OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 6 December 1991 *

Mr President,
Members of the Court,

A — Facts

1. The cases today before the Court have been referred by the Bundesfinanzhof and concern in the first instance the interpretation of the Community rules governing the system of advance payment of export refunds under Regulations No 565/80 [1] and No 798/80. [2] This system of advance payment is designed to ensure a balance between the use of Community basic products with a view to exporting processed products or goods to third countries and the use of basic products from such countries admitted under inward processing arrangements. [3] To this end, Article 4(1) of Regulation No 565/80 provides that an amount equal to the export refund is to be paid as soon as the basic products are placed under customs control (an alternative procedure is set out in Article 5). In order to guarantee reimbursement in the event that the conditions for granting the refund are not fulfilled, a security must be furnished (sixth recital in the preamble to Regulation No 798/80 and Article 7 thereof).

2. Article 2(1) of Regulation No 798/80, however, provides that the application of these procedures is to be subject to the lodging with the customs authorities of a 'payment declaration' in which the exporter states his intention to export the products or goods in question after processing or storage under Articles 4 or 5 of Regulation No 565/80 and to apply for a refund. This payment declaration must include a number of particulars, details of which are given in Article 2(2) and (3) of Regulation No 798/80.

3. The question of the legal consequences which flow from the fact that the product exported does not correspond to the information contained in the payment declaration is one of the two problems which require examination today. More precisely, the Bundesfinanzhof seeks in each of these two joined cases to ascertain what effect such a discrepancy may have on the choice of the date which determines the rate of refund, assuming that the exporter is entitled to a refund. If one applies Article 10(4) of Regulation No 798/80, [4] which governs reimbursement in the case where

* Original language: German.

1 — Council Regulation (EEC) No 565/80 of 4 March 1980 on the advance payment of export refunds in respect of agricultural products (OJ 1980 L 62, p. 5).

2 — Commission Regulation (EEC) No 798/80 of 31 March 1980 laying down general rules on the advance payment of export refunds and positive monetary compensatory amounts in respect of agricultural products (OJ 1980 L 87, p. 42).

3 — See the third recital in the preamble to Regulation No 565/80.

4 — As amended, in this case, by Commission Regulation (EEC) No 3445/85 of 6 December 1985 amending Regulation (EEC) No 798/80 laying down detailed rules on the advance payment of export refunds and positive monetary compensatory amounts in respect of agricultural products (OJ 1985 L 328, p. 13).

the exporter (perhaps because of such a discrepancy) is not entitled, or is entitled only in part, to the amount paid in advance, two possibilities are conceivable. Either one treats as the determinant date the day on which the payment declaration was received or the day indicated on an advance fixing certificate still valid on that date, that is to say, if one, despite the discrepancy, applies the special rules on advance payment (see Article 3(2) of Regulation No 798/80), or else one uses the date of export, as provided for under the general rules governing export refunds for agricultural products.[5]

4. In addition to this problem, the Bundesfinanzhof has also questioned the validity of a regulation by which the Commission set at zero the rate of refund for exports of wheat flour to the USSR.

5. The facts underlying those two problems, the details of which are set out in the Report for the Hearing, may be summarized as follows.

6. As undertakings engaged in commercial milling, the plaintiffs in the main proceedings operate within the scope of the cereals sector. On 27 November 1980 (Case C-5/90) and 28 November 1980 (Case C-206/90) they placed certain quantities of wheat under customs control pursuant to Article 4 of Regulation No 565/80. In the payment declaration submitted under Article 2 of Regulation No 798/80, they undertook to manufacture from this wheat certain quantities of flour with an ash content of 0 to 520 mg/100 g and to export them within the periods prescribed. It appears from the documents relating to the main proceedings and from a document submitted by the defendant that in the context of those payment declarations the plaintiffs used export licences with advance fixing certificates which together related to exactly the same quantities of wheat flour as those mentioned in the relevant payment declarations. Those licences did not contain any information regarding ash content. The plaintiffs applied for export refunds and monetary compensatory amounts under the advance payment system for the flour mentioned in each of the payment declarations.

7. By a series of successive decisions, the Hauptzollamt granted the plaintiffs the following amounts: in Case C-5/90, DM 1 574 347.25 in respect of export refunds and DM 375 517.59 in respect of monetary compensatory amounts, making a total of DM 1 949 864.84; in Case C-206/90, DM 1 314 160.57 in respect of export refunds and DM 273 881.12 in respect of monetary compensatory amounts, making a total of DM 1 588 041.69. In each case, the calculation of the export refunds was based on the rates in force at the time indicated on the advance fixing certificate (3 July 1980 in Case C-5/90 and 1 July 1980 in Case C-206/90). Those rates were derived from Regulation No 1633/80,[6] which lays down rates varying according to ash content and final destination of the

5 — See Article 3(1) of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1979 L 317, p. 1).

6 — Commission Regulation (EEC) No 1633/80 of 26 June 1980 fixing the export refunds on cereals and on wheat or rye flour, groats and meal (OJ 1980 L 162, p. 45).

flour. Of significance for present purposes is the fact that the regulation draws a distinction between wheat flour with an ash content of 0 to 520 mg/100 g and wheat flour with an ash content of 521 to 600 mg/100 g. In the former case, a refund of ECU 75 per tonne is provided for exports 'to other third countries', while the corresponding refund in the latter case is only ECU 71 per tonne. On the other hand, the rate of refund for exports to the USSR comes to ECU 0 per tonne in both cases.

8. In *Case C-5/90*, the list submitted by the Hauptzollamt makes it clear that the fixing of the rate of refund for exports to the USSR at ECU 0 per tonne (for both types of flour) had a twofold effect on the amounts of refund. In the first place, pursuant to the first sentence of Article 4(7) of Regulation No 565/80 (likewise, Article 6(3) of Regulation No 798/80), the amount to be paid as refund was calculated for the vast majority of the amounts in question on the basis of the rate in force for the USSR as the country of destination was still unknown at the time of application for advance payment (decision of 11 December 1980). The amount provided for other third countries was granted only for a certain quantity of flour, earmarked at the outset for Poland, on the basis of flour with an ash content of 0 to 520 mg/100 g. After the exports had been completed between 28 November 1980 and 18 February 1981 and upon presentation of the proof submitted by the plaintiffs in respect of certain quantities to which the first sentence of Article 4(7) of Regulation No 565/80 had been applied, the defendant also paid them the adjusting balance of the amounts to which the plaintiffs were still entitled, on the same basis of calculation, for exports to 'other third countries' (in this case, South Yemen, North Yemen and Poland), once again for flour with an ash content of 0 to 520 mg/100 g. Secondly, the fixing of a zero rate for exports to the USSR also had an effect on exports actually made to that country in so far as no additional payment was made and the amounts granted by the decision of 11 December 1980 remained applicable.

