OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 6 DECEMBER 1972 [1]

Mr President,

Members of the Court,

I — Introduction

The application for annulment submitted by the Government of the Kingdom of the Netherlands calls in question, for the first time to my knowledge, the financing of the common agricultural policy and the working of the European Agricultural Guidance and Guarantee Fund set up by Regulation 25/62 of the Council.

The question which is disputed between the applicant Government and the Commission is whether refunds paid by a Member State on the export of agricultural products to third countries — more exactly, refunds granted by the Netherlands Government on the export of milk products during the period from 1 July 1966 to 30 June 1967 — are 'chargeable' to the Fund, that is to say that responsibility for them should be undertaken by the Fund, when these exports took place as part of a programme of food aid to developing countries.

The dispute has arisen in the following circumstances:

The Fund Committee, the administrative agency whose advice is prerequisite to decisions of the Commission on applications submitted by Member States for reimbursement of the cost of refunds, discussed the question of principle posed by the reimbursement to Member States of the cost of refunds incurred as part of a programme of food aid for the first time when examining the operations carried out during the accounting period 1963/64.

The Committee and the Commission at that time agreed that the cost of refunds connected with food aid should be borne in part by the Fund since the cost at that period was of little importance, but without prejudice to any solution to be adopted in the future.

Subsequently when examining accounts for 1965/66, the Commission, without opposition from the majority of the members of the Committee, took up the opposite position, based on the argument that exports made with a view to supplying food aid constituted gratuitous acts, were thus devoid of any commercial character, and could not confer a right to reimbursement by the Fund of the cost of refunds paid by the Member States.

The Netherlands Government, opposing this argument, submitted to the Commission, on 1 August 1969, an application for reimbursement of the amount of refunds paid by it during the period 1966/67, including expenses of this kind attributable to the food aid which it had supplied, by the provision of various quantities of milk products to developing countries, within the framework of the World Food Programme.

It further developed its point of view in a memorandum submitted to the Commission on 9 February 1970, and requested the latter to give detailed reasons in the event of its maintaining its position of principle on the question of excluding food aid.

The Vice-President of the Commission merely replied that it would examine the question with a view possibly to submitting a proposal to the Council, which alone was competent to decide on the subject of financing supplies provided as food aid, 'bearing in mind that these supplies ought not to be regarded as commercial exports within the meaning of the common organization of the markets'. While declaring himself personally in support of a solution which would meet the

1 — Translated from the French.

point of view of the Government of the Netherlands, at least partially and for the future, the Vice-President thus repeated the arguments already relied upon by the Commission without providing any further explanations.

The Netherlands Government in reply accordingly confirmed its own view of the matter both in a new letter addressed to the Vice-President of the Commission, and through the medium of its representative at the meetings of the Fund Committee, in particular at its 62nd meeting on 16 December 1971.

But on 26th January 1972, the Commission, in deciding on the application of the Netherlands Government, refused the aid of the Fund for such refunds as related to products exported as gifts of food.

Further, in fixing, by a decision taken the same day (No 72/115) the lowest average refund for each basic agricultural product in order to finance the refunds for exports to third countries for this same period 1966/67, the Commission implicitly but definitely excluded in this calculation the refunds attributable to food aid schemes.

Such are the two decisions which the Government of the Kingdom of the Netherlands refers to you under Article 173 of the Treaty. It should be noted that its submissions in support of annulment concern the first of these decisions only in so far as reimbursement of the cost of refunds paid on food gifts has been excluded and that the second decision is impugned only by way of consequence and in so far as the calculation of a lowest average refunds may have been affected by the exclusion of food aid.

II — System of export refunds during the transitional period of organization of the agricultural markets and conditions of intervention of the European Agricultural Guidance and Guarantee Fund during this same period

Before examining the arguments in support of the application it seems to me necessary, for clear discussion, on the one hand to recall the structure of the system of refunds for exports to third countries as it existed at the time of the events in question and on the other hand to explain the conditions under which the Fund at that period was called upon to intervene in this sphere.

While preparing to set up a common agricultural policy whose basic objectives are fixed by Article 39 of the Treaty of Rome and whose possible forms, particularly the common organization of agricultural markets, are defined by Article 40 of the Treaty, the Community authorities agreed to regulate the necessary phases for the realization of this policy.

As a result, until 1967, there was only a transitional system, which did not involve a single Community threshold price or intervention price for all Member States, nor a uniform system of refunds for exports to third countries.

The Member States had the opportunity of instituting these refunds, but they were under no obligation; they were free to make use or not to make use of this instrument of economic policy intended to compensate for the difference in the prices of agricultural products existing between the domestic markets and the world market.

