In Case 167/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court) Hamburg for a preliminary ruling in the action pending before that court between

NORDGETREIDE GMBH & CO. KG, a milling company having its registered office in Lübeck,

and

HAUPTZOLLAMT (Principal Customs Office) HAMBURG-JONAS

concerning the validity of certain provisions of Commission Regulations (EEC) No 851/79 of 30 April 1979 and (EEC) No 1309/79 of 29 June 1979 fixing the export refunds on products processed from cereals and rice,

THE COURT (Second Chamber),

composed of: P. Pescatore, President of Chamber, O. Due and K. Bahlmann, Judges,

Advocate General: S. Rozès
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the

common organization of the market in cereals (Official Journal 1975, L 281, p. 1) creates a single price system for cereals in the Community. The system is achieved by the annual fixing of a target price in respect of the principal products which is valid throughout the Community, of one or more basic or derived intervention prices at which the relevant national agencies are obliged to buy in cereals which are offered to them, and of a threshold price to which the price of imported products is equated by means of a variable import levy.

Regulation (EEC) No 2727/75 also introduces a single trading system at the external frontiers of the Community. The system includes import levies and export refunds, which serve to stabilize the Community market, in particular by preventing price fluctuations on the world market from affecting prices ruling within the Community. The levy charged on imports from non-member countries and the refund paid on exports to those countries are designed to cover the difference between the prices ruling outside and within the Community. The levy is charged and the refund is paid both on cereals and on products processed from cereals.

Specifically with regard to products processed from cereals, Article 14 (1) of Regulation No 2727/75 provides that the import levy is to consist of two components, one variable and one fixed.

(a) The variable component:

Corresponds, in respect of products processed from cereals other than durum wheat, to the incidence on their prime cost of the levies on those basic products;

Is increased, where appropriate, for processed products containing both cereals other than durum wheat and other products, by the amount of the incidence on their prime cost of the levies or customs duties charged on those other products;

Is fixed, for products which do not contain cereals other than durum wheat, with reference to market conditions for the cereal products which are in competition with them.

(b) The fixed component is designed to protect the Community's processing industry.

The levies are to be fixed by the Commission (Article 14 (4)).

Article 16 (1) of Regulation No 2727/75 provides that, to the extent necessary to enable the cereal products to be exported in the state or form of specified processed goods on the basis of quotations or prices for those products on the world market, the difference between those quotations or prices and prices in the Community may be covered by an export refund.

The refund is to be the same for the whole Community. It may be varied according to use or destination (first subparagraph of Article 16 (2)).

The refund is to be granted on application (second subparagraph of Article 16 (2).

When the refund is being fixed, particular account is to be taken of the need to establish a balance between the use of Community basic products in the manufacture of processed goods for export to non-member countries and the use of products brought in from non-member countries under inward processing arrangements (third subparagraph of Article 16 (2)).

The amount of the export refunds is to be that applicable on the day of exportation (Article 16 (3)). However, the refund applicable on the day on which application for the licence is lodged, adjusted for the threshold price in force during the month of exportation, is to be applied to an export to be effected during the period of validity of the licence if the applicant so requests when applying for the licence (first and third subparagraphs of Article 16 (4)).

Refunds are fixed at regular intervals in accordance with the "Management Committee" procedure (fourth subparagraph of Article 16 (2)).

Articles 14 (3) and 16 (5) of Regulation No 2727/75 provide that the rules relating to the import levy for products processed from cereals and those relating to the grant of export refunds and the criteria for fixing the amount of such refunds are to be adopted by the Council, acting by a qualified majority on a proposal from the Commission.

Those rules were laid down in Regulation (EEC) No 2744/75 of the Council of 29 October 1975 on the import and export system for products processed from cereals and from rice (Official Journal 1975, L 281, p. 65).

As regards the levy charged on the importation of products processed from cereals originating from non-member countries, the preamble to Regulation No 2744/75 states that the variable component of the levy must correspond to the incidence on the prime costs of processed products of the levies on basic products and that that incidence may be calculated on the basis of the average of the levies applicable during a representative period to the quantity of the basic product deemed necessary for the manufacture of one unit of the processed product.

