OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 6 OCTOBER 1983

My Lords,

The Hamburg Finanzgericht has referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty the following questions:

1. Is Article 1 (a) of Commission Regulation (EEC) No 2271/78 of 29 September 1978 (OJ L 275, 30. 9. 1978, p. 28) (and six other regulations which consecutively replaced it) void in the light of Article 4 (3) of Council Regulation (EEC) No 2682/72 of 12 December 1972 (OJ L 289, 27. 12. 1972, p. 13, English Special Edition 9-28 December 1972, p. 42), as amended by Council Regulation (EEC) No 707/78 of 4 April 1978 (OJ L 94, 8. 4. 1978, p. 7), in so far as it provides, in the case of mannitol and sorbitol classified under Headings 29.04 C II, 29.04 C III and 38.19 T of the Common Customs Tariff in respect of which no production refund has been granted, for the application of the rates of export refund specified in Table I instead of those specified in Table II of the annexes to the aforementioned regulations fixing rates of refund?

2. If that question is answered in the affirmative, what legal consequences does the invalidity of those regulations entail?

In outline the legislative context in which these questions have been asked is this.

(a) Council Regulation No 1009/67 of 18 December 1967 (OJ L 308, p. 1, of the same date) provided for a common organization of the market in sugar, and defined the products included in it. By Article 9 (6) production refunds were to be granted for certain of those products used in the manufacture of certain products of the chemical industry. Export refunds might be made for exports of those products in the natural state, or in the form of goods listed in the annex to the regulation, an annex subsequently amended by Regulation No 2100/68 of 20 December 1968 (OJ L 309, 24. 12. 1968, p. 4). The Council was required to adopt general rules for granting refunds and for fixing the amount (Article 17).

(b) Those rules were laid down in Council Regulation (EEC) No 2682/72 in respect, *inter alia*, of the goods listed in the said annex. Article 4 (3) provided that "in fixing the rate of the refund account shall be taken, where appropriate, of production refunds . . . applicable in all Member States, in accordance with the regulation on the common organization of the market in the product in question, to basic products or to assimilated products".

(c) Regulation (EEC) No 3330/74 of 19 December 1974 (OJ L 359, 31. 12. 1974, p. 1) repealed Regulation No 1009/67/EEC and set out revised provisions for the common organ-

ization of the market in sugar. By Article 9 (4) it empowered (rather than required) production refunds to be made for the specified products used in the manufacture of certain products of the chemical industry, and provided by Article 19 that export refunds might be made for the products referred to in the earlier regulation, in particular those specified in the annex. This latter was in its turn amended by Council Regulation (EEC) No 705/78 of 4 April 1978 (OJ L 94, 8. 4. 1978, p. 1), which included as items, polyhydric alcohols 29.04 C II mannitol and C III sorbitol, and 38.19 T sorbitol other than that falling within subheading 29.04 C III. Regulation No 2682/72 continued as if made under Regulation No 3330/74.

(d) Council Regulation (EEC) No 1400/78 of 20 June 1978 (OJ L 170, 27. 6. 1978, p. 9) provided that a production refund should be granted for the products listed in Article 1 (1) (a) of Regulation No 3330/74 and sucrose syrups in subheadings ex 17.02 D II of the Common Customs Tariff, "which are used in the manufacture of the products of the chemical industry listed in the annex". The annex listed, *inter alia*, 29.04 C II and III (mannitol and sorbitol) and 38.19 T (other sorbitol).

(e) The seven Commission regulations, mentioned in the first question referred, fixed the rates of the export refunds applicable from 1 October 1978 (in effect until 30 June 1980) for the "basic products appearing in Annex A to Regulation (EEC) No 2682/72 and listed in Article 1 (1) of Regulation (EEC) No 3330/74 exported in the form of goods listed in Annex I to Regulation (EEC) No 3330/74". It provided in Table I a lower rate for those same goods in so far as they are shown in the annex to Regulation (EEC) No 1400/78, and in Table II a higher rate for goods other than those in Table I. Each of these Commission regulations recites Article 4 (3) of Regulation (EEC) No 2682/72 (to the effect that in fixing a rate for export refunds account should be taken, where appropriate, of the refunds applicable in all Member States which are mentioned). Although the regulations do not say so in terms, it seems plain that the intention was to take account, when fixing the rate of export refunds, of applicable production refunds, so that where a production refund was "applicable" the export refund should be reduced.