During this period the Community Regulations merely fixed the maximum rates of refunds: the conditions giving rise to their collection were not defined by these Regulations so that the States enjoyed in this respect a wide power of decision; they had the right to fix the conditions for granting refunds: this is what you recognised by your judgments of 27 October 1971 (Case 6/71 Rheinmühlen v. EVSt, Rec. 1971, p. 837) and of 23 March 1972 (Case 85/71, Kampffmeyer v EVSt, Rec. 1972, p. 222).

Moreover, the financial burden of these refunds rested at the beginning entirely upon the Member States. The Community only undertook reimbursement partially and gradually, beginning from the financial year 1963/64, through

the intermediary of the guarantee section of the European Agricultural Guidance and Guarantee Fund.

It was Regulation No 25/62 of the Council which created this Fund, fixing from the very start the objective to be attained, that is the entire financing by the Community of the agricultural policy, including the cost of refunds on exports to third countries, this financial responsibility of the Community carrying with it a corresponding right on its part to the whole of the revenues received from import levies collected by the Member States on goods originating from these third countries.

But it was necessary there to determine also the conditions under which this objective was to be attained. Hence a period of transition marked by the progressive increase of financing by the Community linked to the growth of revenues derived from the import levies.

Regulation No 17/64 of the Council concerning the conditions of support by the Fund created two sections within the Fund:

— the guarantee section, corresponding to the policy of support for agricultural prices;

— the guidance section, corresponding to common action on agricultural structures.

Acting as an equalization agency, the guarantee section during this transitional period reimbursed the Member States for a progressively increasing portion of the refunds paid to their exporters in order to allow them to sell agricultural products outside the Community on the basis of world prices, and also for the cost of their intervention on the domestic markets.

Concerning the cost of export refunds, two rules were established in principle by Regulation No 25/62 and expressly formulated by implementing Regulation No 17/64.

On the one hand the basis for the reimbursement of refunds was the *net quantities* of products exported, that is to say the difference between exports and imports, these quantities being calculated according to the so-called 'basic products' method, the list of which was decided upon by the Council on a proposal from the Commission.

On the other hand, the rate of refund applied in the case of each product was the rate of refund of the Member State whose average refund was lowest, so that in a system marked by the freedom of each State to institute refunds, countries where the level of agricultural prices was particularly high should not be encouraged to export more to third countries, in the hope that the Community would assume responsibility for the difference, or a part of the difference, between domestic prices and the world price.

The Commission, as has been noted, was competent to calculate the lowest average refunds.

As a matter of procedure, the Member States, each year, before 1st October, had to submit to the Commission an application for reimbursement of the cost in particular of refunds for exports to third countries covering the period from 1 July to 30 June of that year (Article 9 (1) of Regulation No 17/64).

Finally, the proportion of the cost of refunds repayable by the Fund increased progressively to reach in 1966/67 seven-tenths of their total amount.

Such is the system of Community financing, the benefit of which is sought by the Government of the Kingdom of the Netherlands for the refunds paid to its exporters during this same financial year.

III — Discussion

The applicant Government relies on two arguments in support of its case:

The first, a formal argument, is drawn from the failure to provide sufficient reasons, both factual and legal, for the decision relative to aid from the Fund; in the case of the decision relative to the calculation of average refunds, it is quite impossible, it is alleged, to verify whether the Commission has taken

account of the quantity of exports under food aid schemes, and if so, how this has been done.

The second argument is based on the internal legality of the first of these decisions; the concept of exports to third countries under Community law admits of no limitations and applies, it is said, to all operations whereby goods leave the Common Market for a third country otherwise than in transit; in excluding exports intended as food aid the Commission made a wrong interpretation of the Regulations in force at the time. Annulment of the second decision impugned is claimed by way of consequence.

1. Grounds on which the impugned decisions are based

The obligation imposed on the Commission, as also on the Council, by Article 190 of the Treaty, to give reasons for its decision, whether by way of Regulations or in individual cases, does not merely meet a purely formal requirement but results from two considerations:

— on the one hand it is intended to give the persons concerned by its decision, whether States or private persons, the opportunity of knowing the conditions under which the Commission has applied the Treaty or secondary Community law thus putting them in a position to defend their rights;

— on the other hand it aims at making possible for your Court the full exercise of its jurisdiction over the legality of these decisions,

(Judgment of 4 July 1963, Case 24/62, German Federal Republic, Rec. 1963, p. 143).

However, according to the same judgment, this obligation is satisfied when the Commission states clearly and pertinently, though concisely, the chief points of law and fact underlaying its decision so as to make plain the reasoning behind its adoption by the Commission.