Thus, Article 2 (1) of the regulation provides that the variable component of the levy during the course of a given month is to be equal to the average of the levies applicable for the first 25 days of the month preceding that of importation per tonne of the basic product or products (listed in column 3 of Annex I), multiplied by the relevant coefficient for each basic product (which appears against the product in question in column 4 of Annex I).

Pursuant to Article 2 (2), in order to take account of a variation in the levy applicable to basic products, the variable component during the course of the month is to be revised by the Commission at a flat rate. The margin of variation beyond which that revision is

effected is to be determined for each of the basic products in question in accordance with the Management Committee procedure.

The fixed component of the levy, which is designed to protect the processing industry, is determined on the basis of the most representative processing costs. Pursuant to Article 3 and Annex I of the regulation, the fixed component is stated in terms of units of account per tonne.

As regards the refund paid on exports to non-member countries of products processed from cereals, the preamble to Regulation (EEC) No 2744/75 states that the object of the refund should be to cover the difference between the prices of products within the Community and on the world market and that, for that purpose, criteria should be established for determining the refund essentially on the basis of prices of the basic products within and outside the Community and the outlets and conditions for the sale of processed products on the world market.

Accordingly, Article 6 (1) of the Regulation provides as follows:

"The refund which may be granted on processed products shall be determined with particular reference to:

(a) the prices of the basic products used in calculating the variable component of the levy;

(b) the quantities of basic products used in calculating the variable component of the levy;

(c) the possible duplication of refunds applicable to various products obtained from one and the same process and one and the same product;

(d) outlets and conditions of sale for processed products on the world market."

By virtue of the first paragraph of Article 7 of the regulation, the refund in force on the day on which the application for a licence is lodged is to be applied to a transaction to be carried out during the period of validity of the licence, at the request of the applicant and that request is to be lodged at the same time as the application for a licence.

The second paragraph provides that, in such a case, the refund is to be adjusted by reference to the threshold price in force during the month of exportation for the basic product or products. The adjustment is to be effected by increasing or reducing the refund by the difference between the threshold prices valid for one tonne of the basic product during, respectively, the month in which the licence was applied for and the month of exportation, multiplied by the "processing" coefficients laid down for the various processed products (which appear against the processed product in question in column 4 of Annex I to the regulation).

Between 1 and 31 August, and again between 5 and 26 September 1979, Nordgetreide GmbH & Co. KG, an undertaking having its registered office in Lübeck, exported to Poland two consignments, one of 1 400 and one of 1 000 tonnes, of flaked barley having an ash content expressed as a percentage of the dry matter not exceeding 1% by weight and a crude-fibre content expressed as a percentage of the dry matter not exceeding 0.9% by weight, falling within subheading 11.02 E I (b) 1

(aa) of the Common Customs Tariff. Export licences dated 31 May and 31 July 1979 had been obtained for those consignments. At Nordgetreide's request, the export refund had been fixed in advance at the amount of the refund applicable on the date of the export licences.

By a number of decisions adopted during September and October 1979, at Nordgetreide's request, the Hauptzollamt Hamburg-Jonas fixed the refunds applicable to the exports in question.

The Customs Office adopted as the basis for its calculations the amounts of the refunds indicated in Commission Regulations Nos 851/79 of 30 April 1979 and 1309/79 of 29 June 1979, fixing the export refunds on products processed from cereals and rice (Official Journal 1979, L 108, p. 11 and L 162, p. 39). Those regulations refer in particular to Article 6 of Regulation No 2744/75, which defines the specific criteria to be taken into account when the export refund on products processed from cereals is being calculated. In the case of flaked barley within tariff subheading 11.02 E I (b) 1 (aa), Regulation No 851/79 fixes the refund for May 1979 at 163.55 European Currency Units (ECU) per tonne, whilst Regulation No 1309/79 fixes the refund for July 1979 at 128.01 ECU per tonne.

Since the present case relates to refunds fixed in advance, the Hauptzollamt made the adjustment, pursuant to the second paragraph of Article 7 of Regulation No 2744/75, by reference to the threshold price in force during the month of exportation for the basic product, by reducing the refund by the difference between the threshold prices valid for one tonne of the basic product during, respectively, the month in which the licence was applied for and the month of exportation, multiplied by the "processing" coefficient fixed at 2 for the processed product in question by Annex I to Regulation No 2744/75.