9. So far as the nature of these various payments is concerned, the documents relating to the main proceedings also show that *only the payment based on the decision of 11 December 1980 was made as an advance payment*, whereas the corrective payments were made in respect of refunds (in addition to monetary compensatory amounts) pursuant to the second sentence of Article 9 of Regulation No 798/80 on conclusion of the advance payment procedure. It follows that three separate variants require to be examined in Case C-5/90:[7]

— the amount paid in advance was greater than the amount to which the exporter was entitled by reason of the difference in the characteristics of the flour; this

7 — The list produced by the defendant shows that in this case it was not possible to supply proof of export in respect of a small quantity. However, the request for a preliminary ruling is evidently not concerned with the problems which arise in this regard, as will be clear from the wording of the question in the reference.

was the case with regard to the export to Poland, the destination of which was known at the time of application for advance payment ('the first variant');

— the amount paid in advance corresponded to the amount due; this was the position with regard to exports to the USSR, since the rate of ECU 0 was the rate applicable to both the advance and definitive payments (irrespective of the ash content of the flour) ('the second variant');

— the amount paid in advance was lower than the amount due but the total amount paid was greater than the amount due; this was the case with regard to certain exports, the destination of which was not known at the outset but in respect of which it was subsequently established that they had been made to 'other third countries' ('the third variant').

10. The circumstances in *Case C-206/90* correspond to the first variant, as described above. In that case, the country of destination (North Yemen) was known at the outset and the advance payment was accordingly made at the rate in force for 'other third countries'.

11. Following investigations, the defendant reached the conclusion in both cases that the exported flour had an ash content greater than 520 mg/100 g[8] and requested that the plaintiffs reimburse an amount calculated essentially in the following manner:[9]

Total export refunds paid

plus the minimum increase on the total quantities in question (ECU 3 per tonne — second subparagraph of Article 7(1) of Regulation No 798/80);

minus the export refund to which the plaintiffs were entitled by application of the following rates of refund:

— in Case C-5/90, in which some of the exports were effected within the period of validity of the advance fixing certificates, the rate in force on the day indicated on the certificate had been applied in respect of those exports; for the remaining quantities the defendant applied the rate in force on the day of export;

— in Case C-206/90 the rate in force on the day of export was applied in all cases as none of the exports was effected within the period of validity of the advance fixing certificates.

8 — With the exception of a quantity of 50 tonnes in Case C-5/90, the ash content of which was below 521 mg/100 g.

9 — See the preceding footnote. In Case C-5/90 there was a minimal alteration to the monetary compensatory amounts, which is, however, irrelevant for present purposes as it was not based on a change in the rates.

12. Although the defendant subsequently *waived the imposition of the minimum increase* on the ground that the security had already been released, the amount of reimbursement requested in each case was considerable:

— in Case C-5/90: DM 616 507.19;

— in Case C-206/90: DM 830 412.35.

13. This discrepancy is essentially explicable on three grounds. First, all the relevant regulations in force on the dates treated by the Commission as determinant, that is to say:

— Regulation (EEC) No 1633/80;[10]

— Regulation (EEC) No 2793/80;[11]

— Regulation (EEC) No 3143/80;[12]

— Regulation (EEC) No 3223/80;[13]

— Regulation (EEC) No 131/81;[14]

— Regulation (EEC) No 316/81;[15]

provided for lower rates for wheat flour with an ash content of 521 to 600 mg/100 g than for flour with a lower ash content (0 to 520 mg/100 g) in the case of exports to 'other third countries'. In the second place, the general level of rates of refund for wheat flour in all the applied regulations adopted later than Regulation No 1633/80 was lower than that of Regulation No 1633/80, on which the original calculations were based. Moreover, so far as exports to the USSR were concerned, the latter regulation, as I have already pointed out, provided for a zero rate for both types of flour; on the other hand, Regulation No 316/81, which was applied for the recalculation in respect of some of the exports in Case C-5/90, does not fix any refund whatever for exports to the USSR. As the defendant has set out in detail, if Regulation No 1633/80 was used as a basis, there was entitlement to payment of a certain amount, albeit minimal (ECU 27.96 per tonne) by reason of the increases provided for under Regulation (EEC) No 1550/79[16] and Regulation (EEC) No 1875/80,[17] as well as under the amendment introduced by Regulation (EEC) No 1634/80.[18] As the application of Regulation No 316/81 was not based on advance fixing, no amendment could be made in this case, quite apart from the fact that under Article 19 of Regulation No 2730/79 the provisions relating to the advance fixing of export refunds and to the adjustments to be made in the rate of refund are to apply only to products for which a rate of refund equal to or greater than zero has been fixed.

14. The plaintiffs appealed to the Finanzgericht (Finance Court) Hamburg against

10 — See footnote 6 above.
11 — OJ 1980 L 288, p. 27.
12 — OJ 1980 L 329, p. 30.
13 — OJ 1980 L 334, p. 43.
14 — OJ 1981 L 9, p. 17.
15 — OJ 1981 L 34, p. 32.
16 — OJ 1979 L 188, p. 5.
17 — OJ 1980 L 184, p. 10.
18 — OJ 1980 L 162, p. 48.

the decisions which contained those recalculations and which originally still included a request for payment of the minimum increase. They were partially successful: the Finanzgericht applied Article 10(4) of Regulation No 798/80, as amended by Regulation No 3445/85, at the request of the plaintiffs (see the second paragraph of Article 2 of the latter regulation). That court took the view that although it was necessary to calculate the refund by taking account of the fact that, as the defendant argued, the flour exported had an ash content greater than 520 mg/100 g and that it was for that reason necessary to apply the lower rates provided for that category of flour, the date laid down in the advance fixing certificate was the *date* to be taken into account for the purposes of determining the rate of refund. In the present case, it was Article 10(4)(c) of Regulation No 798/80, rather than Article 10(4)(a), which was applicable, since the plaintiffs had complied with the export time-limit. In view of the meaning and purpose of the advance payment procedure, compliance with the time-limits did not presuppose, for the purposes of the refund system, that the goods manufactured from the basic product had to be identical in all respects to those indicated in the payment declaration. [19]

15. The plaintiffs and the Hauptzollamt appealed against those decisions to the Bundesfinanzhof (Federal Finance Court) on points of law. The Hauptzollamt contended that the goods actually exported had not been the subject of an advance payment procedure. The plaintiffs, it argued, had undertaken to export flour with an ash content of 0 to 520 mg/100 g. The plaintiffs accepted the view of the Finanzgericht so far as the application of Article 10(4)(c) of Regulation No 798/80 was concerned, but raised a number of other complaints. For present purposes, it is necessary to bear in mind in this regard that the plaintiffs in Case 5/90 argued in the proceedings before the national court that the Commission acted unlawfully by reducing the refund for exports to the USSR *to ECU 0 per tonne.* In view of those arguments, the Bundesfinanzhof first referred *the following question in each of the joined cases*:

'Is Community law, in particular Article 10(4) of Commission Regulation (EEC) No 798/80, as amended by Commission Regulation (EEC) No 3445/85, to be interpreted as meaning that a recipient of export refunds who, in claiming advance payment of the export refunds under Article 4 of Regulation (EEC) No 565/80, had undertaken pursuant to Article 2 of Regulation No 798/80 to export flour with an ash content of 0 to 520 mg/100 g but in fact exported flour with an ash content of more than 520 mg/100 g must repay the entire amount of the advance payment and only claim instead an export refund for the goods actually exported, in accordance with the rules in Commission Regulation (EEC) No 2730/79 of 29 November 1979?'