The statement of reasons must, then, make it possible to distinguish clearly the facts held by the administration to be decisive (Judgment of 17 July 1963, Case 13/63, Italy v Commission, Rec. 1963, p. 356).

The current of your decisions consequently shows that when the Community institutions base their case upon a given interpretation of the provisions of a Treaty, they are not bound explicity to reject or criticize other possible interpretations (Judgment of 10 May 1960, Cases 3/58 to 18/58, Barbara Erzbergbau, Rec. 1960, p. 411). Nor are they bound to explain an evaluation in detail or to reproduce accounting documents and technical analyses (Judgment 8 February 1966, Case 8/65, p. 10).

Similarly, when an administrative inquiry has preceded the decision, the Commission, when giving reasons for the latter, is not bound to set out all the arguments raised by the parties, nor to discuss all their objections (Judgment of 15 July 1970, Case 41/69, Chemiefarma, Rec. 1970, p. 692 — Judgment of 15 July 1972, Cases 55 and 56/69, Hoechst, Cassella).

In face of these precedents, is it possible to follow the applicant Government and to accept that insufficient reasons have been given for the first of the decisions impugned, that concerning aid from the Fund to the Kingdom of the Netherlands towards the cost of export refunds during the period in question?

The fifth ground for this decision reads as follows:

'Considering that the amounts exported as food gifts are not eligible for aid from the Fund, having regard to the fact that expenditure incurred on non-commercial operations cannot be considered as refunds on exports to third countries within the meaning of the Community Regulations; and that in consequence the quantities and the costs attributable thereto are to be excluded from the net exports and from the calculation of the rates of refund'.

This legal reasoning is certainly brief, but it is clearly expressed; the reasoning followed by the Commission is plain; it gives an interpretation of the Regulations in force from which it believes a distinction can be drawn between commercial exports and exports lacking this character.

But the Government of the Netherlands complains that the Commission has not specified the provisions of the Regulations on which this interpretation is based, and has not indicated the nature and quantity of the products exported as aid for which reimbursement by the Fund of the cost of refunds has thus been disallowed, and on this point has not even made known the final result of its calculations.

Several considerations, Members of the Court, lead me to reject this argument:

1. The decision impugned, given on 26 January 1972, whereas the request for reimbursement submitted by the Dutch Government dated from 1 August 1969, was the subject of a full inquiry, which may fairly be described as an adversary procedure inasmuch as not only had the interested Government presented to the Commission in 1970 a very complete memorandum on its position, but also at the meetings of the Fund Committee the question of exports under food aid schemes was the subject of discussions and the representative of the Netherlands explained there the point of view of his Government, while by way of appendix to its report on the intervention of the Fund for the financial year 1966/67 the Commission enlarged on its own line of argument.

2. The facts relating to the Netherlands' exports under the World Food Programme, furnished by this Government in its initial request, were fully and exactly incorporated in the Report dated 7 December 1971 relating to the intervention of the Fund (document No VI/4640/71 F, p. 14) discussed during the 62nd meeting of the Committee on 16th December following. The list of products in question, the quantities exported and the total cost of refunds shown were explicitly set out therein. Let me add that the impugned decision itself contains in an appendix an analysis of intervention by the guarantee section of the Fund for the period in dispute. This document, which shows for each product the total amount of refunds allowed for reimbursement and the corresponding quantities, makes it similarly possible to check by deduction the exports for which the Commission has disallowed the intervention of the Fund.

3. The general reference to 'the Community Regulations' in the reasoning of the impugned decision is, in my opinion, sufficient, since it clearly points to the provisions relating to the conditions of intervention by the Fund and moreover, as regards the export of milk products, reference to Regulation 13/64 relating to the progressive organization of the market in this sector suffices for finding the provisions relevant to export refunds.

4. Finally, supposing that you ought to be especially strict concerning the reasons given for a decision in an individual case causing hardship to a private person, at least when such a decision is given without a previous administrative inquiry to enable this private person to be fully informed of the circumstances in which the decision was taken, your position, in my opinion, ought to be less rigid in a case where the decision concerns the Government of a Member State, which in fact had the possibility not merely of being informed by its representative of the discussions preparatory to the decision, but also of making known through this representative its own point of view.

From these considerations I think I can conclude that the plea based on insufficiency of reasoning cannot in this case be accepted, in relation either to the first or to the second of the decisions impugned.