(f) As from 1 July 1980 the lower rate only applied to goods "insofar as they are shown in the annex to Regulation (EEC) No 1400/78 and have benefited from the granting of a production refund".

Merck, a German enterprise, originally produced mannitol and sorbitol from sugar in the crystalline state, turning it into an invert solution and then subjecting the latter to hydrogenation (in

order to produce mannitol and sorbitol in batches), and until September 1974 it received the production refund and an export refund at the lower rate. There were apparently no production refunds between that date and 1978. Meanwhile in 1976, Merck began to purchase invert solutions from others and then carried out hydrogenation itself by a system of continuous production to obtain mannitol and sorbitol.

The German authorities took the view that the invert sugar solution was not a product listed in Article 1 (1) of Regulation No 3330/74 or sucrose syrup as mentioned in Article 1 of Regulation No 1400/78, since it consisted basically of glucose, fructose and water. Accordingly no production refund was applicable. Merck apparently accepted this, and so does the Commission.

The German authorities also decided that, since mannitol and sorbitol were mentioned in the annex to Regulation No 1400/78, the lower rate of export refund applied.

Merck contests this on the basis that the regulations fixing the rate must be read as excluding from the higher rate only those products which actually benefited from a production refund, or, if that is not the right construction, on the basis that the regulations are *pro tanto* invalid in that the Commission has failed to give effect to the clear intention in Article 4 (3) of Council Regulation No 2682/72 that the applicability of production refunds should be taken into account when export refunds are fixed, and *ex hypothesi* it has failed to do so.

The Commission's basic reply is that it was perfectly proper in the interests of administrative efficiency or convenience to have a system which did not involve enquiries as to whether production refunds had in fact been claimed. It was entitled to assume that mannitol and sorbitol came only from products in Annex A to Regulation No 2682/72 and listed in Article 1 of Regulation No 3330/74. Because mannitol and sorbitol were mentioned in the annex to Regulation No 1400/78 that concludes the question. Within a reasonable time of learning of Merck's revised process it amended the regulation with effect from 1 July 1980.

The court making the reference asks whether the seven regulations are void. It does so, however, on the basis that the construction adopted by the authorities of those regulations and Regulation No 1400/78 is correct — i.e. that because mannitol and sorbitol were mentioned in the annex to the latter, the lower rate applies.

It is, thus, necessary to decide first whether that construction is right, before the question of invalidity arises.

The relevant goods are those specified "insofar as they are shown in the annex". In my view in order to decide the extent to which goods are shown in the annex, Regulation No 1400/78 must be read as a whole. It is not correct simply to look at words appearing in the annex out of context. It is quite plain that the production refund granted applies only to the specified products which are used in the manufacture of the

products of the chemical industry listed in the annex. The products listed in the annex are those, and only those, which have been manufactured by using "the basic products". Mannitol and sorbitol are thus only included in Table I of the seven regulations insofar as it is shown that they are mannitol and sorbitol made by the use of the basic products referred to in Article 1 of Regulation No 1400/78. Here they were not. Accordingly they are included in Table II and were eligible for the higher rate.

This result seems to me to derive from the proper reading of the regulations, and to be wholly consistent (and to be the only meaning consistent) with Article 4 (3) of Council Regulation No 2682/72. It does not run counter to the Commission's primary anxiety, namely that it did not wish to cause enquiries to be made as to whether, in a case where the refund fell to be made, it had in fact been made. This case is not concerned with the question whether someone who could have claimed a production refund, and did not do so, can have the benefit of the higher export refund. That is a wholly different question which does not arise. The only question is as to what products fall within the annex to Regulation No 1400/78.

In my opinion on this reading of the regulations, the seven regulations in question were not void.

If I had come to the contrary conclusion — namely that on a proper reading of the regulation all mannitol and sorbitol were limited to the lower rate of export refund (even where they were not entitled to the production refund because they were not made from one of the specified products) — the question would have arisen as to whether the seven Commission regulations were valid to the extent to which they excluded from the higher rate of export refund mannitol and sorbitol which were not eligible for a production refund.