(a) The calculation for the August 1979 exports is as follows:

Rate of refund under Regulation No 851/79	163.55 ECU
Difference between the threshold prices for barley in May (190.28 ECU) and August 1979 (178.90 ECU) = 11.38 ECU, multiplied by the processing coefficient (2) fixed in Annex I to Regulation No 2744/75	22.76 ECU
Refund adjusted in accordance with the second paragraph of Article 7 of Regulation No 2744/75	140.79 ECU

(b) The calculation for the September 1979 exports is as follows:

Rate of refund under Regulation No 1309/79	128.01 ECU
Difference between the threshold prices for barley in July (192.04 ECU) and September 1979 (180.69 ECU) = 11.35 ECU, multiplied by the processing coefficient (2) fixed by Annex I to Regulation No 2744/75	22.70 ECU
Refund adjusted in accordance with the second paragraph of Article 7 of Regulation No 2744/75	105.31 ECU

On 3 and 10 October 1979, Nordgetreide lodged complaints with the Hauptzollamt against the decisions fixing the refunds. The complaints were rejected by decisions of 10 and 6 December 1979, against which Nordgetreide commenced proceedings before the Finanzgericht Hamburg on 2 January 1980.

Nordgetreide did not dispute that the Hauptzollamt had properly applied Commission Regulation Nos 851/79 and 1309/79 but alleged that those regulations did not correctly determine the refund applicable to flaked barley. For determination of the refund, they applied a coefficient of 1.5 to the levy on barley — the basic product — whereas Regulation No 2744/75 of the Council specifies a processing coefficient of 2. The same coefficient should be applied in both cases.

By order of its Fourth Senate dated 29 April 1982, the Finanzgericht Hamburg decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice of the European Communities had given a preliminary ruling on the following questions:

1. Are the refunds fixed in annexes to Commission Regulations (EEC) No 851/79 of 30 April 1979 and No 1309/79 of 29 June 1979 in respect of flaked barley falling within tariff heading 11.02 E I (b) 1 of the Common Customs Tariff valid or does the fixing thereof contravene the provisions of Regulation (EEC) No 2744/75 of the Council of 29 October 1975?

2. What are the legal consequences in the event of the fixing of the refunds being found to be invalid?

The order of the Finanzgericht Hamburg was received at the Court Registry on 11 June 1982.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 21 July 1982 by the Commission of the European Communities, represented by its Legal Adviser, Peter Karpenstein.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, the Court requested the Commission to reply in writing to one question. That request was complied with within the prescribed period.

The Court also requested the Commission to have its Agent accompanied at the hearing by an expert.

By order of 17 November 1982, made pursuant to Article 95 (1) and (2) of the Rules of Procedure, the Court assigned the case to the Second Chamber.

Considering that the case related to the interpretation of Regulation No 2744/75 of the Council, the Court requested the Council to arrange to be respresented at the hearing.

II — Written observations submitted to the Court

The *Commission* stresses that the court making the reference does not dispute the applicability of the coefficient provided for in the second paragraph of Article 7 of Regulation No 2744/75 for the adjustment of export refunds fixed in advance. Its doubts relate solely to the method of calculation adopted by Regu-

lations Nos 851/79 and 1309/79 for determination of the refund applicable to flaked barley.

First question

(a) In the context of the common organization of the market in cereals, levies are to some extent fixed automatically, by reference to objective data. The competent institution does, on the other hand, enjoy wide discretion for the fixing of export refunds. The levies charged should reflect price movements on the world market; there is an obligation to fix levies so as to guarantee a certain price level in the Common Market. As regards the fixing of export refunds, however, Article 16 of Regulation No 2727/75 provides that the difference between quotations or prices on the world market and prices in the Community *may* be covered by an export refund, and the opening words of Article 6 (1) of Regulation No 2744/75, relating to processed products, confer a similar discretionary power.

Thus, there is, in the Commission's view no obligation to fix export refunds in the cereals market, either for the basic product or for the processed products. It is left to the discretion of the Community institutions — in the present case, the Commission in cooperation with the Management Committee for Cereals — to decide, in the light of market developments inside and outside the Community and of the objectives pursued by the common commercial and agricultural policies, whether export refunds are to be granted in order to promote exports of products processed from cereals to non-member countries and to fix the level thereof.

