compensatory amounts granted on the export of goods supplied as part of the national food-aid programme;

2. Orders the Commission to pay the costs.

Mertens de Wilmars Bahlmann Galmot

Pescatore Due Everling Kakouris

Delivered in open court in Luxembourg on 9 November 1983.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 4 OCTOBER 1983 [1]

Mr President,
Members of the Court,

I — The Court has before it an action brought on 8 February 1982 by the Federal Republic of Germany against the Commission of the European Communities, seeking a declaration that its Decision No 81/1034 of 16 November 1981 disallowing the financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as 'as Fund'), of the sum of DM 32 894 745.37.

The sum at issue covered two items: the first, of DM 945.51, related to the payment of aid for the private storage of table wine, and the second, of DM 16 978 093.28, related to payment by the competent customs office (Hamburg-Jonas) of monetary compensatory amounts for supplies of German food aid in the form of wheat and wheat flour, effected on behalf of the national intervention agency.

The grounds given for disallowing the latter sum were that it was not in

1 — Translated from the French.

keeping with the principle of "refunds on exports to non-member countries" or of "intervention intended to stabilize agricultural markets, respectively, granted and undertaken according to Community rules within the framework of the common organization of agricultural markets".

The Government of the Federal Republic of Germany, whilst wholly maintaining in every respect its view of the law as notified to the Commission, explains in its application that it is confining itself to the two sums in question essentially for reasons of expediency and the logical conduct of the action.

In the course of the written procedure, the Commission agreed to finance the wine-storage aid, of DM 945.51. That outcome was embodied in Commission Decision No 83/34 of 14 January 1983 on the clearance of the accounts submitted by the Federal Republic of Germany for the financial year 1976.

I shall therefore limit my observations to the question of the monetary compensatory amounts.

II — First may I outline the legal framework of food aid for cereals at the time of the supplies in question.

No provision for the grant by the Community of food aid, as such, is made in the Treaty of Rome, which established the European Economic Community. However, at the "Kennedy Round", the Community and the six States of which it consisted at the time signed the International Grains Agreement of 18 August 1967. It contained an agreement on the wheat-trade, and a further agreement on food aid. [1]

On its expiry on 30 June 1971, the Arrangement was extended by the International Wheat Agreement of 1971, which was concluded on behalf of the Community only on 25 June 1974 [2] but upon whose provisional application the Council had decided on 7 June 1971.

Like the 1967 Agreement, the 1971 Agreement consists of a wheat-trade agreement and a food-aid agreement.

Under the latter agreement, the Community undertakes to supply every year for a given period a tonnage which is likewise determined in terms either of Community operations or — on a lesser scale — of national operations.

The performance of the duties arising thereunder takes the form, on the one hand, either of the purchase of cereals or flour on the Community market or of the use of products held by intervention agencies and, on the other hand, by the mobilization — in exceptional circumstances — of cereals on the world market. [3]

In the case of the transactions which are the subject of these proceedings, recourse was had to the first of the above expedients, namely the use of intervention stocks.

The criteria governing the mobilization within the Community of cereals

1 — The Council decision of 17 March 1970 concluding both those agreements was published in the *Journal Officiel des Communautés Européennes*, L 66, 23. 3. 1970, p. 1.

2 — Official Journal, L 219, 9. 8. 1974, p. 24.

3 — Article 22 a of Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals, inserted by Regulation (EEC) No 289/69 of the Council of 17 February 1969; see also Article 28 (1) of Regulation (EEC) No 2727/75 of the Council of 29 October 1975.

intended for food aid and the arrangements for the Community's financial intervention vary according to whether the food aid is on a national or a Community basis.

(a) Food aid supplied by the national authorities

In such cases the cereals are mobilized by national invitations to tender for the intervention stock of the State supplying the aid in accordance with the system prevailing at the time. [1]

The product is one which is covered by a common organization of agricultural markets. Its cost is borne by the budget of the donor State, but payment of the normal export refund designed to offset the difference between prices within the Community and world prices — minus costs incurred subsequently to delivery free on board — was financed by the Guarantee Section of the Fund (Title 6 of the Budget: "Refunds"). That is what is known as the "Community financing of fob refunds".