19 — So far as the increase is concerned, the Finanzgericht took the view that this also had to be paid by the plaintiffs pursuant to Article 10(4) of Regulation No 798/80 on the difference between the amount paid in advance and the amount to which they were entitled in respect of export refunds and monetary compensatory amounts. However, this point subsequently came to serve no further purpose in view of the fact that the Hauptzollamt waived the increase during the procedure (see point 12 above). Certain explanatory comments will, however, be made on this matter (see point 62 below).

16. The Bundesfinanzhof also referred the *following question* in Case C-5/90:

'If Question 1 is answered in the affirmative, is Regulation (EEC) No 1633/80 valid inasmuch as it fixes the rate of export refunds for exports to the USSR at 0 ECU? If not, in certain circumstances is an exporter to be put in a position as if the refund for exports to the USSR had not been suspended?'

B — Opinion

The question common to both cases

17. The first question seeks essentially to ascertain the consequences of the above discrepancy between the characteristics of the goods exported and the information contained in the payment declaration, so far as concerns the choice between the various possibilities set out in Article 10(4) of Regulation No 798/80, as amended by Regulation No 3445/85. As I have already pointed out, the Bundesfinanzhof wishes to know whether it must, for the purpose of ascertaining the date which determines the calculation of the amount due to the exporter in such a case, apply the general rules under Regulation No 2730/79 (Article 3(1] or the special rules governing advance payments (Article 3(2) of Regulation No 798/80).

18. I. Before establishing the connection with Article 10(4) of Regulation No 798/80, I wish briefly to consider the different legal consequences of these two sets of rules, bearing in mind the provisions on advance fixing applied in the national proceedings.

19. In the absence of such advance fixing, the position is quite straightforward.[20] The rates for refunds and monetary compensatory amounts depend, in the case of the general rules, on the date of export, while in the case of the rules on advance payment they depend on the date on which the payment declaration was received.

20. On the other hand, if the exporter has an advance fixing certificate, he must, in the case of the general rules, export the goods or products within the period of validity of that certificate if he wishes to benefit from the rates corresponding to the date indicated thereon.

21. The position is different if the rules on advance payment are applied. In this case, it follows from the provisions in chronological order, that is to say;

— Article 17(1)(b) and the second indent of Article 17(8)(b) in conjunction with the third indent of Article 9(3)(b) of *Regulation No 193/75*,[21] applicable in this case;

20 — See point 3 above.

21 — OJ 1975 L 25, p. 10.

— Article 29(b) and the third indent of Article 32(b)(aa) in conjunction with the third indent of Article 22(1)(b) of *Regulation No 3183/80*;[22]

— Article 29(b) in conjunction with the fourth indent of Article 22(1)(b) of *Regulation No 3719/88*,[23]

that, in view of the period of validity of the licences,[24] the obligation to export is to be treated as satisfied and the right to export on the basis of the licence to be treated as exercised on the date on which the customs authorities accept the payment declaration. Under Article 3(2)(b) of Regulation No 798/80, this date is also determinant for any adjustments to be made to the rate of refund fixed in advance or the monetary compensatory amount. If the acceptance of the payment declaration and actual exportation are treated as identical, this raises the question of what becomes of the period of validity of the advance fixing certificate. It must be pointed out in this regard that the rules on the advance payment procedure may in fact result in an extension of that period of validity;[25] that is precisely what has happened in the present case. While the period for processing under Article 11(1) of Regulation No 798/80 generally corresponds to the remaining period of validity of the advance fixing certificate, the period is increased to three months if it amounts to less than that. In all cases, traders are granted the 60-day period within which exports must be completed under Article 11(3), a period adapted to the above rules since it does not begin to run until the conclusion of the procedure under Articles 4 or 5 of Regulation No 565/80.

22. These, then, are the differences between the general rules and the special system of advance payment in so far as they affect the date which determines the rate of refund.

23. II. In order to establish the connection between the above considerations and Article 10(4) of Regulation No 798/80, with the interpretation of which we are today concerned, it is necessary to bear in mind the fact that the time-limits within which the rules on advance payment apply (in particular, Article 3(2) of Regulation No 798/80 on the determinant date), are derived from the abovementioned Article 11 of that regulation. If the time-limits there prescribed are not complied with following the introduction of the advance payment procedure, the exports subsequently effected will again be subject to the general provisions.[26] The second indent of Article 42(1) of Regulation No 3183/80 (in the same way as the second indent of Article 43(1) of Regulation No 3719/88) confirms this for the special case in which the exporter had made use of an advance fixing certificate in the advance payment procedure. Article 10(4)(a) of Regulation No 798/80 presents this result in the form

22 — OJ 1980 L 338, p. 1.

23 — OJ 1988 L 331, p. 1.

24 — The export licence and the advance fixing form a single unit from the legal standpoint (judgment in Case 316/86 Hauptzollamt Hamburg-Jonas v Krücken [1988] ECR 2213, at paragraph 17).

25 — See the third phrase in the third recital in the preamble to Regulation No 798/80 and the judgment in Joined Cases 44 to 51/77 Union Malt and Others v Commission [1978] ECR 57.

26 — See the Opinion of Advocate General Mayras in Union Malt, cited above, at p. 89.

of a retrospective rule under which the exporter must reimburse the amount of the advance payment (increased by the amount under Article 7(1], a total, therefore, representing the sum of the security, if he fails to comply with the period laid down in Article 11. In other words: if the time-limit is exceeded, the rules governing advance payment, which formed the legal basis on which advance payment could be made, become inapplicable, with the result that the amount paid on that basis must be reimbursed by the exporter.

24. On the other hand, if the time-limit laid down under Article 11 is complied with, the exporter remains in principle entitled under the advance payment procedure, subject to a limitation to the amount owed if it is less than the amount paid in advance. This is the common denominator of the rules under Article 10(4)(b) and (c), each of which provides initially that:

'where the time-limits laid down under Article 11 have been complied with but the entitlement to refund covers a smaller amount . . . '.

25. III. 1. On the basis of the above explanations I would initially like to consider the first variant (for both Cases C-5/90 and C-206/90) in view of the fact that it raises precisely the problem over which the parties are in dispute, that is to say, the choice between subparagraphs (a) and (c) of Article 10(4) of Regulation No 798/80. Before we examine the individual points in dispute, we can at least establish that the parties agree in proceeding on the basis that *Article 10(4)(a)* is applicable in the case where a *different product* to that indicated in the payment declaration has been exported. That view can be accepted without further examination.

26. Is the exported flour, in view of its higher ash content, a 'different product' to that indicated in the payment declaration, as the Hauptzollamt and the Commission argue, or should the view of the applicants that similar goods of different (lower) quality were exported be upheld?

27. (a) So far as concerns the criterion determining the reply to that question, I would agree with the defendant that in this case it is the law governing refunds which provides the criteria to be applied. Contrary to the views which have been expressed (particularly during the hearing by Getreide-Import), the issue of possibly divergent commercial practices is irrelevant to the case. While, on the one hand, the export refund constitutes a measure which, as a support for exports, is directed at participation in world trade, it represents, on the other, a public law advantage guaranteed by the Community (through the agency of the Member States) within the system of the common agricultural policy. In view of this particular nature of export refunds, it is self-evident that the applicable concepts and distinctions must, on grounds of legal certainty, be taken in the first instance from the system of rules governing refunds, in which Article 15 of Regulation No 2730/79, which excludes refunds in respect of products 'which are not of sound

and fair marketable quality', shows that in this regard reference to commercial concepts and distinctions is in no way excluded.

