that, where goods listed in Annex C are used in the manufacture of exported goods listed in Annex B to Regulation No 3035/80, the quantity of basic products to be taken in order to calculate the refund is that laid down in Annex C for the first-mentioned goods. In that connection, it is immaterial whether the exported goods were obtained directly from basic products eligible for export refunds or whether their manufacture required the use of a method involving the processing of an intermediate product not eligible for export refunds. Consequently, export refunds are to be granted for vitamin C, which is listed in Annex B, obtained from sorbitol, which is listed in Annex C, at the rates laid down in respect of sugar even if the sorbitol is obtained from glucose produced from white sugar.

REPORT OF THE JUDGE-RAPPORTEUR
In Case C-285/91 *

I — Facts and written procedure

1. *Legal background*

According to Article 1(1) of Council Regulation (EEC) No 3035/80 of 11 November 1980 laying down general rules for granting export refunds on certain agricultural products exported in the form of goods not covered by Annex II to the Treaty, and the criteria for fixing the amount of such refunds (OJ 1980 L 323, p. 27):

'1. This Regulation lays down general rules for the fixing and granting of refunds applicable to exports of the basic products listed in Annex A hereto (hereinafter "basic products"), of products derived from the processing thereof, or of products assimilated to one of those two categories in accordance with paragraph 2, when these various products are exported in the form of goods not covered by Annex II to the Treaty but listed, as the case may be:

— in the Annex to Regulation (EEC) No 804/68,

— in Annex I to Regulation (EEC) No 3330/74,

— in Annex B to Regulation (EEC) No 2727/75,

— in the Annex to Regulation (EEC) No 2771/75,

* Language of the case: German.

— in Annex B to Regulation (EEC) No 1418/76,

— in the Annex to Regulation (EEC) No 1111/77.

These goods, which are set out in Annexes B and C to this Regulation, are hereinafter "goods".'

Annex B to Regulation No 3035/80 includes, *inter alia*, white sugar and Annex C sorbitol.

Council Regulation (EEC) No 3330/74 of 19 December 1974 on the common organization of the market in the sugar sector (OJ 1974 L 359, p. 1), as amended, was replaced by Council Regulation (EEC) No 1785/81 of 30 June 1981 (OJ 1981 L 177, p. 4).

Annex I to Regulation No 1785/81 covers, *inter alia*, sorbitol and vitamin C (since Commission Regulation (EEC) No 2306/88 of 26 July 1988 (OJ 1988 L 201, p. 65), that annex has referred to 'organic chemicals').

The first and fourth paragraphs of Article 2 of Regulation No 3035/80, as amended by Council Regulation (EEC) No 2223/86 of 14 July 1986 (OJ 1986 L 194, p. 1), provide as follows:

'The amount of the refund granted for the quantity, determined in accordance with Article 3, of each of the basic products exported in the form of the same type of goods, shall be obtained by multiplying this quantity by the rate of the refund on the basic product calculated per unit of weight in accordance with Article 4.

...

When goods are used in the manufacture of the goods exported, the refund rate to be taken in calculating the amount applying to each of the basic products, to products derived from the processing thereof, or to products assimilated to one of those two categories in accordance with Article 1(2) which were used in the manufacture of the goods exported, shall be the rate applicable when the former goods are exported unaltered.'

The first subparagraph of Article 3(3) of that regulation provides as follows:

'In respect of the goods listed in Annex C, the quantity of basic products to be taken in calculating the amount of the refund shall be that shown in that Annex against each of those goods.'

According to footnote 7 to Annex C to Regulation No 3035/80, as added by Regulation No 2223/86, cited above,

'The refund shall be determined in relation to the quantities used of D-glucitol (sorbitol)

obtained from any amylaceous products and of D-glucitol (sorbitol) obtained from sucrose, and shall be calculated on the basis of the following quantities of maize and white sugar:

— 1, 52 kg of maize for 1 kg of D-glucitol (sorbitol) in aqueous solution, obtained from amylaceous products,

— 0, 74 kg of white sugar for 1 kg of D-glucitol (sorbitol) in aqueous solution, obtained from sucrose,

— 2, 45 kg of maize for 1 kg of D-glucitol (sorbitol), other than in aqueous solution, obtained from amylaceous products,

— 1, 06 kg of white sugar for 1 kg of D-glucitol (sorbitol) other than in aqueous solution, obtained from sucrose.'

2. *The main proceedings*

Since 1984 Firma E. Merck, the applicant in the main proceedings (hereinafter 'Merck'), has been exporting to non-member countries vitamin C, which falls within Chapter 29 of the Common Customs Tariff.