1 — Regulation (EEC) No 1693/72 of the Council of 3 August 1972 fixing criteria for the mobilization of cereals intended as food aid, Official Journal, English Special Edition 1966-72, p. 108, as repealed and replaced by Regulation No 2750/75 of 29 October 1975, Official Journal, L 281, 1. 11. 1975, p. 89; the detailed rules for the implementation of Regulation No 1693/72 were set forth in Regulation No 522/73 of the Commission of 14 February 1973, Official Journal, L 50, 23. 2. 1973, p. 33. Regulation No 1703/72 of the Council of 3 August 1972 amending Regulation No 2052/69 as regards the Community financing of expenditure arising from the implementation of the Food Aid Convention of 1967 and laying down rules for the Community financing of expenditure arising from the implementation of the Food Aid Convention of 1971, Official Journal, English Special Edition, Second Series, II, Agriculture and Food Aid, p. 54. Regulation (EEC) No 2681/74 of the Council of 21 October 1974 on Community financing of expenditure incurred in respect of the supply of agricultural products as food aid, Official Journal, L 288, 25. 10. 1974, p. 1.

(b) Food aid on a Community basis

In such cases, a tendering procedure is usually employed for the stocks held by an intervention agency. The invitation to tender is then on a Community basis and is open to any person interested whatever his place of business. The invitation covers the supply of the product delivered fob or, exceptionally, at a later stage.

In those circumstances, the aid is wholly charged to the Community budget: not only the fob delivery together with costs of transport, insurance ('cif terms') or distribution, as the case may be, but also the actual value of the product, determined in accordance with the intervention purchase-price prevailing on the date when the stocks are removed, are entered under Title 9, Chapter 92 of the Budget, under the heading "Cooperation with developing countries and non-member countries: Food aid". That is known as the "Community financing of gifts".

Thus the supply of food aid matches, in some respects, the specific criteria of development-aid policy pursued either at national or at Community level, whilst displaying in other respects an affinity with measures for the support of agricultural markets.

That dual nature was reflected at that time in the differing budgetary treatment of credits allocated to food aid. The presentation of the budget did not enable expenditure to be clearly broken down betwen measures adopted under the common agricultural policy and those under the Community food-aid programme as such. Depending on the product concerned — since food aid was

extended to other agricultural products, in particular milk products — and depending on the detailed rules for mobilization and the nature of the aid, the expenditure was financed either wholly under Title 9 of the General Budget of the Communities, or by the Guarantee Section of the Fund (Title 6), or partially by each. [1]

Regulation (EEC) No 2681/74 of the Council of 21 October 1974, on the expenditure arising from the supply of agricultural products, which is paid by Member States as from 1 January 1975, introduced provisions to clarify the situation. In future:

Title 9 ("Food aid expenditure") was to cover expenditure attributable to the value of the goods charged to the Community in pursuance of the obligations arising under the conventions or agreements concluded by the Council.

Title 6 ("European Agricultural Guidance and Guarantee Fund — Guarantee Section") was to cover the part of expenditure attributable to export refunds.

Once monetary compensatory amounts were established in trade between, on the one hand, Member States *inter se* and, on the other, Member States and countries outside the Community, [2] it was arranged that, in the latter case, the compensatory amounts granted on importation should be deducted from the levies, whilst amounts granted on exportation should be added to the refunds.

The question then arose as to whether, when food aid was supplied by a Member State whose currency had appreciated, compensatory amounts might be granted by that State and, if so, on what terms the payment of such amounts might be financed by the Community on the model of the export refunds.

III — Acting as authorized agent of its government, the German intervention agency had been instructed to mobilize certain quantities of wheat and wheat flour, to be drawn from its stocks for the purpose of constituting supplies of national food aid. It adopted tendering procedure following the publication of notices in the Bundesanzeiger [Official Gazette] which contained no express reference to Community legislation. The interested parties were to express their offers in German marks, the offer price being net, fob or cif. The trader submitting the most favourable tender — the lowest bidder — was appointed by the agency, and the goods were supplied between 1 July 1972 and 18 March 1975.