28. (b) The distinction drawn by the Hauptzollamt in the present case is based on Regulation No 162/67 of the Commission,[27] in the version applicable at the material time.[28] Article 1(1) of that regulation divides wheat flour into six separate categories according to ash content, the lowest ash content being 0 mg/100 g and the highest being 1900 mg/100 g. Article 1(1) also states that the amount of wheat required for the manufacture of 1 tonne of flour increases in inverse proportion to the ash content. These categories also include the two here in question with ash contents of 0 to 520 mg/100 g and 521 to 600 mg/100 g. This categorization belongs to the system of the criteria under which the amount of refund is determined pursuant to Regulation No 2746/75.[29] The first recital in the preamble to Regulation No 162/67 refers to the system of that regulation, which replaced Regulation No 139/67 (previously applicable).[30] That recital provides as follows:

'... Article 4(2)(b) of Council Regulation No 139/67/EEC of 21 June 1967 ... provides that refunds shall be fixed for flour, groats and meal, taking account in particular of the quantities of cereals required for the manufacture of the products in question; ... the analysis of the ash content of the manufactured product has proved to be the most effective of the technical methods of ascertaining this quantity of cereals ...'.

29. Article 4(2)(b) of Regulation No 2746/75 in fact provides that, with regard *inter alia* to wheat flour (compare the reference in Article 4(1) to Article 1(c) of Regulation No 2727/75), the refunds are to be fixed in the light of the quantities of cereals required for the manufacture of the products in question and the value of by-products. The significance of this criterion becomes clear if one bears in mind the interests involved with regard to export refunds for wheat flour. According to the first recital in the preamble to Regulation No 2746/75, the criteria laid down in that regulation were intended to make it possible 'to cover the difference between quotations and prices for those products within the Community and on the world market, while respecting the general aims of the common organization'.

30. The difference between the price of flour in the Community and the price on the world market may of course be influenced by the quantity of grain used. The more grain is used, the more the trader will be affected by the extra cost resulting from the use of grain produced within the Community rather than grain obtainable at lower prices on the world market.

27 — Regulation No 162/67/EEC of the Commission of 23 June 1967 on the method of fixing the export refund on flour, groats and meal of wheat and of rye (OJ, English Special Edition 1967, p. 122).

28 — The amending regulation (Commission Regulation (EEC) No 2849/91 of 27 September 1991) abolished the distinction between wheat flour with an ash content of 0 to 520 mg/100 g and wheat flour with an ash content of 521 to 600 mg/100 g (OJ 1991 L 272, p. 62).

29 — Regulation (EEC) No 2746/75 of the Council of 29 October 1975 laying down general rules for granting export refunds on cereals and criteria for fixing the amount of such refunds (OJ 1975 L 281, p. 78).

30 — OJ, English Special Edition 1967, p. 88.

31. Depending, however, on the position of supply and demand on the world market, it may happen that on that market the price ratio for various types of flour no longer corresponds to the quantities of flour used for manufacturing each of those types of flour. It is for that reason that Article 4(2)(c) of Regulation No 2746/75 provides that the calculation of the refund must also take account of the 'possibilities and conditions for the sale of those products on the world market'.

32. As for the present case, with regard to Regulation No 1633/80 as applied to the advance payment, the difference in ash content between the two types of flour in question was reflected in the rates of refund indicated above (see the fourth recital in the preamble to Regulation No 1633/80). In its reply to a question put by the Court, the Commission stated in this regard that:

'It is vital, when fixing the export refunds applicable to flour, to draw a distinction on the basis of ash content in order to take account of the factors mentioned in Article 2 of Regulation No 2746/75. The refund applicable to flour is derived from the refund applicable to wheat and flour with a high ash content is produced from a smaller quantity of wheat than flour with a low ash content. That is why, in accordance with Commission Regulation No 1633/80, the rate of refund applicable to flour with an ash content of 1651 to 1900 mg/100 g is the lowest and that for flour with an ash content of 0 to 520 mg/100 g is the highest rate.'

33. (c) In the light of the position in law and fact, is it possible to say that the flour exported was, from the point of view of the refund system, a 'different product' to that mentioned in the payment declaration? In my opinion, that question must be answered in the negative.

34. It must first be pointed out that the two types of flour are produced from the same basic product and that the method of processing (milling) is identical in each case. The external indication of all these points of similarity is that both types of flour share the same tariff number in the Common Customs Tariff. The difference between the two products lies solely in the fact that the amount of grain used is greater for one than for the other and that the rate of refund may also differ accordingly. It follows that, although this difference in rates makes it clear that the Community may have a greater or a lesser interest in providing subventions for exports, this difference is not one of *substance,* as in the case of the export of a totally separate product, but is solely a difference of *degree* capable of being precisely expressed in figures through the difference in the export refund. This situation resembles the case in which the *amount* of the product exported is less than that specified in the payment declaration. This distinction between cases in which there is a substantive difference and cases in which there is a difference of degree capable of being expressed in figures is precisely that which constitutes the basis of Article 10(4) of Regulation No 798/80 where it provides for cases of failure to respect the time-limits for exportation a system which differs from that applicable to cases in which the amount due in respect of

refund is a lower amount. It is therefore not Article 10(4)(a), but rather Article 10(4)(c), which applies in the case where rates are differentiated according to ash content by reason of a difference in the amounts of grain required to manufacture the flour.

35. During the oral procedure, however, I was given the impression that the Commission was not at all certain that the difference existing at the time between the rates of refund were based (solely) on differences in the amounts of grain used. On the contrary, if I have correctly understood its argument, the Commission did not exclude the possibility that conditions on the world market would (also) have required such a differentiation (see Article 4(2)(c) of Regulation No 2746/75). Is there in this latter case a 'different product', with the result that Article 10(4)(a) of Regulation No 798/80 becomes applicable?

36. In my view, this question also should be answered in the negative. In the first place, it is often impossible to separate the two aspects of grain quantities and conditions on the world market. This is attributable to the circumstance (already explained) that the export of flour to third countries represents in one sense an export of grain, with the result that grain prices on the world market may always have an effect on the rate of refund. Secondly, from the point of view of Community interest, the export of wheat flour remains an export of milled wheat, with the result that the *substantive interest* in export is identical, irrespective of whether the *degree of that interest* depends only on the amount of wheat or also on the importance attached to the composition of the processed product on world markets.

37. It is for that reason that I take the view that the present case does not come under Article 10(4)(a) of Regulation No 798/80 (but rather under Article 10(4)(c)), even if we proceed on the basis that the Commission's reply to the above question of the Court is unreliable.

38. (d) It seems to me that two factors reinforce the opinion which I have developed up to this point.