Merck manufactures that product from glucose syrup obtained from invert sucrose produced from sugar beet. The glucose is subsequently converted into sorbitol, which is used to manufacture the vitamin C.

Merck observes that Hauptzollamt (Principal Customs Office) Hamburg-Jonas ('the Hauptzollamt'), the defendant in the main proceedings, granted it, in respect of exported vitamin C, the refund laid down for goods not falling within Annex II to the Treaty as provided for in Regulation No 3035/80, Annex C, in force at the material time, for the agricultural product, sugar. However, from 12 August 1987 to 24 January 1989, the Hauptzollamt refused applications — 106 in all — for export refunds for such goods.

After making an unsuccessful objection, Merck brought an action for the annulment of the Hauptzollamt's decision of rejection of 18 July 1989 and for an order that the Hauptzollamt should pay Merck export refunds, calculated at the rate laid down for sugar, for the abovementioned period.

In the national court, Merck argued that it was wrong to break down the production of the product at issue into individual technological steps until a raw material governed by a market organization was found which was not eligible for export refunds. It observed that the Commission drew a distinction between cereal glucose and sugar glucose, as appeared from the second recital in the preamble to Commission Regulation (EEC) No 166/89 of 24 January 1989 amending Regulation (EEC) No 2727/75 on the common organization of the market in cereals (OJ 1989 L 20, p. 16). In so far as the goods in question were sugar products, they benefited from the market organization in sugar, even

if glucose was used as a raw material. That solution was objectively necessary because the difference between the world market price and the European Community price in the sugar sector was considerably higher than for cereals.

As for the Hauptzollamt, it contended that, under the fourth paragraph of Article 2 of Regulation No 3035/80, the applicable rate was that for sorbitol, since the exported goods were obtained from that product. It stated that the rules on the calculation of the refund for sorbitol were laid down in Annex C to that regulation, under which, according to footnote 7, that calculation depended on whether the sorbitol was manufactured from amylaceous products or from sucrose. The goods at issue were manufactured, not from sucrose, but from glucose, which was an amylaceous product within the meaning of footnote 7 to Annex C. In its view, the question from which product the glucose was in fact manufactured was not relevant. Glucose did not come under the common market organization for sugar, but under that for cereals, and that common market organization did not provide for the grant of refunds until Regulation No 166/89 came into force, which was after the period at issue.

The national court points out that the vitamin C exported by Merck is a product not covered by Annex II to the Treaty and is mentioned in Annex I to Regulation No 1785/81 and in Annex B to Regulation No 3035/80. It could, therefore, be eligible for an export refund and it is, moreover, common ground between the parties that under the provisions fixing the refund which were adopted pursuant to Article 4(1) of Regulation No 3035/80 export refunds can be granted at the rate for sugar where the goods in question are produced in a manufacturing process whereby sorbitol is obtained directly from invert sugar.

However, as, in this case, the exported goods were manufactured using a process in which glucose was first manufactured from invert sugar and the glucose was only processed into sorbitol in a further operation, the national court asks which provisions apply for assessing entitlement to export refunds in such a case and how they must be interpreted.

In the first case, the question arises as to whether the detailed rules for the calculation derive solely from Article 3(1) and (2) of Regulation No 3035/80 in so far as the goods are listed in Annex B to that regulation; if so, there would be no need for an interpretation of footnote 7 to Annex C to that regulation. On the other hand, the refund would have to be calculated on the basis of the sorbitol (for which the rates are laid down in Annex C to Regulation No 3035/80), if the appropriate basis were the fourth paragraph of Article 2 of Regulation No 3035/80, according to which, when goods not covered by Annex II (in this case, sorbitol) are processed into other goods not covered by Annex II, the applicable refund is that for the goods which are not processed. Consequently, the refund would have to be calculated as if the goods exported were the goods from which the goods exported were obtained and not the goods actually exported.

The national court states that, according to footnote 7 to Annex C, the refund for sorbitol is to be determined on the basis of the quantities of sorbitol used which are obtained from amylaceous products or from sucrose, and is to be calculated on the basis of the quantities of maize and white sugar specified in the footnote. However, it may be considered that sucrose is 'used' to produce sorbitol where the sorbitol is produced from sucrose in several stages or, in contrast, that it is used to produce sorbitol only where the sorbitol is obtained directly from sucrose, that is to say, where it is not obtained from a product derived from sucrose, but from sucrose itself. The latter interpretation appears to be supported by the wording of footnote 7 and also by the rule — which is not directly relevant — in Article 3(2) of Regulation No 3035/80, according to which the concept of use does not refer to the original product but to the manufacturing stage immediately preceding the production of the sorbitol, in so far as the goods obtained in that stage are covered by the regulation.