Between those two dates the intervention agency submitted some 200 refund claims to the customs office in Hamburg. In the majority of cases no refund was paid out because, from November 1973 until March 1975, the refund was rated at zero on account of the rise in world cereal prices.

The refund claims were accompanied by the control copies needed when the application of a Community measure (in this instance, the grant of a refund) is conditional upon proof that such goods

1 — See second recital in the preamble to Regulation (EEC) No 2681/74 of the Council of 21 October 1974, Official Journal, L 288, 25. 10. 1974, p. 1; that regulation virtually took over the provisions of Regulation No 1700/72, although the latter has never formally been repealed.

2 — Regulation (EEC) No 974/71 of the Council of 12 May 1971, Official Journal, English Special Edition 1971 (I), p. 257.

have been put to the use or have reached the destination provided for. [1]

The general rules and implementing arrangements [2] governing export refunds were applicable by analogy to monetary compensatory amounts.

In order to qualify for the latter amounts, the applicant had to comply with certain requirements. He had to produce evidence that the products had been exported, by presenting the control copy, lodge a written claim drawn up on a special form which might be drawn up by the Member State in question, and submit an application for payment of the monetary compensatory amount within the six months following the date of completion of customs formalities; otherwise the application was rejected save in cases of *force majeure*.[3]

IV — Regulation (EEC) No 456/75 of the Commission of 26 February 1975 [4] added to Regulation No 1463/73 Article 16a, which is worded as follows:

"(1) In respect of the following transactions concerning products supplied for purposes of Community or national food-aid programmes no monetary compensatory amount shall be applicable:

In the case of products from intervention stocks, intra-Community trading operations and exportation to third countries;

In the case of products mobilized on the Community market, exportation to third countries.

(2) No monetary compensatory amount shall be applied in respect of exports to third countries for purposes of food-aid programmes carried out by humanitarian organizations, provided that such programmes have been approved under the procedure laid down in Article 6 of Regulation (EEC) No 974/71."

Those provisions entered into force 20 days after 27 February 1975 (the date of their publication in the Official Journal). However, paragraph (1) might apply at the request of the interested party with effect from 1 January 1974. [5]

It appears from that provision that, if monetary compensatory amounts had been collected on the occasion of the exportation to non-member countries of products drawn from intervention stocks and attracting national food aid, the exporter might ask *ex post facto* to be exempted from them.

However, the German authorities, proceeding *a contrario*, drew a different conclusion from the wording, namely that, prior to its entry into force, the grant of monetary compensatory amounts had been permissible in respect of the exportation to non-member countries of products drawn from intervention stocks in connection with national food-aid programmes. It was thus possible to obtain financing from the Fund, up to the level of the compensatory amounts, for export transactions carried out between 1 July 1972 and 18 March 1975, since the fact that they had been effected was attested by control copies, *provided always that the applications for payment of the refunds might be regarded as an express claim for monetary compensatory amounts.* Since the last applications for payment of

1 — Regulation (EEC) No 2315/69 of the Commission of 19 November 1969 on the use of Community transit documents for the purpose of applying Community measures for verifying the use and/or destination of goods.

2 — Article 16 of Regulation No 120/67.

3 — Article 14 of Regulation No 1463/73.

4 — Official Journal, L 51, 27. 2. 1975, p. 5.

5 — Article 3 of Regulation No 456/75; those provisions were repeated in Article 18 of Regulation No 1380/75 of the Commission of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts, which came into force on 1 June 1975.

compensatory amounts relative to goods supplied between 1 July 1972 and 18 March 1975 were lodged by the intervention agency in August 1975, with the Hamburg Customs Office, the latter considered the condition to have been satisfied, and it paid over to the agency a total of DM 16 978 093.28, which the relevant German department reclaimed from the Fund.

When checking whether the export licences had been attached to the applications for payment, the officers of the Commission discovered that they were not accompanied by a written claim for the grant of the compensatory amounts.

It should be noted that, in pursuance of Article 13 of Regulation No 1463/73, a notice from the Federal Minister for Agriculture of 30 May 1973, published in the Bundesanzeiger on 5 June 1973, had laid down that application for monetary compensatory amounts on exportation must be made on *forms* prepared on the model laid down by the Ministry of Finance.