39. (aa) It may first of all be held that once the ash content exceeds a certain limit it also becomes significant for the substantive interest attaching to the provision of subsidies for flour exports. From this it follows that the conclusion previously arrived at is valid when that limit is complied with. In this connection, reference must be made to the limit of 1900 mg/100 g in the definition of the sixth category set out in Regulation No 162/67 in conjunction with the Commission regulations which regularly determine rates of refund. This is a system in which no refund is granted in respect of exported flour with a higher ash content than that specified. Even if the system were to be revised with a view to granting an export refund even for flour with a higher ash content, account would still have to be taken of the provisions of the Common Customs Tariff. The notes at present in force on Chapter 11 (see 2(A)(b)) indicate

that milled wheat products do not come under that chapter (and are consequently not 'wheat flour' within the meaning of No 1101 0000 = position 1101 A prior to the introduction of the combined nomenclature) if they have an ash content greater than 2.5% (2500 mg/100 g). The two types of flour at issue in the present cases, however, come within all those limits. This confirms the point of view here being taken.

40. (bb) Further confirmation for this view is also to be found in the Court's judgment in *Plange Kraftfutterwerke*,[31] which featured more prominently in the written than in the oral procedure. The Court there had to decide on a case in which exported mixed cereal feedingstuffs contained less cereal (63.9% by weight) than had been indicated in the payment declaration (more than 65% by weight); by reason of that difference, the trader had received through advance payment a comparatively higher refund, since the rate provided for by the relevant regulation on rates of refund applicable when the payment declaration was submitted was higher for feedingstuffs with a cereal content greater than 65% than that applicable to feedingstuffs with a cereal content between 50 and 65% by weight.[32] In particular, the Court had to address the question whether the authorities could in such a case demand reimbursement of the *supplement* calculated on the *total* amount paid in advance or only on the amount *which was not due*. In this connection the Court, applying Regulation No 1957/69,[33] which preceded Regulation No 798/80, ruled as follows:

'... a trader who has undertaken, pursuant to Article 3(2) of Regulation No 1957/69, to export mixed cereal feedingstuff with a cereal content exceeding 65% by weight, but who has in fact, owing to circumstances in which no blame attaches to him, exported mixed cereal feedingstuff containing only between 50 and 65% by weight of cereal, is obliged under Article 6(1) and (5) of the said regulation, even where the deposit has already been released, to repay the difference between the refund paid in advance and the refund which he should have obtained for the products actually exported, that difference to be increased by 20%.'

41. It must be acknowledged that the present situation differs from that in the case just mentioned. The main issue in *Plange Kraftfutterwerke* concerned the level of the supplement (additional amount) to be reimbursed rather than the date to be used for the calculation of the amount due to the exporter. In the present situation, the position is exactly the opposite: the only issue in dispute is the determinant date and the question in the reference is not concerned with the level of the supplement.

42. Despite this, I can identify a certain similarity between the two cases resulting

31 — Case 288/85 *Hauptzollamt Hamburg-Jonas* v *Plange Kraftfutterwerke GmbH & Co.* [1987] ECR 611.

32 — See Commission Regulation No 1136/77 (OJ 1977 L 135, p. 14).

33 — OJ, English Special Edition 1969 (II), p. 417.

from the application of the rules on advance payment. It must be pointed out in this regard that Regulation No 1957/69, applicable at the time of the *Plange Kraftfutterwerke* case, had already established a connection between the obligation to repay in full the refund granted (which, according to the general scheme of the rules applicable, also means that the determinant date can no longer be that provided for within the framework of the system of advance payment)[34] and the obligation also to pay the full supplement. In the case of merely partial repayment (which means, so far as concerns the amount remaining due to the trader, that the determinant date for the system of advance payment continues to apply), it follows that the supplement may be reclaimed only in the amount of the portion which remains repayable. This follows from Article 6(1) and (5) of Regulation No 1957/69. According to Article 6(1) and the conditions there laid down (failure to furnish proof of compliance with time-limits in respect of processing or exportation), repayment of 'the refund paid increased by 20%' was due. Article 6(3), however, provided that the repayment specified in Article 6(1) was required only in proportion to the quantities of products or goods in respect of which the proof referred to in Article 6(1) had not been furnished.

43. Article 10(4) of Regulation No 798/80, as amended by Regulation No 3445/85, which is the applicable provision in the present case, also establishes this connection between the basis for calculating the additional amount and the question whether it is appropriate to continue to apply, as the determinant date, the date under the system of advance payment. As I have already explained, the determinant date under that system is no longer applicable in the case envisaged under Article 10(4)(a); in that case, however, the additional amount (as part of the security) is also due in full. In the cases referred to in Article 10(4)(b) and (c), on the other hand, the date of the system of advance payment continues to apply with regard to the amount to be left to the trader and the latter is required to repay the additional amount only on a *pro rata* basis. The only difference between the regulation here applicable and Regulation No 1957/69 lies in the fact that the provision on partial repayment is not restricted to differences in quantities, but is wider in scope; it covers cases in which '... entitlement to refund covers a smaller amount ...'.

44. In its judgment in *Plange Kraftfutterwerke*, the Court extended the scope (in respect of the supplement) by basing itself on the objectives of the regulation. In this regard, it ruled as follows (paragraph 18):

45. 'As has already been pointed out above, that purpose [of the repayment provisions] is to avoid the unjustified enrichment of a trader who has enjoyed interest-free credit where it transpires that the refund paid before the processing of the exported products was not due to him. However, the interest-free credit enjoyed by a trader in Plange's situation does not cover the whole of the refund actually paid in advance but only that refund reduced by the amount of the refund to which the trader was entitled.'

34 — See points 24 and 25 above.

46. As I have already mentioned, the Court was required only to examine the calculation of the supplement, not the method for calculating the amount to which the trader was entitled as a refund. However, I cannot imagine that the Court intended to suppress the connection between those two matters without giving any indication, no matter how minimal, in the key passage of its judgment. The formula used by the Court in indicating that the amount of the reduced refund is the amount of 'the refund which he *should have* obtained for the products actually exported' [35] also argues against the suggestion that the Court intended to dissociate the two aspects.

47. The Commission, nevertheless, has also referred to paragraph 11 of the judgment in *Plange Kraftfutterwerke*, in which the Court stated that:

'The grant of the refund constitutes an advantage for the trader which is justified if certain conditions concerning the characteristics of the product exported and the method of exportation are fulfilled.'

48. That passage, however, does not affect the conclusion already arrived at. In the first place, the purpose of those comments within the judgment was simply to provide a basis for the view that the obligation on the trader to repay did not involve the issue of whether fault was attributable to him. The final sentence of paragraph 11 states that:

'It is not therefore necessary in order to claim repayment that the trader should have been guilty of fraud or of mistakes attributable to fault on his part.'

49. Secondly, for the reasons already indicated, the passage does not justify the conclusion that failure to comply with the conditions concerning 'the characteristics of the product exported' and 'the method of exportation' results in repayment of the *total* amount paid in advance (in addition to the supplement).

50. That judgment, which incidentally concerns a situation in which (just as in the present cases) the difference between the product actually exported and that indicated on the payment declaration was merely a difference of *degree* and not a *substantive* difference in respect of the interests of the Community, thus confirms the view which I am here taking.

51. (e) Two further arguments against this solution have been put forward.

