between the treatment accorded to potato starch producers and to maize starch producers. The basis of the computation is different, and there is a fundamental difference in that the refund paid to the producers of potato starch must be passed on to potato growers who, unlike most maize producers, were largely operating inside the Community.

Next it is argued that there is discrimination between maize starch producers on the one hand and those who use sugar in certain parts of the chemical industry on the other hand. Again I do not accept this. There are plainly differences which appear on the face of the regulation to which the Court has been referred which are economically capable of explaining the different results. A sugar refund system had operated side by side with the maize starch refund system for years without, as far as the Court is aware, any complaints of discernible discrimination, and if any change should have been made, it should have come when the amendment of the effective cost price applicable to the sugar production refund was effected in Council Regulation No 1862/74 of 15 July 1974 (Official Journal L 197, 19. 7. 1974, p. 4) consequent upon the change in the supply price used for the maize starch refund. It does not seem to me that any discrimination within the meaning of Article 40 (3) of the Treaty has been shown.

Although the German authorities continued between 1967 and 1974 to pay on the basis of the rates in force on the day on which the maize was placed under official supervision, and then by the notice of 9 July 1974 changed the basis as already indicated, so that the right to a refund only accrued at the date of processing, it does not seem to me that it can be said that the conclusion to which I have come as a matter of Community law violates the principle of the protection of legitimate expectations. The German authorities, on any view, were not applying the regulation correctly and were apparently the only ones who before 1974 did not grant the production refund at the time of processing (see the Decree of the Federal Minister of Finance, 10 July 1974 (BZ Bl, 1974, p. 750)). Whether the shortness of the notice of the change that was given on 9 July 1974 creates any kind of estoppel in German law against the German authorities, it does not seem to me that it can do so as a matter of Community law so as to affect the proper interpretation of these regulations. Notice of the change to take place in the Community with effect from 1 August 1974 was given on 10 May 1974 in Regulation No 1132/74 and it has not been suggested that the period of notice was in any way inadequate.

Accordingly, in my opinion, the question referred should be answered on the lines:

The production refund for maize placed under customs supervision before 1 August 1974, but processed into starch after that date, yet within the time limit laid down for processing, is to be calculated on the basis of the difference per 100 kg between the threshold price fixed by Regulation No 1427/74 and 8.20 units of account fixed by Regulation No 1132/74, whether or not the Federal Republic of Germany continued to apply the provisions of Regulation No 1060/68 pursuant to the second paragraph of Article 7 of Regulation No 2012/74.