In my opinion, if this latter is the correct reading, the Commission failed, in drafting the regulations, to comply with the requirements of Article 4 (3) of Council Regulation No 2682/72. It is clearly not appropriate, in fixing the rate of an export refund applicable to a specified product, to take account of a production refund from which the product in question is not entitled to benefit. Moreover to treat all mannitol and sorbitol in the same way for the purpose of an export refund is to discriminate against those producers of mannitol and sorbitol who are not entitled to a production refund, and who consequently will be at a commercial disadvantage compared with other producers who are entitled to it.

The Commission has put forward two main arguments in support of the validity of its regulations.

The first is that, when implementing the rules laid down by the Council in Regulation No 2682/72, the Commission has a broad discretion in the matter and may validly opt for a simplified procedure in order to avoid administrative difficulties. Although clearly the Commission has a discretion, and, broadly speaking, can lay down the administrative procedures which it considers best, it cannot validly do so in a way which goes outside the parameters laid down by the Council. It does not seem to me that Council Regu-

lation No 2682/72 permits, in the interests of administrative ease, the fixing of an export refund which takes into account a production refund for which the goods in question are not eligible. This is not a case where the administrative difficulties concerning the operation of the refund system were such that the Commission had no choice but to draft the regulations as it did. That is clear from the way the situation was remedied in July 1980.

Secondly, the Commission says that at the time it adopted the regulations it assumed that only the products attracting a production refund were used to make mannitol and sorbitol. That this was proved not to be so is due to a technical development of which the Commission was not aware. If an undertaking decides to use a new technical process without giving the Commission sufficient time to assess it, the undertaking acts at its own risk.

It seems to me that the information given to the Court at the hearing made it clear that this was not the position. There was not in fact a new technical development which could not reasonably have been foreseen. What essentially happened was that the first stage of a two-stage process (making an invert solution and then hydrogenating it) was carried out by a separate company apparently in the interests of efficiency and ensuring a continuous production. This is not a new scientific or technical development which could not have been anticipated, and moreover it was adopted by Merck some two years before the first of the Commission's regulations came into effect. What the position would be if a completely new technical development had been discovered of which the Commission knew nothing is a different question which does not fall for consideration in this case.

Accordingly, in my view, to the extent that the Commission regulations excluded from the higher rate of export refund mannitol and sorbitol not eligible for a production refund they were invalid.

On this basis the Finanzgericht asks what are the legal consequences of the invalidity of the regulation.

Although it is "first of all for the national authorities to draw the consequences in their legal system of the declaration of such invalidity made under Article 177 of the EEC Treaty", where national measures are involved (Case 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279), it is open to the Court to say what is the effect of its ruling that a Community institution's act is invalid. The result in the present case is, in my view, that the referring court must regard the invalid provision as having no legal effect. There is no need for further positive steps to be left to be taken by the Commission. Accordingly the declaration of invalidity means that Article 1 (a) of the Commission's regulations ceases to apply to goods shown in the annex to Regulation No 1400/78 which are not entitled to

benefit from the production refund. Since Article 1 (a) does not validly apply to such goods, it follows that they fall to be dealt with under Article 1 (b) (see e.g. Case 238/78 *Ireks Arkady* v *Council and Commission* [1979] ECR 2955 at p. 2991 per Mr Advocate General Capotorti; Case 66/80 *International Chemical Corporation* v *Amministrazione delle Finanze dello Stato* [1981] ECR 1191 at p. 1230 per Mr Advocate General Reischl and Case 112/76 *Manzoni* v *FNROM* [1977] ECR 1647 at p. 1662 per Mr Advocate General Warner).

Nonetheless, in the light of what is, in my view the correct interpretation of the Commission regulations, it is my opinion that the questions referred to the Court should be answered to the effect that examination of the matter has not revealed any factor indicating that Commission Regulations Nos 2271/78, 2555/78, 2807/78, 3115/78, 181/79, 410/79 and 615/79 are invalid.

Since the reference is a step in the proceedings in the national court, the company's costs should be reserved to that court and the Commission should bear its own costs of the reference.