52. (aa) The Commission has based the first of those arguments on Article 2 of Regulation No 798/80. It takes the view that the accuracy and completeness of the information are essential constituents of the

35 — My emphasis.

payment declaration, with the result that if the information and the products do not correspond it follows that there has not been a proper submission of a payment declaration in respect of those products. Applying this logic to the present case, the Commission considers, in view of Article 2(2)(a) of Regulation No 798/80, that the nomenclature of the two products, as apparent from Regulations No 162/67 and No 1633/80, is different and that it was in any event necessary to indicate accurately the ash content pursuant to Article 2(2)(c) of Regulation No 798/80, under which particulars of the composition of the products are required in so far as these are necessary for determining the refund; according to the Commission, it follows from Regulation No 1633/80 that the refund is linked to the ash content.

53. The Commission also examines the possibility provided for in Article 10(4)(b) and (c) of Regulation No 798/80, that is to say, the case in which, although the amount of refund to which the trader is entitled is smaller than the amount paid in advance, it may be assumed that the time-limit for processing has been complied with. With regard to Article 2 of Regulation No 798/80, the Commission expresses the view that such cases are conceivable where what is at issue is not the identity of the products, that is to say, the information to be provided in the payment declaration under Article 2(2) of Regulation No 798/80, but rather factors which do not affect that identity and therefore have no bearing on the existence and date of the payment declaration. Factors of this kind capable of being considered include, in the Commission's opinion, the indications as to use or destination of products set out in Article 2(4) of Regulation No 798/80.

54. That argument fails to convince me. It is pursuant to Article 10(4) of Regulation No 798/80 that the legal effects of departures from the contents of a payment declaration relevant to the level of refund require to be determined. According to the wording of that provision, the fact that the discrepancy relates to *the product* is by itself no argument for applying Article 10(4)(a). In order for it to be possible to accept the views expressed by the Commission, such a result would have to follow from the objectives and construction of the provision, bearing in mind the interests at issue. As I have already explained, however, those considerations simply do not lead to the conclusion drawn by the Commission.

55. Furthermore, if one were to follow the Commission's logic one could also take the view that a use or destination different from those set out in the payment declaration also come under Article 10(4)(a) of Regulation No 798/80, a view which the Commission considers to be quite wrong. In such a case (at least where the exporter has claimed a higher rate of refund for a certain use or destination within the framework of the advance payment system: see Article 2(4) in conjunction with Article 6(3) of Regulation No 798/80), one might consider that the 'identity' of the *transaction effected* (such as export to State X) differs from that

indicated in the payment declaration (export to State Y).

56. The Commission submits a related argument in claiming that the Court has held [36] that the obligation to furnish accurate information in a payment declaration may be regarded as an essential obligation, failure to comply with which can justify the full loss of entitlement to the benefit obtainable from the transaction.

57. In submitting this argument, the Commission overlooks the fact that the distinction which it draws between principal and secondary obligations does not correspond to the wording of Article 10(4). According to the second phrase in the fifth recital in the preamble to Regulation No 798/80 and to the first sentence in Article 2(2) thereof, it appears to be justifiable to treat every departure from the payment declaration as a breach of a principal obligation if it is significant with regard to the rate of refund. Article 10(4), however, does not provide that such a breach will always entail loss of the total amount paid in advance, a point which the Commission itself conceded by referring to the case of a country of destination which differs from that given in the payment declaration.

58. (bb) The second argument against the solution which I have proposed was put forward by the Hauptzollamt. It fears that this solution will place obstacles in the way of the necessary administrative control and that it will be necessary to increase inspections at the time of export if the customs authorities are required to deal with the possibility that the applicant may export different goods, contrary to his undertaking, without forfeiting his rights under the customs control procedure.

59. That is a fear which I treat with the utmost seriousness. Physical inspections are necessary in order to be able to discover the qualitative differences which here concern us. Given the large volume of exports from the Community, however, such inspections cannot be carried out in every case. As the Court held in *Metelmann*, [37] 'it is virtually impossible to check whether the goods leaving the Community are the same as those which were the subject of a customs declaration other than on the basis of the packaging and the dimensions of the goods'. Furthermore, the Court of Auditors of the Community, in its Special Report No 2/90, [38] stated that '100% physical control of exports attracting refunds is neither desirable nor feasible; there are too few customs officers and such an intensity of control would stifle the export trade'. It should also be pointed out that until 16 February 1990, the date on which Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts [39] came into force, there were no Community rules governing the frequency and extent of physical inspections. The Court of Auditors had repeatedly criticized

36 — The Commission refers in this connection to the judgments in Case 66/82 Fromançais SA v FORMA [1983] ECR 395 and in Case 15/83 *Denkavit Nederland BV* v *Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171.

37 — Judgment in Case 276/84 *Gebr. Metelmann GmbH & Co. KG* v *Hauptzollamt Hamburg-Jonas* [1985] ECR 4057, at paragraph 11.

38 — Special report on the management and control of export refunds accompanied by the replies of the Commission (OJ 1990 C 133, p. 1), at point 3.28.

39 — OJ 1990 L 42, p. 6.

this type of inspection during the period prior to this date.[40]

60. It would seem obvious that the competent authorities of the Community and the Member States have an interest in ensuring that irregularities which are relatively difficult to monitor should attract more serious legal consequences than those which easier to control. However, account can be taken of such an interest when applying the relevant legal provisions only if those provisions provide a basis for so doing. Article 10(4) of Regulation No 798/80, however, provides no such basis. This, moreover, represents in my opinion the crucial distinction *vis-à-vis* the *Metelmann* case, in which the Court had to interpret the term 'unaltered' as used in Article 9(1) of Regulation No 2730/79, the purpose of which is evidently to facilitate customs inspections. In this interpretation the Court, quite logically, attached decisive importance to the aspects relating to inspections.

61. (f) From all this it follows that Article 10(4)(c) of Regulation No 798/80 must be applied in this context, and not Article 10(4)(a). It is along those lines that the question common to both cases should be answered in so far as it relates to the first variant. For the sake of completeness, it might also be pointed out that, contrary to the view expressed by the Hauptzollamt, release of the security does not in any way signify that the (proportional) supplement can no longer be requested.[41] It is a matter for the Hauptzollamt and, if necessary, the national court involved to determine whether, in the context of the obligatory recalculation, the authorities are bound by the declaration in which they stated that they would not be seeking payment of the supplement.

62. 2. On this basis, I can confine myself to a few observations with regard to the second variant. In view of the fact that Article 10(4)(a) of Regulation No 798/80, as already explained, is not applicable, recourse might at most be had to Article 10(4)(c). However, that provision is also not applicable as it presupposes that the amount paid in advance is higher than that actually due to the exporter.[42] Under the second variant, the amounts will be identical since the rate applicable to the plaintiffs in Case C-5/90 was a single rate for exports to the USSR, irrespective of the ash content of the flour.

63. However, as the question of the Bundesfinanzhof concerns not merely the interpretation of Article 10(4) of Regulation No 798/80 but relates to all Community law, it is necessary to point out for the sake of completeness that the Hauptzollamt cannot require any repayment in the case of the second variant in view of the fact that the plaintiffs in Case C-5/90 never received (in respect of their exports to the USSR) a higher refund than that to which they were entitled.

40 — See Special Report No 2/90 (footnote 38), point 3.29 et seq.; also the Special Report of 26 June 1985 (OJ 1985 C 215, p. 1), point 3.9 et seq., and the Annual Report concerning the financial year 1987 (OJ 1988 C 316, p. 1), point 4.54 et seq..