(b) It is apparent from Article 16 of Regulation No 2727/75 and from Article 6 of Regulation No 2744/75 that, for the fixing of export refunds, the Commission is required to have regard to very few criteria, some of which are described in very vague terms. The third subparagraph of Article 16 (2) of Regulation No 2727/75, in particular, indicates that the primary consideration is the market situation at the time in question and that the fixing of export refunds is by no means an automatic procedure. Nor do the criteria laid down in Article 6 (1) of Regulation No 2744/75, although slightly more specific, provide a calculation in which it is sufficient to insert the prevailing market prices and the processing coefficient in order automatically to arrive at the rate of refund applicable to the case under consideration. Those criteria serve only as guidelines, as is demonstrated by the use of the expression "with particular reference to". Moreover, Article 6 itself provides for a large number of cases in which it is possible to depart from the criteria set out in Article 6 (1), or to suplement them. Even if subparagraphs (a) to (c) of Article 6 (1) could be regarded as indicating fixed magnitudes, reflecting a degree of automatic determination, the fact would nevertheless remain that the calculation might be corrected by application of the criterion contained in subparagraph (d). When the rates of refund are fixed, account must always be taken of the outlets and conditions of sale fort the processed product on the world market.

In the Commission's view, the law as now in force certainly does not impose any rigid procedure for the calculation of the rates of refund applicable to processed products.

(c) Unless particular market conditions call for a different method, when the Commission fixes the rates of refund for

flaked barley every month, it takes account of the criteria in Article 6 (1) of Regulation No 2744/75 as follows:

Since, under Article 6 (6) of Regulation No 2744/75, refunds for processed products are fixed only once a month, there is first calculated, in accordance with the system of levies on those products, the average variable component of the levy applicable to the basic product (barley) during the first 25 days of the month preceding the fixing. The criterion indicated in subparagraph (a) is thereby fully taken into account.

The average rate of levy thereby calculated, which enables the price of the basic product from which the product to be exported is derived to be virtually equated with the price level on the world market, is then mulitplied by a coefficient of 1.5.

The result thus obtained is reviewed in the light of prevailing market conditions (the existence of surpluses, prices and demand on the markets of non-member countries) and, where appropriate, is adjusted upwards or downwards in accordance with subparagraph (d) or Article 6 (3). No such adjustments were made in the case of Regulations Nos 851/79 and 1309/79.

(d) The adoption of a multiplier of only 1.5 is the result of the combined application of the criteria set out in subparagraphs (b) and (c) of Article 6 (1) of Regulation No 2744/75.

The Commission does not dispute the empirical value (since two tonnes of barley are generally required to make one tonne of flaked barley) used as a basis for determination of the coefficient of 2, which appears in column 4 of Annex I to Regulation No 2744/75. Article 6 (1) (b) of that regulation by implication refers back to Article 2 (1) thereof and hence to the quantities fixed in column 4 of Annex I. Nevertheless, the quantity of basic products necessary for manufacture of the processed product is only one of the factors to be taken into consideration for determination of the rate of refund. Article 6 (1) (c) is intended in particular to avoid the possible duplication of refunds granted in respect of various products obtained from one process and one basic product. Such a risk of duplication arises in the production of flaked barley where, besides the grains, the yield includes between 12 and 15% of bran, sharps and other residues falling within subheading 23.02 A II (a) and between 30 and 35% of barley groats and meal falling within subheading 11.02 A III (a) of the Common Customs Tariff. The regulations at issue in the main proceedings also fixed export refunds for both those by-products; had there been no reduction of the coefficient derived merely from the quantitative ratio between the basic product, barley, and the processed product, flaked barley, a duplication of refunds would have occurred. If a coefficient of 2 had been used, the plaintiff in the main proceedings would have received the full rate of refund on the barley, the basic product, and would, in addition, have been able to benefit from further refunds for two by-products produced in large quantities. The already long-standing use of a multiplier of only 1.5 for calculation

of the monthly refunds on flaked barley is designed solely to preclude the possibility of duplication.