The officers of the Commission initially took the view that the actual claim for compensatory amounts had been submitted after the date on which Regulation No 456/75 had entered into force, and that the submission of the control copy could not serve as a substitute unless the intervention agency had, in lodging the application for payment of the *refunds*, formally expressed its intention of seeking payment of the compensatory amounts.

The officers of the Commission were thereby complying with a note inserted in the annual report of the Court of Auditors for the financial year 1980, [1] which stated:

"Because they receive the normal price on the Community market, no refund or monetary compensatory amount is to be paid to the exporters of food aid. . . .

In order to avoid . . . errors it would appear necessary for the national agencies responsible for paying for food aid to demand the submission of the export certificate (Form T 5 or EX 16) from the supplier and so prevent the supplier [from] obtaining from another department the refunds payable on presentation of this certificate."

Pointing to the judgment of the Court in the *Schlüter & Maack* case of 6 June 1972, [2] the German authorities claimed that the submission of the control copy by the intervention agency to the customs office responsible for paying the refunds within the period laid down by Article 14 of Regulation No 1463/73 was manifestly designed to obtain all the benefits (refunds and compensatory amounts) to which the exporter was entitled on the basis of the evidence furnished by the document in question, and therefore amounted to an application for the grant of monetary compensatory amounts for the purposes of Article 13 of Regulation No 1463/73.

In the course of the written procedure, the Commission conceded that the submission of control copies might be

1 — Official Journal, C 344, 31. 12. 1981, p. 110, paragraph 9.17.

2 — Case 94/71, [1972] ECR 307.

equivalent to a claim for a compensatory amount, but it limited that concession to cases in which the copies contained at least an indirect reference — which it regards as indispensable — to the grant of those amounts. The Commission thereby acknowledged that exports with regard to which the trader either stated that he had taken cognizance of the notice of the Federal Ministry of 30 May 1973 or referred in some other way to the compensatory amounts, conferred an entitlement to those amounts; it made a correction in the applicant's favour of DM 11 570 202.60, but it stands by its refusal as regards the remainder (DM 5 407 890.68).

IV — The problem may thus be formulated as follows: may the submission by an official agency, within the appointed period, of documents relating to the payment of a refund be considered retroactively to be equivalent to an application for the grant of monetary compensatory amounts even when no payment of refunds is forthcoming and when the special form provided for the application has not been filled in?

In support of its affirmative answer to that question, the German Government points out that the T 5 control copies were produced in due time by the intervention agency, and that those documents prove that the basic conditions for claiming payment of the compensatory amounts were satisfied, so that their production must be regarded as equivalent to an application for payment (indeed, the Commission has subsequently admitted this, at least in part).

However, it takes the view that the requirement specified in those control copies that at least an indirect reference be made to the compensatory amounts in order to prove that, at the time of exportation, the trader was aware of his right to the benefit in question and intended to take advantage of it, reflects a disproportionate and discriminatory formalism.

It was disproportionate, it is alleged, in terms of the purpose to be achieved, because the goods reached their intended destination or were put to their intended use, and there was no risk of a duplicated payment of the compensatory amounts.

It was discriminatory because no special application form was required in other Member States, and because the compensatory amounts granted on the exportation of cereals to non-member countries as part of a national food-aid programme were borne by the Fund.

The Commission, after modifying its initial stance by accepting that a reference either to the German ministerial notice providing for a special form or to compensatory amounts in general might be equivalent to the application for the purposes of Article 14 of Regulation No 1463/73, contends that, in default of that minimum, there is not even a rudimentary application.

The Commission further points out that, in certain cases in which the "monetary coefficient" [1] had initially been applied to the refund, the application had later been abolished. In view of the fact that the monetary coefficient is not inapplicable unless there is no compensatory amount to be paid [2] the cancellation shows clearly that, in the opinion of the competent German authorities, no com-

1 — Articles 4 (3) and 18 of Regulation (EEC) No 1380/75 of the Commission of 29 May 1975; see also *Kühlhaus* judgment of 9 March 1978, Case 79/77 [1978] ECR 611.