This latter, in fact, concerns the

calculation of the lowest average refund. Drawing the logical conclusion from the exclusion of the cost of refunds attributable to food aid granted by the Member States, the Commission was bound to exclude these refunds from the calculation. It was, therefore, not in the least necessary to set out explicitly at this point the reasons which were clearly to be deduced from the principle previously laid down by the Commission.

2. *Faulty interpretation of Community law*

As for the merits of the problem, we have seen that the sole reason invoked in the impugned decision and developed in the defendant's case rests upon a distinction which, according to the Commission, must be drawn between exports corresponding to transactions of a commercial character and those which lack this character since they concern food gifts.

In the first place we must bear in mind that none of the Regulations in force make any mention of exports of agricultural products to third countries as food aid, whether bilateral or within the framework of the World Food Programme.

It is from the general spirit of these Regulations that the Commission draws the distinction with which it confronts the applicant Government. But, Members of the Court, this argument finds no support either in the legislation or in the actual organization of the refund system.

The basic provision is Article 3 of Regulation No 25/62 of the Council, relating to the financing of the common agricultural policy, applicable during the transitional period. It provides that 'The following expenditure shall be eligible for aid from the Fund:

(a) refunds on exports to third countries calculated on the basis of the net quantities of exports and the rate of refund in the Member State whose average refund is the lowest in accordance with the provisions of the Regulations on individual products.'

By virtue of Article 8 of the same Regulation this provision was to be applied to milk products from 1st November 1962.

Further, Article 14 (2) of Regulation No 13/64 of the Council on the gradual establishment of a common organization of markets in the milk and milk products sector, provides:

'In order to encourage exports to third countries on the basis of prices ruling on the world market, the difference between those prices and the prices in the exporting Member State may be covered by a refund'.

The concept for exports is not further defined by these provisions. They do not contain any limitation based on the non-commercial character of the operations envisaged; no exception is laid down. This concept therefore includes all operations causing goods to leave the geographical territory of a Member State for a destination in a third State, on condition, of course, that this destination is final, and that the goods are not admitted into the third country only in transit.

Further, though the refund, according to Article 14 of Regulation No 13/64, covers the difference between the price of the product in question on the domestic market of the exporting Member State and the prices ruling on the world market, this formula merely serves to explain the underlying reason for the system and to prevent States from granting refunds of an amount exceeding this difference. Besides, on this point, the Commission has taken care to fix the maximum amount of the refund, particularly for milk products (Regulation No 56/66 of 23 May 1966).

Finally, the reference to 'the prices ruling on the world market' cannot be construed as limiting the grant of refunds solely to exports amounting to commercial transactions, to the exclusion of those corresponding to gifts

of food products to developing countries. In other words, the concept of the world market is only introduced here in so far as concerns *the level of prices on the world market,* which is generally lower than that of the prices ruling on the markets of the Member States. It has no bearing on the nature of the transactions which are the occasion of the export, whether these are properly commercial transactions or supplies of food products financed by the States.

Analysis of the legislation, therefore, does not support the Commission's case.

But, in addition, there exist positive reasons for rejecting its argument.

In the first place, as I have recalled, the Member States were free during the transitional period to institute, or not to institute, refunds for exports to third countries, with the sole reservation that their total amount should not exceed the maximum rates fixed by the Commission. There was therefore no single Community concept of refunds any more than there was a Community definition limiting the term 'export'; the Commission was bound by the decisions of the States in so far as concerns reimbursement by the Fund of the cost of refunds, in the sense that it could not object to assumption of liability for them once these States had decided to institute them and to pay them to their exporters. An express provision would have been required to exclude from the right to reimbursement costs attributable to food gifts.

In the second place, it is not surprising that such a provision never saw the light of day during the transitional period, for food aid, whether bilateral or part of the World Food Programme, was at that time within the sole competence of the Member States.

The Community did not itself directly undertake food aid operations until the time when, the transitional period having finished, a common organization of agricultural markets had really been put into effect.

The Council then, admittedly, had recourse to special measures, other than the refund scheme, in order to meet its obligations in this field. In the milk product sphere in particular, it put at the disposal of the World Food Programme, free of charge, intervention butter, granted the processers a special indemnity covering the costs of processing and established a standard contribution towards the cost of transport and insurance. (Regulation No 1399/69.) Similarly, in the cereal sphere, it ensured the fulfilment of the obligations derived from the convention relating to food aid by the purchase of cereals or flours on the Community market or by the use of cereals stored by the intervention agencies.

But the fact relied upon by the Commission, that, at the single market stage, it was judged necessary to take specific measures to finance the expenditure attributable to food aid, clearly cannot be relied upon to support the exclusion, during the transitional period, of the cost of refunds incurred by the Member States in this field. Documents of a later date than this period cannot provide support for the Commission's argument. Let me merely note that the problem of food aid had been neither discussed nor decided by the Regulations then in force.