The use of a coefficient of 1.5 is thus in no way arbitrary, nor does it constitute a departure from the application of the coefficients which appear in Annex I of Regulation No 2744/75. The Commission has done no more than apply, as correctly and as exhaustively as possible, the criteria contained in Article 6 (1) of Regulation No 2744/75. The multiplier used to express the ratio between barley and flaked barley simply takes into account the normally applicable coefficient of 2 and, at the same time, the anti-duplication rule in Article 6 (1) (c) of Regulation No 2744/75. In the present case, therefore, there is neither an infringement of the law in force nor any contradiction inherent in the method of calculation. The objections as to the validity of Regulations Nos 851/79 and 1309/79 are thus unfounded.

Second question

(a) In any event, a declaration that Regulations Nos 851/79 and 1309/79 were void would by no means automatically entail higher refunds. The Commission has wide powers of discretion in fixing the refunds and it would not in any case be divested of those powers.

Should the reduction of the multiplier used for the fixing of the refunds be held to be erroneous, the Commission would, in the light of the Court's decisions, have to recalculate the amounts of the refunds for May and July 1979. In view of all the circumstances of this case, the fresh calculation might, at least in theory, produce results which were similar to or indeed less favourable than the results obtained by the application of Regulations Nos 851/79 and 1309/79.

In view of its previous decisions, the Court would have no alternative but to conclude that the Commission was required to take the necessary steps to rectify any irregularity which had been ascertained.

(b) Moreover, the pre-conditions for the application by analogy of the second paragraph of Article 174 of the EEC Treaty, whereby the Court may state which of the effects of a regulation which it has declared void are to be considered definitive, appear not to have been satisfied in this particular case.

It seems desirable that if Regulations Nos 851/79 and 1309/79 are declared void such a declaration should not, in the interests of legal certainty, have retroactive effect except in cases where the fixing of the refunds had been contested within the periods prescribed by national law. In all other cases, in the event of the application by analogy of the second paragraph of Article 174 of the Treaty, the judgment should take effect only as regards the future.

The Commission suggests that the questions submitted by the Finanzgericht Hamburg for a preliminary ruling should be answered as follows:

Consideration of Commission Regulation (EEC) No 851/79 and (EEC) No 1309/79 has disclosed no factor of such a kind as to call in question the correctness of the amounts of the refunds fixed by them.

In the alternative:

Except in cases where the fixing of the refunds applicable to products processed from cereals is contested before national authorities, courts or tribunals within the

prescribed periods, the nullity of Commission Regulations (EEC) No 851/79 and (EEC) No 1309/79 does not entail the right to contest the Commission's fixing of export refunds for such processed products as regards the period prior to the judgment of the Court.

III — Oral procedure

At the sitting on 20 January 1983 oral argument was presented and replies were given to questions put by the Court by Nordgetreide GmbH & Co. KG, the plaintiff in the main proceedings, represented by Walter Bergmann, Rechtsanwalt of Lübeck, the Council, represented by Bernhard Schloh, an adviser in its Legal Department, and the Commission, represented by Peter Karpenstein, assisted by Ole Tougaard, an administrator in the Directorate General for Agriculture, appearing as an expert.

The *plaintiff in the main proceedings* took the view that the coefficient of 2 adopted to express the conversion ratio between basic and processed products for calculation of the adjustment to the refund pursuant to the second paragraph of Article 7 of Regulation No 2744/75 should likewise be used for calculation of the refund itself under Article 6 (1) thereof. Uniform application of the same coefficient would not run counter to the prohibition of duplication, which — the plaintiff alleged — did not relate to processing coefficients. Furthermore, the Commission's claims regarding the various by-products yielded by the manufacture of flaked barley were incorrect.

The *Commission*, through its expert, enlightened the Court on the technical aspects of the case, especially the refund system; its agent explained, in particular, the difference in function between the two coefficients at issue.

The *Council* denied that the main proceedings were concerned with the validity of Regulation No 2744/75. With reference to the interpretation thereof, it was to be observed that the Commission was empowered, by virtue of Article 6 (1), to determine the refund on the processed products and that it had adopted for that purpose a processing coefficient which, in the light of the criteria set forth in Article 6, seemed normal and justified.

The Advocate General delivered her Opinion at the sitting on 10 March 1983.

