OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 30 JANUARY 1974 [1]

Mr President,
Members of the Court,

Introduction

General arrangement of the system of production refunds for broken rice used in the brewing industry

The common organization of the market in cereals set up by Regulation No 120/67 of the Council involves two separate systems of refunds:

— The first concerns refunds granted to Community exporters; its purpose is to allow them to sell cereals at a competitive price in third countries.

— The second is intended to permit the use of basic cereal products, maize and common wheat, in certain industries, in particular for the manufacture of starch, at prices lower than those which would result from applying the system of levies and common prices, so as to make these cereals competitive in relation to non-agricultural substitute products.

In order to attain this objective, production refunds were instituted for maize and wheat intended for the starch industry.

But since maize groats and meal can also be used in the production of beer, it was decided to grant them a refund when used in the brewing industry.

Finally, since starch as well as beer can also be manufactured from broken rice, Article 9 of Regulation No 359/67 of the Council on the common organization of the market in rice provided that a production refund would be granted both for broken rice used in the manufacture of starch and for that used by the brewing industry.

In order to fix the prices at which these various products could be bought by the processing industries, the initial and decisive consideration lay in the need to allow manufacturers of starch to buy maize at a competitive price by comparison with prices of chemical substitute products. This price was fixed by Article 1 of Regulation No 371/67 of the Council at 6·80 u. a. of account per 100 kg of maize.

Next the question arose of ensuring 'a fair balance in the use of other products, in particular of broken rice, for the manufacture of starch'.

The Community legislature considered that this objective would be achieved by fixing the supply price of broken rice intended for that industry at 8·30 u. a. per 100 kg.

The search for a similar balance between supply prices for the brewing industry of maize starch on the one hand and of maize groats and meal and broken rice on the other led to the calculation of the production behind refund for broken rice in such a way that the price was brought down to 8·30 u. a., that is to say the same level as that fixed for the starch industry.

With regard to maize and common wheat, whose prices on the world market were normally lower than Community prices, the amount of the production refund was equal to the difference between the threshold prices for the products and the supply prices thus established.

On the other hand, the determination of the refund for broken rice had to take account of a different situation. In Fact, as its world price was high and relatively

1 — Translated from the French.

close to the Community price, it was appropriate to avoid calculating too generous a production refund which would make it possible to import it at a lower price than the world rate; equally, it was necessary to limit the financial burden of the refunds.

In principle, the amount of the refund was to be equal to the difference between the threshold price and the supply price; but according to Article 1 (2) of Regulation No 367/67 of the Council this amount was limited to the difference between the threshold price and the c.i.f. price for broken rice, at least when the latter price exceeded 8·30 u. a. per 100 kg.

Finally, in order to prevent broken rice from being delivered to industry at a price lower than that resulting from the current state of the world market, Article 1 of amending Regulation No 852/67 of the Council expressly laid down that production refunds would not be granted when the c.i.f. price for broken rice was equal to or greater than the threshold price.

I — The facts — The questions put

Such is the general arrangement of this system of production refunds for broken rice intended for the brewing industry, detailed rules for the application of which were laid down by Regulation No 2085/68 of the Commission, in particular with reference to the procedure for granting the refund.

An examination of the preliminary questions put to you by the Pretore di Roma will lead you to make the interpretation clear, essentially on the question to whom the refund should be granted — the producer of broken rice or the brewer.

The facts with which the Italian court was concerned are as follows: Birra Dreher SpA bought in September 1971 from Riseria Fratelli Roncaia 200 quintals of broken rice intended for the brewing of beer, for which it paid 9 400 lire per quital, the actual current market price in Italy at the date of agreement, but above the threshold price fixed at 12·5 u. a. per quintal, namely 7 812·5 lire.

The company, assuming that it was entitled to a production refund at the rate of 4·20 u. a. per quintal, equal to the difference between the threshold price and the supply price, namely 2 625 lire per quintal, applied to the Intendenza di Finanza di Roma for a payment of 525 000 lire, the total amount of the refund in respect of the purchase of 200 quintals of broken rice.

The administration rejected this claim on the ground of the decree issued by the Minister of Finance on 10 June 1970, Article 4 of which provides that all requests for payment of refunds presented by the brewery using the broken rice must be accompanied by the agreement in writing of the undertaking producing it. In this case Birra Dreher S.p.A. was not able to produce such an agreement from Riseria Roncaia which moreover had by that time ceased all activity.