41 — See the judgment in Plange Kraftfutterwerke, cited above, at paragraph 10.

42 — See also the eighth recital in the preamble to Regulation No 798/80.

64. 3. The third variant (under which the plaintiffs in Case C-5/90 had first obtained advance payment at the rate provided for the USSR and had subsequently obtained an additional payment after exportation for flour with a higher ash content exported to other third countries) presents a slightly different picture. While neither Article 10(4)(a) nor (c) of Regulation No 798/80 is here applicable, the *total* amount granted exceeds the amount due by reason of the differences in rates according to the ash content of the flour. In such a case, it follows from the decision in *Ferwerda*[43] that, in the absence of Community rules on repayment, it is necessary to apply rules of national law on recovery of payments made in error.

The second question in Case C-5/90

65. The Bundesfinanzhof refers in Case C-5/90 the question of the validity of Regulation No 1633/80, inasmuch as that regulation fixes the rate of export refunds for exports to the USSR at ECU 0, in the case that the first question referred, with which I have just dealt, is answered in the affirmative.[44] As I have proposed that this question be answered in the negative, the following considerations on the issue of validity are set out only in case the Court should take a different view in the matter.

66. I. The first objection to the imposition of a zero rate for exports to the USSR is that this amounts to an embargo measure adopted by reason of the Soviet intervention in Afghanistan. Such a measure, it is claimed, is not permissible within the context of the fixing of export refunds as neither Article 16 of Regulation No 2727/75 nor Articles 2 or 4 of Regulation No 2746/75 allows a rate (ECU 0) to be fixed for reasons unconnected with Community law on the common organization of the markets.

67. The Commission, on the other hand, takes the view that such a measure is covered by the relevant legal bases in two separate respects.

68. In the first place, it takes the view that the disputed fixing of the rate comes within the enabling provisions of Regulation No 2746/75, on the basis of Article 16 of Regulation No 2727/75. According to the Commission, the essential features of the legal system of refunds include not only Article 16 but also Article 29 of Regulation No 2727/75, which provides that when the regulation is applied appropriate account must be taken, at the same time, of the objectives set out in Articles 39 and 110 of the Treaty. The objectives of Article 110 include the common commercial policy and the harmonious development of world trade, whereby commercial policy also covers measures of embargo. The Commission refers in this connection to the import rules contained in Regulations No 596/82 of 15 March 1982,[45] No 877/82 of 16 April 1982[46] and No 2340/90 of

43 — Judgment in Case 265/78 *Ferwerda BV* v *Produktschap voor Vee en Vlees* [1980] ECR 617.

44 — The Court is bound by the interdependence between the two questions even though, in my opinion, it is precisely in the case of a negative reply to the first question that the second question becomes relevant for the purpose of resolving the dispute in the main proceedings since, in the event of an affirmative reply, it is Regulation No 316/81 which will apply to exports to the USSR, and not Regulation No 1633/80.

45 — OJ 1982 L 72, p. 15.

46 — OJ 1982 L 102, p. 1.

8 August 1990[47] and to the Court's judgments in *Edeka*[48] and *Faust.*[49]

69. Secondly, it argues that the suspension of refunds is also justified by the objective of harmonious development of world trade. In this connection, the Commission cites the conclusions of the General Affairs Council of 15 January 1980, according to which:

'Following the measures decided on by the United States concerning deliveries of agricultural products to the Soviet Union, the Council laid down the principle that Community deliveries must not replace, directly or indirectly, United States deliveries on the USSR market. With this in mind, the Council requested the Commission to take the necessary measures as regards cereals and products derived therefrom and to propose other possible measures for other agricultural products while respecting traditional patterns of trade. A consultation procedure was being instituted with the other main cereal-exporting countries in order to avoid disturbances on the world market.'

70. The measure in question was therefore adopted in order to preserve traditional trading patterns and to prevent exports from the United States being replaced by exports from the Community. The Commission argues that, considered from this perspective, the disputed measure also contributed to the objectives of Article 39 of the Treaty (stabilization of markets, including the world market). If that measure had not been adopted, the probable result would have been not only an appreciable disruption of trade but also retaliatory measures on the part of the United States or at least measures which could have had a considerably disruptive effect on the Community market.

71. As the starting point for my examination I can point out (as I already have in connection with the question considered previously) that the fixing of rates of refund must, by its very nature, take account of the situation on the world market. This consideration does not appear for the first time in the specific criteria of Article 4 of Regulation No 2746/75, but already features among the (general) matters to be taken into account under Article 2 of that regulation. Under Article 2(a), those matters include:

'the existing situation and the future trend with regard to:

— prices and availabilities of cereals on the Community market,

— prices for cereals and cereal products on the world market'.

72. Article 2(b) provides that account must be taken of:

47 — OJ 1990 L 213, p. 1.

48 — Judgment in Case 245/81 *Edeka Zentrale AG* v *Germany* [1982] ECR 2745.

49 — Judgment of the Court in Case 52/81 *Firma Werner Faust* v *Commission* [1982] ECR 3745.

'the aims of the common organization of the market in cereals, which are to ensure equilibrium and the natural development of prices and trade on *this market*'. [50]

73. Those provisions are consistent with Article 7 of the regulation, which provides for the possibility of varying the refund according to destination. This is permissible in cases 'where the world market situation or the specific requirements of certain markets make this necessary'.

74. It also follows from the text of Article 2(b) of Regulation No 2746/75, according to which the aims of the common organization of the market in cereals are to 'ensure equilibrium and the natural development of prices and trade on this market', [51] that the Community legislature proceeded on the basis that the Community and world markets are interdependent and charged the Commission with ensuring that account is taken thereof (Article 26(3) in conjunction with the fourth subparagraph of Article 16(2) of Regulation No 2727/75).

75. It is appropriate in this connection to begin by examining the objective, referred to by the Commission, of ensuring that deliveries from the United States would not be replaced by deliveries from the Community. My view is that such an objective is legitimate in the light of the criteria just mentioned, since unaltered continuation of deliveries (on the basis of conditions of refund applicable to 'other third countries') would have upset the competitive equilibrium of the different countries of supply which had determined the situation of the world market prior to the United States embargo and which, by disrupting trade patterns, had placed in doubt what had previously been regarded as a 'natural development' of 'trade'.

76. The plaintiff Bremer Rolandmühle has failed to cast doubt on the submission that this objective was indeed pursued through its argument that the fixing of the disputed rate was obviously not determined on the basis of the criteria in Articles 2 and 4 of Regulation No 2746/75 but solely on the basis of the political decision to boycott deliveries of cereals to the USSR. To be able to accept that argument as the basis for a finding of invalidity, it is necessary, in my opinion, to point to specific indicia supporting the view that the measure here in question was not based on the same grounds as other measures adopted previously by the Commission in connection with the system of refunds, which were designed as early as the beginning of 1980 to counteract possible exports (including exports of wheat flour) to the USSR [52] and which for their part are undeniably based on the abovementioned ground of commercial policy. [53] There are, however, no such indicia here.

50 — My emphasis.

51 — Article 2(a) makes it clear that the reference is to the Community market and the world market. [Translator's note: the English version of Article 2(b) refers simply to 'this market', whereas the other language versions refer to markets in the plural].