Decision

1 By an order dated 29 April 1982 which was received at the Court on 11 June 1982, the Finanzgericht [Finance Court] Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the validity of Commission Regulation (EEC) No 851/79 of

30 April 1979 fixing the export refunds on products processed from cereals and rice (Official Journal 1979, L 108, p. 11), and of Commission Regulation (EEC) No 1309/79 of 29 June 1979 on the same subject (Official Journal 1979, L 162, p. 39), which are based on Regulation (EEC) No 2744/75 of the Council of 29 October 1975 on the import and export system for products processed from cereals and from rice (Official Journal 1975, L 281, p. 65).

2 It appears from the file on the case that when, in August and September 1979, the plaintiff in the main proceedings exported some flaked barley falling within tariff subheading 11.02 E I (b) 1 (aa) the Hauptzollamt [Principal Customs Office] Hamburg-Jonas fixed the refunds in accordance with the rates shown in the annexes to Regulations No 851/79 and No 1309/79, deducting the adjustment provided for by the second paragraph of Article 7 of Regulation No 2744/75. It is not contested that the calculation made by the Hauptzollamt is consistent with the regulations cited.

3 None the less, the plaintiff contests the method of calculation by which the rates set forth in the annexes to the two Commission regulations cited above are arrived at. The analysis of the calculation of the refunds undertaken by the plaintiff and the Finanzgericht does indeed disclose that, whilst the adjustment was calculated on the basis of a coefficient of 2, as laid down by Article 7 of Regualtion 2744/75, the refund itself, on the other hand, was determined on the basis of a coefficient of 1.5.

4 The plaintiff argues that the substitution of that coefficient for the coefficient fixed in Annex I to Regulation No 2744/75 is not warranted by any provision of Community law and that there is, moreover, an illogicality in the method adopted by the Commission, inasmuch as a coefficient of 1.5 was used to calculate the refund itself, whereas a coefficient of 2 was employed for calculation of the adjustment.

5 The Finanzgericht considers that there is indeed some doubt as to the validity of the Commission regulations. It acknowledges that Article 6 (1) of Regulation No 2744/75 allows the Commission a margin of discretion with regard not only to any duplication of refunds applicable to the various

products obtained from one and the same process but also to outlets and conditions of sale for processed products on the world market; however, it wonders whether those provisions permit the Commission to depart from the processing coefficient fixed by Annex I to that regulation.

6 In order to clarify that doubt the Finanzgericht submitted the following two questions:

1. Are the refunds fixed in the annexes to Commission Regulations (EEC) No 851/79 of 30 April 1979 and No 1309/79 of 29 June 1979 in respect of flaked barley falling within tariff heading 11.02 E I (b) (1) of the Common Customs Tariff valid or does the fixing thereof contravene the provisions of Regulation (EEC) No 2744/75 of the Council of 29 October 1975?

2. What are the legal consequences in the event of the fixing of the refunds being found to be invalid?

7 Pursuant to Article 2 of Regulation No 2744/75, the variable component of the levy charged on products processed from cereals is determined with reference to the levy applicable to the corresponding basic products, multiplied by the coefficients appearing in Annex I to the regulation.

8 In the case of the product in question, namely flaked barley, the applicable coefficient is 2. It emerges from the explanations furnished by the Council that the coefficient is based on experience, dating back to the time when the common market in cereals was first organized, in view of the fact that the production of one tonne of flaked barley calls for the utilization of two tonnes of the basic product.

9 According to the sixth recital in the preamble to Regulation No 2744/75, the object of the refund is to cover the difference between the prices of products within the Community and those on the world market. It adds that "for that purpose, criteria should be established for determining the refund essentially on the basis of prices of the basic products within and outside the Community and the outlets and conditions for the sale of processed products on the world market".

10 To that end, Article 6 (1) of Regulation No 2744/75 provides as follows:

"The refund which may be granted on processed products shall be determined with particular reference to:

(a) the prices of the basic products used in calculating the variable component of the levy;

(b) the quantities of basic products used in calculating the variable component of the levy;

(c) the possible duplication of refunds applicable to various products obtained from one and the same process and one and the same product;

(d) outlets and conditions of sale for processed products on the world market."

11 By virtue of the second paragraph of Article 7 of the regulation, the amount of the refund is adjusted by reference to the movement of the threshold prices in force for the basic product or products. The adjustment — which operates upwards or downwards, depending on price movements — is multiplied by the relevant coefficient fixed in Annex I to the regulation.