Finally let me add that only the Council would have been competent to issue a provision excluding from the right to reimbursement of the costs of refunds those costs attributable to food aid granted by the Member States.

Certainly, by virtue of Article 10 of Regulation No 17/64, the Commission was required to decide on the applications for reimbursement submitted by the States, and after consultation with its Management Committee to decide on the intervention of the Fund.

But it had no discretionary power in the matter. It could only act, as regards responsibility for refund costs, within the framework, on the one hand, of Regulation No 25/62, of the Council, Article 3 of which makes refund costs eligible for aid from the Fund, and on the other hand, of the Regulations

concerning the products, in this case Regulation No 13/64 of the Council.

In order to exclude from the intervention of the Fund refund costs attributable to food gifts, it would have been necessary to append to these provisions emanating from the Council an exception which only the Council itself would have been competent to make.

Such is, moreover, the meaning of the reply of the Vice-President of the Commission to the memorandum of the Netherlands Government in 1970. Only the Council — he said — is competent on the legal plane to pronounce on the subject of financing supplies provided as food aid.

These arguments, Members of the Court, seem to me to be decisive.

They will lead me to propose to you the annulment of the impugned decision relating to intervention by the Fund, as being based on legally faulty grounds and having made a wrong construction of Community law, in this case of Article 3 of Regulation No 25/62 and of Article 14. (2) of Regulation No 13/64, and, for the same reasons, to propose the annulment of the decision relating to fixing the rates of the lowest average refunds.

However, in case you should have any doubts as to this solution, I think it may be useful to recall the circumstances in which the Netherlands Government acted within the framework of the World Food Programme.

This programme, set up at the end of the year 1961, jointly by the Food and Agriculture Organization (FAO) and the United Nations Organization, had as its basic objectives the encouragement of the Economic and social progress of the developing countries by multilateral food aid, and the provision of emergency aid in exceptional circumstances, to population threatened by famine. However, the implementation of the programme had to take account of the safeguarding of commercial markets and it afforded, in a certain measure, an outlet for the disposal of surplus agricultural products.

The donor States, members of UNO or FAO, could contribute in different ways:

— either by the gift of food products, these products being valued on the world market at the date of their delivery,

— or by undertaking responsibility for services, in particular the cost of shipping and insurance for the transport of these products,

— or, finally, by putting at the disposal of the programme funds in convertible currencies paid in equal annual instalments.

It is within this framework that the Netherlands Government put at the disposal of the World Food Programme, for the three years 1966 to 1968, a sum of six million dollars, divisible as to 2/3 for the purchase of food products and as to 1/3 to cover 'services', that is to say freight and insurance. It rested with the Director of the World Food Programme to request the Netherlands Government, within the limits of this credit, to supply certain products to named third countries. The suppliers, producers or merchants were then approached by way of invitations to tender organized by the Netherlands Government; tenders were made on the basis of world market prices, on assurance being given to the suppliers that they would benefit, as in the case of all exports, from the refunds instituted in the Netherlands, in conformity with the Community Regulations.

The purchase price of the products was paid direct to the supplier by the Government which, by agreement with the management of the World Food Programme, undertook the loading and carriage of the goods by sea on behalf of the Programme, these services being paid for out of the credits put at the latter's disposal.

It is clear that there is nothing in this procedure to differentiate the transaction from any transaction of sale for export, except the fact that the price of the

goods on the world market and the cost of transport are borne directly by the donor Government.
As for the supplier who has sold on the basis of quotations ruling on the world market, he has a right to benefit from an export refund covering the difference between the domestic price and the world market price, a refund which had been instituted by the Netherlands Government as was within its competence.
The export, so far as he is concerned, bears the marks of a commercial transaction.
These considerations, in my view, constitute a further reason for rejecting the Commission's argument.

I am therefore of the opinion that

— the Court should annul the Commission's decision of 26 January 1972 concerning intervention by the European Agricultural Guidance and Guarantee Fund in the costs to the Kingdom of the Netherlands of refunds for exports to third countries during the accounting period 1966/67 in so far as the quantities exported as food aid and the cost of refunds attributable thereto have not been admitted for the purpose of calculating the reimbursement due to this Government for export refunds;

— the Court should annul the Commission's decision No 72/115, dated 26 January 1972, fixing the lowest average refunds for financing refunds for exports to third countries for the same accounting period, in so far as the said decision has not taken account of quantities exported as food aid;

— finally, that the costs of the action should be borne by the Commission.