However, it is permissible to ask whether the Community legislator intended to make the grant of export subsidies for sorbitol products depend on the sorbitol's being obtained directly from sucrose. The structure of footnote 7, cited above, appears to suggest rather that the legislator only envisaged, on the one hand, the — seemingly traditional — procedures for processing starch into glucose and for further processing that glucose into sorbitol and, on the other hand, the procedure for obtaining sorbitol directly from sucrose.

According to the national court, there therefore seems to be leeway for interpreting footnote 7 to Annex C to Regulation No 3035/80 so as to conclude that the refund based on white sugar which is provided for by footnote 7 is also applicable to goods produced from sorbitol obtained from sugar glucose.

In view of those uncertainties, the Finanzgericht Hamburg decided, by order of 14 August 1991, to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Must the fourth paragraph of Article 2 and Article 3(1), (2) and (3) in conjunction with footnote 7 to Annex C to Regulation (EEC) No 3035/80 be interpreted as meaning that export refunds can also be granted for vitamin C produced from sorbitol at the rates of refund laid down in respect of sugar if the sorbitol has been obtained from glucose produced from white sugar?'

3. *Procedure before the Court of Justice*

The national court's order was received at the Court Registry on 7 November 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 31 January 1992 by the applicant in the main proceedings, represented by Rolf Streckmann, Tax Adviser, Hamburg, and on 10 February 1992, by the Commission of the European Communities, represented by Ulrich Wölker, of its Legal Service.

The written procedure followed its normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to refer the case to the Third Chamber. Pursuant to the second sentence of Article 104(4) of the Rules of Procedure, the Court (Third Chamber) decided that the procedure should not include an oral part.

II — Written observations submitted to the Court

Merck argues that either the exports at issue gave entitlement, at the material time, to the grant of an export refund at the rate fixed for sugar or, as the Hauptzollamt considers, they gave no entitlement to any refund.

According to Merck, if glucose, including sugar glucose, had indeed to be regarded as an amylaceous product, which depends on the interpretation of footnote 7 to Annex C to Regulation No 3035/80, ascorbic acid (vitamin C) could not give rise to the grant of an export refund in respect of periods prior to the entry into force of Regulation (EEC) No 166/89, cited above.

The second and third recitals in the preamble to that regulation read as follows:

'Whereas that Annex does not include certain products obtained from cereal glucose; whereas those products are in competition with products obtained from sugar qualifying for the export refund provided for by the market organization in sugar; [second recital]

Whereas provision should accordingly be made for the said products to qualify for the export refund also by extending Annex B to Regulation (EEC) No 2727/75' [third recital].

Merck concludes from this that the Commission did in fact intend to distinguish between cereal glucose and sugar glucose. Sugar glucose, in contradistinction to cereal glucose, has to be regarded as a product obtained from sugar. Consequently, a product which, in turn, is obtained from sugar glucose, such as the sorbitol used to manufacture ascorbic acid, ought also to be eligible for the refund provided for in the context of the common organization of the market in sugar.

If the Hauptzollamt takes the view that the glucose is quite simply an amylaceous product within the meaning of footnote 7 to Annex C to Regulation No 3035/80, without therefore inquiring from which agricultural product it is actually obtained, this runs counter to Regulation No 166/89, which makes a clear distinction between cereal glucose and 'products obtained from sugar'.

Lastly, Merck argues that this view is borne out by the wording of footnote 7, according to which the refund is to be granted at the rate laid down for sugar in so far as the sorbitol is obtained from sucrose. It is uncontested in this case that the sorbitol was obtained — albeit indirectly — from sucrose.

The *Commission* observes in the first place that, according to the first paragraph of Article 2 of Regulation No 3035/85, the export refund granted in respect of 'goods' within the meaning of the second subparagraph of Article 1(1) of that regulation refers to the rates applicable to the basic products used. However, the case, as here, where the exported goods are not obtained directly from a basic product, but from other 'goods', is governed by the fourth paragraph of Article 2 of that regulation.

The Commission goes on to submit that the 'goods' within the meaning of the second paragraph of Article 1(1) of Regulation No 3035/85 which are used to make the vitamin C are sorbitol, which is mentioned in Annex C to that regulation. Consequently, the refund must be calculated by reference to the rates applicable to the basic product used to manufacture the sorbitol, as if the sorbitol had been directly exported.

As for the determination of the quantity of the basic products used, Article 3 of Regulation No 3035/80 makes a distinction depending on whether the goods in question appear in Annex B (quantity to be fixed depending on the quantity of the basic product actually used) or in Annex C (quantity to be fixed depending on the quantities of basic products fixed on a flat-rate basis) to that regulation.