The Pretore di Roma, requested by the applicant to order the Amministrazione delle Finanze to pay it the sum claimed, stayed the proceedings and now asks you in its first question whether the aim of the system of production refunds for broken rice, provided for by Regulation No 367/67 of the Council, is to place this product, with regard to its competitiveness and advantage from the point of view of cost, in a position identical to that of other cereals, like maize, which are granted similar refunds, when they are intended for the brewing of beer.

Secondly the court would like to know whether, in the light of the aim thus referred to, the Regulation in question and the implementing regulation made by the Commission under No 2085/68 are to be interpreted as meaning that in order to promote the use of broken rice in breweries it is appropriate to make it possible for brewers to obtain this product at an advantageous price, at any

event below the normal market price which may be reached by broken rice intended for other purposes.

In fact, these two questions are more concerned with the economic aims of the Community rules than with their legal interpretation and must be regarded as a preliminary to the third question, in which you are asked to decide whether a brewer who has paid for broken rice at the normal local market price, that is, unaffected by the refund, has himself the right to receive the said refund, as the producer of broken rice for his part has obtained for his product the highest price which he could get in the state of that market.

This is the central problem raised by the present case: who has the right to the refund — the producer of broken rice or the brewer?

This leads to the last question, which is whether Member States may, by means of internal measures, make the exercise of the brewer's right to obtain for his own account the payment of the refund subject to the requirement of a written agreement from the producer of broken rice.

II — Discussion

It is no doubt because the applicant in the main action has based the essential part of its argument on the ideal that brewers have the right to buy broken rice at a price lower than the normal market price and has maintained that the aim of the Community legislature was to guarantee to the brewing industry the supply of this product at an advantageous supply price that the Italian court has phrased its first two questions in the terms I have mentioned.

The aim of the system of production refunds for broken rice intended for brewing is, in my opinion, quite different.

As we have seen in examining the whole system organized by the basic Regulations with regard to cereals and to rice, it is the problem of the starch industry which is at the root of production refunds.

As can be seen clearly from the preamble to Regulation No 120/67 on the common organization of the market in cereals, the Council took account of 'the special situation on the market in starches' and deliberately intended to maintain the outlets offered by the starch industry for certain cereal products, such as maize and common wheat, and to make it possible for these products to be used in the manufacture of starch at competitive prices by comparison with those of chemical substitute products.

The grant of production refunds constituted the means of ensuring this protection by providing compensation for the rise in prices resulting from the imposition of Community levies.

However, as starch found itself, in the brewing industry, in direct competition with other agricultural products of first-stage processing such as maize groats and meal, there is no doubt that brewers were strongly influenced by the economic advantage resulting from the low price of starch — brought about by the refund — by comparison with the high price of maize groats and meal, to use starch in their manufacturing processes since it can be substituted for products derived from maize.

This is why the production refund was extended to these products when they are intended for the brewing industry.

It was not a question of reserving for that industry a particularly advantageous system of supply, but merely of protecting the outlets for cereal products capable of being substituted one for another.

The same problem arose when the common organization of the market in rice was put into operation. Since the starch industry also made use of broken rice as a raw material it was necessary to institute a production refund, not only, moreover, when this rice was intended

for the manufacture of starch, but also when it was used in the brewing industry on the same lines as maize groats and meal and for the same reason.

Thus the aim of Community policy in this field is certainly that of organizing the equilibrium of the market in cereal products and in rice and not that of supporting the production of beer, which does not form part of the agricultural products listed in Annex II to the Treaty.

Furthermore the applicant in the main action is mistaken in claiming to base an argument on the fact that producers of broken rice are themselves industrialists. It is the product which is the subject of Community protection. In this respect broken rice, although a product of first-stage processing, is expressly referred to by the Regulation on the common organization of the market in rice.

Taking account of the economic objectives pursued, the solution formulated by Regulation No 2085/68 of the Commission with regard to the selection of the person entitled to the refund is strictly in accordance with the aims of this system.

Article 3 (2) of this Regulation in fact provides as follows:

'In order to receive payment of the refund, the *producer of broken rice* shall submit to the competent authorities an application to which must be appended his invoice to one of the industries referred to in Article 2 showing the date of delivery or a true copy stating the quantity of broken rice sold and indicating the exact business name of the undertaking in question.'

Thus the Commission designates only the producer of broken rice as the applicant for payment of the refund and consequently as the person entitled to the grant of this refund. It makes no mention of the brewer. Moreover, a similar solution was adopted in Regulation No 559/68 (Article 2 (1)) as regards the production refund for maize groats and meal intended for brewing.

The system is simple; it is clear; it is in accordance with the guiding principles of the basic Regulation.