52 — See, for example, Commission Regulation No 229/80 of 31 January 1980 (OJ 1980 L 26, p. 49), which fixed a negative corrective amount (ECU -30 per tonne) for exports of common wheat flour to the USSR.

53 — See *Bulletin of the European Communities* 1-1980, paragraph 2.1.36.

77. It is necessary to draw a distinction between the above considerations and the further question as to whether the objective of an embargo, which apparently (even in the view of the Commission) was a determinant factor in the adoption of the contested measure *in addition to the abovementioned grounds of commercial policy*, could render that measure unlawful. That question ought, in my opinion, to be answered in the negative and it is unnecessary to consider whether the embargo as such represented a justifiable objective under the applicable provisions.

78. Under Community law, the pursuit of an objective other than that in respect of which a power has been conferred may result in the invalidity of a measure on grounds of misuse of powers. However, the Court has refused to recognize the existence of misuse of powers in cases where it was argued that the contested measure was pursuing a separate and possibly unlawful aim in addition to its objectively justified purpose. [54]

79. If, therefore, no criticism could be levelled at the measure in respect of the objective which it pursued, it is still not entirely clear that it was appropriate for attaining that objective. Admittedly, the Commission did explain, in response to a question put by the Court, that in view of the difference at the material time between the price on the world market and that in the Community (as evidenced by the rates of refund provided for other third countries) products exported at the Community price would have had no prospect of being purchased for the USSR market. Against this it must be pointed out that exports to the USSR did however take place in this case without being hindered by the zero rate.

80. In order to conclude that the measure was insufficiently appropriate, however, it would be necessary to demonstrate that the fixing of the disputed rate had overall no appreciable effect on the volume of exports to the USSR. The information before me, however, does not allow such a conclusion to be drawn.

81. It follows from the above that there are no grounds for declaring Regulation No 1633/80 invalid, with regard to the matter complained of, on the basis of the objectives pursued by the Commission.

82. II. It has also been argued that the contested regulation infringes Article 190 of the EEC Treaty inasmuch as no reasons are given for the choice of the zero rate.

83. Although no specific reasons are in fact given, this argument fails to convince me.

84. The Court has consistently held that the statement of the reasons on which regulations are based is not required to specify the often very numerous and complex matters of fact or of law dealt with in the regulations, provided that the latter fall

54 — See judgment in Case 1/54 *France* v *High Authority* [1954-1956] ECR 1.

within the general scheme of the body of measures of which they form part.[55] With regard to rules in the area of agriculture laying down the specific amounts necessary for financial implementation, the Court has ruled that it was sufficient that the statement of reasons should set out generally the legal bases and criteria used.[56]

85. It must be noted in this regard that the preamble to Regulation No 1633/80 refers to Article 2[57] and Article 4[58] of Regulation No 2746/75, which set out the criteria for fixing the rates of refund. The second phrase of the second recital in the preamble to Regulation No 1633/80 specifies that:

'... [Article 2 of Regulation No 2746/75] provides that it is also important to ensure equilibrium and the natural development of prices and trade on cereal markets ...'.

86. Admittedly, this is a stereotype formula which also features in the parallel regulations applicable to other periods, although it is not possible there to identify any measure comparable to that contested in this case.[59] Account must, however, be taken in this regard of the fact that a statement of grounds must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.[60] Account must also be taken in this regard of the decision-making practice which resulted in the measure in question.[61]

87. With regard to the present case, it must be held in this regard that the Commission had adopted as early as January 1980 the first measures designed to prevent exports of agricultural products (including wheat flour) to the USSR and that these measures undoubtedly coincided in time with the USSR intervention in Afghanistan in December 1979 and the reactions of the United States already referred to.[62] Beginning with Regulation (EEC) No 289/80 of 7 February 1980,[63] the Commission began to set increasingly lower rates for exports of wheat flour to the USSR than for exports to other third countries; initially (until Regulation (EEC) No 1006/80)[64] the difference was ECU 30 per tonne, a figure which was subsequently increased to between ECU 31 and more than ECU 46 per tonne.[65] It was not until Regulation (EEC) No 1480/80[66] that a rate of ECU 0 was set for all categories of wheat flour.

88. It follows from the foregoing that the reasons on which the disputed measure was based were capable of being identified from the context of earlier similar legal measures

55 — Judgment in Case 250/84 *Eridania and Others* v *Cassa Conguaglio Zucchero* [1986] ECR 117, at paragraph 38.

56 — See the judgments in Case C-27/90 *SITPA* v *ONIFLHOR* [1991] ECR I-133, at paragraph 14, and in Case 16/65 *Schwarze* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877.

57 — Second recital.

58 — Fourth recital.

59 — See, for example, Regulation No 1715/77 (OJ 1977 L 189, p. 23).

60 — Judgment in Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, at paragraph 16.

61 — See the judgment in *Delacre* (previous footnote), at paragraph 15.

62 — See footnotes 52 and 53 above.

63 — OJ 1980 L 31, p. 18.

64 — OJ 1980 L 107, p. 35.

65 — Regulation (EEC) No 1221/80 (OJ 1980 L 122, p. 39).

66 — OJ 1980 L 147, p. 24.

and that Regulation No 1633/80 in that regard satisfies the requirements of Article 190 of the EEC Treaty.

89. III. As the examination of the second question referred in Case C-5/90 has failed to disclose anything capable of casting doubt on the validity of Regulation No 1633/80 in the disputed context, it is unnecessary to consider the second part of the question, which concerns the consequences of a declaration that the regulation is invalid.

C — Opinion

90. *1.* I propose that the Court should reply as follows to the question common to each of the joined cases concerning the interpretation of Regulation No 798/80, as amended by Regulation No 3445/80:

1. If an exporter has undertaken in a payment declaration made pursuant to Article 2 of Regulation (EEC) No 798/80 to export flour with an ash content of 0 to 520 mg/100 g and has, on the basis of that information, received advance payment of an amount greater than that which he would have received, on the basis of the applicable rates, if the ash content indicated in the payment declaration corresponded to that of the flour which was in fact later exported, the ash content of which was between 521 and 600 mg/100 g, that exporter is required — if the minimum surcharge is applied — to repay the amount provided for in Article 10(4)(c) of Regulation No 798/80, as amended by Regulation No 3445/80.

2. If the indication of an ash content lower than the actual ash content of the flour exported has resulted neither in the payment of an amount greater than that which would have been due under the advance payment procedure nor in the payment of an amount greater than the total amount due in respect of export refunds, the exporter is not required to repay the amounts granted, whether in full or in part.

3. If the indication of a lower ash content than that of the flour exported has not resulted in the payment of an amount greater than that due under the advance payment procedure but has, however, resulted in the payment of an amount

greater than the total amount due in respect of export refunds, the exporter is required to repay the excess amount in accordance with national rules on recovery of amounts wrongly paid.

91. *2.* In the alternative (if the Court should take a view different from that expressed under heading 1) I propose the following reply to the further question referred by the Bundesfinanzhof in the event of an affirmative answer to the first question:

Consideration of the second question referred in Case C-5/90 has disclosed no factor of such a kind as to affect the validity of Regulation No 1633/80 in so far as it fixes at ECU 0 the rate of refund applicable to exports of wheat flour to the USSR.