2 — Article 4 of Regulation No 1463/73.

pensatory amount was due in respect of the deliveries in question. The intervention agency manifestly shared that viewpoint, since it had not resisted the implied corollary, namely that neither the monetary coefficient nor the compensatory amounts were applicable. That inference is borne out, it is claimed, by the fact that the agency did not present any express application for payment of the compensatory amounts until June and August 1975.

Similarly, when the customs office did not grant a refund in respect of the period from November 1973 to March 1975, the intervention agency did not protest against that implied refusal to grant the compensatory amounts.

V — I have some doubt in choosing between those two arguments.

Logically, the compensatory amounts should not be financed by the Fund except where Community tendering procedure is involved. The only reason for introducing compensatory amounts is to put the tenders on a comparable footing. However, under the detailed rules governing the tendering procedure at issue, only tenders from undertakings from a Member State could be considered; they related to cereals held by the intervention agency of that State, even though the customs formalities on exportation were completed in Benelux States.

Moreover, in trade with non-member countries compensatory amounts serve either to increase or to reduce — as the case may be — levies and refunds; the amounts are added to the export refunds from States whose currency has appreciated in value. If there is no refund there should, in principle, be no grounds for granting compensatory amounts either.

Finally, I do not know whether or not the tenderers had included "compensatory amounts" as an item in their tenders, or whether allowance was automatically made for their repercussions.

However, in its judgment of 6 October 1982 *(Eggers* v *Hauptzollamt Kassel),* [1] the Court held — as the Commission itself had suggested — that delivery of a control copy did not constitute an essential preliminary step for claiming compensatory amounts, and that national authorities were obliged to supply not only the Community control copy but also the national control copy, both of which were needed for the award of the compensatory amount on exportation. It seems logical to draw the inference that the delivery of a control copy, even if it contains no express reference to the compensatory amount, is equivalent to an application for the award therof.

As regards export refunds, the Court held in its judgment of 22 January 1975 *(Unkel* v *Hauptzollamt Hamburg-Jonas)* [2] that the headings provided for in the control copy) [3] did not on their own make it possible to determine in every case that all the conditions to which the grant of the refund is subject were fulfilled, and that it was for the national authorities to determine in each case the probative value in this respect of the entries on that copy.

The German authorities were thus entitled to call for the production of further documentary evidence. Pursuant to Article 13 of Regulation No 1463/73,

1 — Case 302/81, [1982] ECR 3443.

2 — Case 55/74, [1975] ECR 9, at p. 22.

3 — Article 1 of Regulation No 2315/69 of the Commission of 19 November 1969, which subsequently became Article 10 of Commission Regulation (EEC) No 223/77 of 22 December 1976 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure, as amended by Commission Regulation (EEC) No 2105/81 of 16 July 1981, Official Journal, L 207, 27. 7. 1981, p. 1.

the authorities had indeed prescribed a special printed form in a notice of 30 May 1973. The notice even stated that a *separate* application for the award of monetary compensatory amounts must be submitted *even if* the export refund itself was the subject of an application in some other connection. It was not until 17 May 1976 that the above requirement was abolished, by a notice dated 2 July 1976.

It is none the less my opinion that it is a matter for the German authorities alone to deal with any failure to comply with that formality. They waive such compliance when they are convinced that evidence has been furnished which shows that the conditions governing payment of the compensatory amounts have been observed. They thus act in reliance on the *bona fides* of traders and their servants, and, in particular, they take it on trust that there is no possibility of obtaining double payment or of having the goods brought back into normal circulation.

The only way in which the Commission could successfully resist the request for reimbursement in respect of the cases still at issue would have been to produce evidence that those conditions were not satisfied and that the supplies had not reached their intended destination or been put to their designated use.

Since no such evidence has been produced, I take the view that Decision No 81/1034 of 16 November 1981 should be declared void inasmuch as it refuses to allow the financing by the Guarantee Section of the Fund of the sum of DM 5 407 890.68, being the monetary compensatory amounts granted on the exportation of supplies within the framework of the national food-aid programme, and further that the costs should be borne by the Commission.