Admittedly, it would have been possible to conceive of a different solution and to provide, on the basis of Article 43 of the Treaty, that the refund should be granted to industrial manufacturers of products not included in Annex II to the Treaty, whilst admitting nevertheless that the effect of the refund would be advantageous to the agricultural producers concerned.

But in such a case it would have been necessary for the Regulations to state this categorically — which they did not do. On the contrary they laid down the principle of payment to the producer on the sole condition that the use of the rice in the brewing industry is proved by the production of documents and that it can be verified.

Was it for the Community authorities themselves to make sure that the producer of broken rice, the person entitled to the refund, should pass it on to the brewer? I do not think so. The Regulations by no means impose such an obligation; they do not provide that the refund must be transferred to the brewer or that its effect must be reflected in the selling price.

However, there is the problem of the contractual relationships between producers of broken rice and manufacturers of beer, and the control of these relationships has been left by the Community legislation to the national authorities, who have the task of paying the amount of the refunds.

The Italian Minister of Finance, in deciding in his decree of 10 June 1970 that brewers could claim payment of the refund themselves only upon presentation of the written agreement of the producer of broken rice, has not added any unlawful condition to the Community legislation. Starting from the

principle laid down by Regulation No 2085/68 that the producer is entitled to the refund, he has limited himself to drawing the consequences of the wishes expressed by that same producer when, having sold his broken rice at the full market price, he has, by way of contract, transferred his claim to the refund to the industrial user. Such an assignment of a claim is always possible. However, it is necessary that it be proved.

Disregarding these provisions of domestic law, one might, however, wonder whether Community rules do not imply that the brewery using the broken rice is, in any event, to benefit from the system of refunds to the extent that one of the effects of this system is to lower the price of the broken rice which it may use in the brewing of beer.

In my opinion this question must be answered in the negative.

From the point of view of the common organization of markets it is of no consequence whether broken rice is used for this purpose rather than for another. The important thing is that it should find an outlet.

If, therefore, at the time of the events under consideration, the broken rice was sold to the industry at the normal market price, higher than the threshold price and without its being necessary to have recourse to the subsidy represented by the refund, this is not at all contrary to the basic aim of the Community rules, which is in this case to ensure a balance between the various agricultural raw materials capable of being used in the brewing of beer.

In fact, the level of prices at the time on the Italian market made it possible for broken rice to find a destination other than the brewing industry under sufficiently profitable conditions.

The fact is that Birra Dreher SpA thought that it could buy 200 quintals of broken rice at this high price without even making sure, at the time of entering into the contract, of the assignment of the right to the refund to which the seller was entitled.

Whilst I can understand that the company thus acted in a way which it later came to regret, I do not think that it can claim to seek in Community law a means of obtaining compensation through the grant of the refund to it.

Before I suggest to you the replies which, in my opinion, should be given to the questions put by the Pretore di Roma, I feel it is necessary to examine briefly the question raised in Court by the representative of the Italian Government, which relates to the *ex parte* nature of the procedure in an application for an order of the court, at least in its initial stage.

He has maintained that the Pretore cannot refer to you preliminary questions in pursuance of Article 177 of the Treaty since, within the framework of this special procedure, the court acts solely upon the basis of the allegations of the applicant and without there having been any previous discussions in which the parties have met face to face.

But, as Mr Advocate-General Trabucchi recently recalled in his opinion in Case 2/73 — *Riseria Luigi Geddo v Ente Nazionale Risi* — heard on 20 June last, the power of the national court to refer preliminary questions to you is governed solely by Community law and not by domestic law.

The application of Article 177 of the Treaty involves only two conditions:

— the first is that the authority referring the matter to you shall be a court or tribunal within the meaning of that Article; and

— the second is that a question of interpretation of Community law raised, even, should the occasion arise, by the court or tribunal of its own motion, seems to it to be necessary to enable it to give judgment.

This is what you clearly decided by your judgment of 14 December 1971 — Case 43/71, *Politi*, (Rec. 1971, p. 1048) — in refusing to take into consideration the stage of the proceedings at which the question was put.

I see no reason today to go back on that decision.

Finally, my opinion is that you should rule:

1. that the provisions of Regulation 367/67 of the Council providing for the grant of production refunds for broken rice used in the brewing industry and of Article 3 of implementing Regulation No 2085/68 of the Commission confer the right to claim payment of the said refunds only upon the producers of broken rice and not upon the brewery which uses it;

2. that no provision of the said Regulations restricts the power of a Member State to recognize an assignment by the producer of broken rice of his right to the refund to the brewery using it or to require that the said assignment of claim should be the subject of a written agreement by the producer.