OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 17 SEPTEMBER 1974 [1]

Mr President,

Members of the Court,

1. In the course of a dispute over grant of the refund provided for under Regulation No 141/64/EEC of the Council of 21 October 1964 on exports to third countries of gluten flour produced from cereals other than the wheat referred to in tariff heading 11.09, questions have arisen over the interpretation to be given to Article 18 of the Regulation in the light of Article 3 (b) of Regulation No 163/64/EEC of the Commission of 29 October 1964, which lays down how the provisions of Article 18 are to be applied.

Article 17 of Regulation No 141/64/EEC establishes a system of refunds to producers for maize and soft wheat used by the starch industry and Article 18 supplements it by providing that, in the calculation of the amount of the export refunds applicable to products covered by the Regulation, account must be taken of the refunds to producers provided in respect of the aforementioned raw materials.

Article 3 (b) of the implementing Regulation, No 163/64 of the Commission provides that when a Member State grants a refund to producers, 'the amount of the refund which may be granted on the export of the processed products referred to in Article 1 to third countries, shall be ascertained in accordance with the provisions of Article 15 of Regulation No 141/64/EEC; but the amount of the export refund which may be granted shall be reduced by the amount of the refund to producers granted by the exporting Member State on the date of exportation'.

In May 1967, the firm whose owner is the plaintiff in the main action, exported gluten flour which it had produced from cereals other than wheat, the raw material used being a product imported from third countries under the description of 'maize gluten-based fodder', [1] which appears under tariff heading 23.03. The raw material did not come under any common organization of the market in agricultural products. It was not subject to any charge on entering the Community. When the gluten flour produced from this product was exported, the German intervention agency (Einfuhr- und Vorratsstelle für Getreide und Futtermittel) granted the plaintiff a refund calculated in accordance with Article 15 of Regulation No 141/64 and which therefore took maize prices specially into account, deducting, however, as required by the provision, already mentioned in Article 3 (b) of Regulation No 163/64, the amount of the refund to producers in respect of maize granted by the exporting State on the date of exportation. This export refund was DM 47.40 per metric ton.

The plaintiff is on the other hand asking to be granted the full amount of the refund applicable at that time, viz DM 398 per metric ton: he maintains that there is no justification for the deduction in his case of the refund to producers in respect of maize, which he had not received because in producing the gluten flour he used a product for which no refunds were provided.

Against the background of this dispute

1 — Translated from the Italian.

1 — *Translator's Note:* This is a literal translation of the Italian phrase used by the Advocate-General, but this phrase does not appear in the Italian text of tariff heading 23·03

the Bundesfinanzhof asks the Court to rule whether Article 18 of Regulation No 141/64, taken together with Article 3 (b) of Regulation No 163/64, must be interpreted as meaning that, when no provision is made for a refund to producers on a product produced from maize and imported for the manufacture of gluten flour without being subject to levy on importation, account must nevertheless be taken of the refund to producers of starch from maize in calculating the amount of export refund which, at the material time, each State was, within limits laid down by the Community Regulations in force, entitled to grant its exporters.

The Commission contends that the deduction must be applied in every case because of practical requirements and because of the general terms of the provision in Article 3 of Regulation No 163/64, which precludes any direct connection between the costs of production and the amount of the refund to producers to be taken into account in calculating the export refund.

2. The decisive consideration to be taken into account in replying to the Bundesfinanzhof seems to me, however, to be that, as expressly declared in the eleventh recital of the preamble to Regulation No 141/64 of the Council, the refund allowed on exports to third countries 'is for the purpose of compensating for the difference between the price of the basic products prevailing in the exporting Member State and the price on the world market'. It is clear that the product employed by the exporter to manufacture gluten flour is not included among the basic products referred to in the Regulation. As we have seen, the product in question was not covered by a common organization of agricultural markets.

Another consideration is that, under Article 15 of Regulation No 141, the amount of refund must be calculated on the basis of the price of basic products covered by the Regulation in the light of conditions on the world market. In the present case, the connection between these two cannot be established because, in the production of goods which can benefit from a refund, use has been made of raw material for which no provision has been made in the Regulation.

The right of States to grant export refunds on the goods in question was provided not for the benefit of gluten flour exports in themselves, regardless of the raw materials from which they have been produced, but rather in relation to the use within the Community of certain basic materials which fall under the common organization of the market.

The Commission, however, contends that for practical reasons associated with identification, all gluten flour was able to benefit from the refund system.

But this is to confuse the principle of law with the practical difficulties of identifying the circumstances in which it must be applied. These difficulties might possibly be resolved on the basis of an assumption that, in the absence of evidence to the contrary, the gluten flour exports were manufactured from maize and are therefore entitled to the refund. But if it is established beyond doubt that the flour was produced from a different raw material from those covered by Regulation No 141/64, it would be contrary to the Community rules to grant a refund. A refund in such circumstances would be unjustified and therefore illegal.

Let me recall what I stated in Case 149/73 *(Witt v Hauptzollamt Hamburg — Ericus* (1973) E.C.R. 1587 at p. 1597) on the need to distinguish between the practical difficulties of identification and the meaning of legal concepts and institutions. The practical difficulties involved, not in establishing the legal classification of a product and the legal purpose of the grant of a refund, but merely in identifying for marketing purposes the characteristics of the product may give rise to working rules of thumb by inducing the authorities to

act in practice on assumptions based on the formula 'id quod plerumque accidit' — in this case the assumption that the gluten flour produced from cereals other than wheat was manufactured from the basic product usually employed for this purpose. But such difficulties do not justify such a departure from the principle of law as would, in cases where the object of a refund is exclusively to facilitate the sale of the products concerned, be represented by, in principle, extending the grant of the refund to those goods which were not manufactured from appropriate basic products.

4. As, moreover, the raw material in question was imported from third countries without having to meet any charge on entry into the Community, and as, accordingly, the plaintiff was able to obtain it within the Common Market at the world market price, there is an absence of the economic condition on the basis of which (in terms of the eleventh recital of the preamble to Regulation No 141) the Community legislators permitted an export refund to be granted on the product manufactured from it.

In these circumstances, it becomes quite unnecessary to consider the plaintiff's claim to receive, in addition to what he has already received without justification, a sum equal to the refund to producers, the object of which is made clear in the twelfth recital of the preamble to Regulation No 141/64 of the Council is to offset, at least in part, the amount of the levy imposed on the basic product on importation into the Community; in the case of the basic product employed by the plaintiff, no import levy was imposed on entry into the Community.

I therefore conclude by advising that the Court's reply to the national court should be a declaration that, under the provisions of Regulation No 141/64 of the Council, exports to third countries of gluten flour manufactured from a basic product not coming under the common organization of agricultural markets cannot qualify for a refund.