12 In the context of the common organization of the cereals market, refunds are determined by the Commission in accordance with the "Management Committee" procedure. The regulations which the plaintiff now challenges were adopted under that procedure.

13 Contrary to the argument put forward by the plaintiff, the computation of the refunds on the basis of the levies governing the basic product is not an automatic calculation process. Article 6 of Regulation No 2744/75 implies a discretionary power, which has been properly delegated by the Council to the Commission.

14 Whilst it is true that subparagraphs (a) and (b) of Article 6 (1) refer to specific values, namely the prices and the quantities of the basic products used for calculation of the variable component of the levy, the same does not

apply to subparagraphs (c) and (d), which allow the Commission a discretionary power in two respects:

Under subparagraph (c), regarding the elimination of any duplication of refunds applicable to various products obtained from one and the same process, which necessarily implies an alteration of the processing coefficient adopted by Regulation No 2744/75; and

Under subparagraph (d), regarding the outlets and conditions of sale for processed products on the world market or, in other words, considerations of commercial policy.

15 Whilst the Commission was required by Article 6 (2) to take account of the fact that, according to experience, two tonnes of barley are necessary to produce one tonne of flaked barley, it was nevertheless entitled to reduce the coefficient in order to ensure that the latter product, when sold on the world market, could not enjoy a duplication of refunds, regard being had to the fact that processing enables other by-products to be obtained which, in their turn, qualify for refunds. Duplication such as that would lead to overcompensation of the difference between the price of the product in question within the Community and the price ruling on the world market, contrary to the objective expressed by the sixth recital in the preamble to Regulation No 2744/75.

16 It thus follows from the foregoing that the reduction of the coefficient from 2 to 1.5 is justified by the fact that refunds are granted in respect of by-products obtained from the processing of barley into flaked barley. Hence the application of the latter coefficient derives from the legitimate exercise by the Commission of the discretionary power reserved to it by Article 6 of Regulation No 2744/75.

17 Contrary to the plaintiff's allegations, there is no illogicality in the fact that under the system set up by Regulation No 2744/75 two different coefficients are applied for the calculation of the same refund, according to whether the calculation relates to the refund itself or to adjustment thereof. Regulation No 2744/75 expressly requires that the coefficient contained in Annex I be

applied to the adjustment, whereas it permits that same coefficient to be amended for the purpose of fixing the refund itself, in the light of the factors referred to in Article 6. It therefore appears that the fixing procedure criticized by the plaintiff merely constitutes the correct application by the Commission and the national authorities of the criteria set forth in Regulation No 2744/75 of the Council.

18 Thus, the answer to be given must be that consideration of the first question raised by the Finanzgericht has disclosed no factor of such a kind as to affect the validity of Commission Regulations Nos 851/79 or 1309/79.

19 In view of the above answer the second question is devoid of purpose.

Costs

20 The costs incurred by the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Finanzgericht Hamburg by order of 29 April 1982, hereby rules:

Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Commission Regulations Nos 851/79 of

30 April 1979 and 1309/79 of 29 June 1979 fixing the export refunds on products processed from cereals and rice.

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 24 March 1983.

For the Registrar

H. A. Rühl
Principal Administrator

P. Pescatore
President of the Second Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 10 MARCH 1983 [1]

Mr President,
Members of the Court,

The Court is requested by the Finanzgericht [Finance Court] Hamburg to give a preliminary ruling on the validity of certain provisions of Commission Regulations Nos 851/79 of 30 April 1979 and 1309/79 of 29 June 1979, fixing the export refunds on products processed from cereals and rice.

I — The facts are as follows:

Nordgetreide, a company in Lübeck which imports and processes cereals, exported to Poland between 1 August 1979 (the commencement of the marketing year 1979-1980) and 31 August 1979 1 400 tonnes and between 5 and 26 September 1979 1 000 tonnes, of flaked barley classified under Common Customs Tariff subheading 11.02 E I (b) 1 (aa) (flaked barley of an ash content, referred to dry matter, not exceeding 1% by weight and of a crude fibre content, referred to dry matter, not exceeding 0.9% by weight).

Like the barley from which it is derived, that product of first-stage processing is

1 — Translated from the French.