According to the Commission, it seems, in view of the fact that sorbitol obtained from sucrose is involved in this case, that it is necessary to exclude the use of sorbitol coming under subheadings 29.04 C III (a) 1 and (b) 1 and 38.19 T I (a) and II (a) (since Commission Regulation (EEC) No 4055/87 of 22 December 1987 (OJ 1987 L 379, p. 1)), or CN Codes 2905 44 11, 2905 44 91, 3823 60 11 and 3823 60 91), that is to say, sorbitol containing 2% or less of mannitol, since such sorbitol is a virtually pure amylaceous product for which Annex C lays down solely a quantity of maize, namely 172 or 245 kg per 100 kg of sorbitol.

As regards the other types of sorbitol, the Commission considers that it is necessary, in view of the fact that the national court refers to exports going back to 1984, to distinguish between the rules applicable until 19 July 1986 and the rules applicable as from that date.

Until 1986, Annex C provided, in the case of sorbitol 'obtained from sucrose', that the export refund was granted for 74 kg of white sugar (in aqueous solution) or for 106 kg (other than in aqueous solution) per 100 kg of sorbitol.

Since Regulation No 2223/86 entered into force, the quantity of white sugar to be taken into consideration has no longer been given in precise figures in the column of basic products, but has been replaced by a reference to footnote 7 (referred to in the national court's order), which takes account of the use of mixtures of sorbitol.

In the Commission's opinion, the mere fact that sorbitol is manufactured *indirectly* from sucrose does not mean that the refund cannot be granted on the basis of sugar.

First, regardless of the fact that, contrary to the national court's interpretation, the expression 'used' which is employed in footnote 7 refers to the sorbitol and not to the basic product, namely sucrose, the wording of footnote 7 clearly shows that it refers to sorbitol which is obtained only indirectly from sucrose ('The refund shall be determined in relation to the quantities used of D-glucitol (sorbitol) obtained ... *from* sucrose').

Next, the fourth indent of Article 8(3) of Regulation No 3035/80 confirms this view in so far as it requires the applicant to declare the basic products 'actually used in the manufacture' of the sorbitol and the proportions of sorbitol 'obtained from amylaceous products and sucrose'.

Lastly, it is immaterial, for the purposes of achieving the objective of Regulation No 3035/80, namely that of facilitating the exportation of certain basic products whose price is higher in the Community than on the world market, whether the goods exported were obtained directly from those basic products or whether their manufacture necessitated an intermediate process.

Article 3(2) of Regulation No 3035/80, which is cited by the national court, does not call that interpretation in question. As the second sentence of the first subparagraph of that provision states,

'Where, during one of the stages of manufacture of such goods, a basic product is itself processed into another more elaborate basic product used at a later stage, only the latter basic product shall be considered as actually used.'

On the one hand, that rule refers to the processing of one basic product into another basic product. However, in this case, the sugar is transformed into glucose, which is not a basic product within the meaning of the combined provisions of Article 1(1) and Annex A of Regulation No 3035/80.

On the other hand, recourse cannot be made to a provision which is designed accurately to calculate the basic products used (in the case of goods mentioned in Annex B) in the context of the flat-rate method referred to in Article 3(3), which is applicable in this case and applies to goods covered by Annex C.

In sum, the Commission considers that:

the manufacturing process for goods not coming within Annex II to the Treaty should be taken back until a basic product mentioned in Annex A to Regulation No 3035/80 is arrived at;

if the goods exported (vitamin C listed in Annex B to Regulation No 3035/80) are produced from other goods and not directly from a basic product, it is that basic product which, under the fourth paragraph of Article 2 of that regulation, has to be regarded as the goods exported without processing;

the determination of the quantity of the basic products used comes under either Article 3(1) and (2) of the regulation where the goods appear in Annex B or under Article 3(3) where the goods appear in Annex C;

in the latter case, the quantity of basic products to be taken into consideration results from Annex C;

since sorbitol can be obtained from two different basic products, maize or white sugar, the applicant must indicate the proportions of each which have been used (fourth indent of Article 8(3) of Regulation No 3035/80), without taking account of the manufacture of an intermediate product between the basic product and the goods (in this case, glucose, which is neither a 'basic product' according to Annex A nor 'goods' according to Annex B or C);

the quantity of the basic product actually to be taken into consideration results from the figures set out in footnote 7 (since 1986) or in column 9 of the table in Annex C (until 1986).

J. C. Moitinho de Almeida
Judge-Rapporteur