2. Since monetary compensatory amounts may be fixed in advance only if the export refunds and levies are also fixed in advance, forfeiture of the refund fixed in advance also entails forfeiture of the monetary compensatory amounts fixed in advance. Where customs formalities are completed after the event, reference may not be made to different dates for the purpose of fixing the rate of the monetary compensatory amount payable pursuant to Regulation No 1371/81 and the rate of the refund.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 24 October 1985 *

Mr President,
Members of the Court,

1. Facts and questions submitted for a preliminary ruling

In August 1981 Metelmann GmbH & Co. KG, Hamburg, (hereinafter referred to as 'Metelmann') completed at two German customs offices the customs export formalities in respect of two consignments of milk powder packed in sacks of 25 kg and bound for Poland. The export refund and the monetary compensatory amount were fixed in advance on the export licence by reference to subheading 04.02 A II (b) 1 of the Common Customs Tariff.

Following completion of those formalities, the products were dispatched to Hamburg free port where the third party to whom Metelmann had sold the milk powder repackaged it into units of 1 kg before it left the geographical territory of the Community.

The Hauptzollamt Hamburg-Jonas demanded repayment of the export refunds and monetary compensatory amounts on the ground that, pursuant to the second indent of the first subparagraph of Article 9 (1) of Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal 1979, L 317, p. 1), the sums in question were to be paid only on condition that the product in respect of which customs formalities were completed had left the geographical territory of the Community 'unaltered'.

Metelmann's objection against the Hauptzollamt's decision was rejected whereupon Metelmann instituted proceedings before the Finanzgericht [Finance Court], Hamburg, which, by order of 1 October 1984, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 9 (1) of Commission Regulation (EEC) No 2730/79, which

* Translated from the Dutch.

provides *inter alia* that export refunds are to be paid only if the product in question has left the geographical territory of the Community "unaltered', to be interpreted as meaning that an alteration in the product's presentation (such as repackaging into smaller units) entails forfeiture of the export refund, where such alteration brings the product within a different tariff subheading, even though the rate of refund applicable under the regulation fixing the export refunds is the same for both subheadings?

(2) If not, where the product's presentation is altered between the time of completion of customs export formalities and its departure from the territory of the Community, is the refund to be paid at the rate fixed in advance or at the rate applicable at the time of completion of customs export formalities?

(3) Are the interpretations requested in Questions 1 and 2, or one of them, to be applied to the relevant monetary compensatory amounts by an analogous interpretation of Commission Regulation (EEC) No 1371/81 of 19 May 1981, notwithstanding that the regulation, and in particular Article 7 (4) and Article 16 (2) thereof, lay down no express requirement that the product must be unaltered on exportation?'

2. Question 1

Metelmann maintains that Article 9 (1) of Regulation No 2730/79 does not contain a strict prohibition on altering the goods. In that regard it relies on Article 4 (5) of Commission Regulation (EEC) No 798/80 of 31 March 1980 laying down general rules on the advance payment of export refunds and positive monetary compensatory amounts in respect of agricultural products (Official Journal 1980, L 87, p. 42); that paragraph was added to Article 4 by Article 2 (1) of Commission Regulation (EEC) No 2674/80 of 17 October 1980 (Official Journal 1980, L 274, p. 11). In its view, Regulation No 798/80 permits a number of operations, including repackaging, to be carried out in respect of products under a customs-warehousing or free-zone procedure which are bound for exportation unaltered.

To begin with, it is clear that, apart from the question whether it is possible to apply by analogy such legislation which concerns specific cases, Article 4 (5) has been misinterpreted by Metelmann. That provision reads as follows:

'(5) Products or goods under a customs-warehousing or free-zone procedure may be there subjected, under the conditions fixed by the competent authorities, to the following operations:

...

(4) packing, unpacking, change of packings or repair of packings

In this case, however, not only was the milk powder repackaged but it was repackaged in different units. It is clear from the expression 'changement d'emballage' which is used in the French version of that provision that the operation carried out is not included, as the Commission also emphasized at the hearing. That strict interpretation is justified, as is clear from Council Directive 71/235/EEC of 21 June 1971 on the harmonization of the provisions laid down by law, regulation or administrative action relating to the usual forms of handling which may be carried out in customs warehouses and in free zones (Official Journal, English Special Edition 1971 (II), p. 398). Article 1 (8) of that directive is couched in the same terms as

Article 4 (5), namely, 'packing, unpacking, change of packings, repair of packings', but includes in addition 'decanting and simple transfer into other containers'.

That strict interpretation of Article 4 (5) of Regulation No 798/80 is necessary as a result of the need for supervision. As the Commission has pointed out, every year over two million operations of the kind at issue are carried out in the Community. Accordingly, one of the requirements of proper supervision is that the declarations attesting to the completion of customs formalities and the statements in Control Copy T5 must be identical. In practice it is impossible, in view of the massive scale on which such operations are carried out, to establish the identity of the goods otherwise than on the basis of the packaging and its dimensions. Viewed in those terms, such a requirement and the strict interpretation thereof must be regarded as being in conformity with the principle of proportionality.

The result of non-compliance with the condition embodied in the second indent of the first subparagraph of Article 9 (1), as thus interpreted, is that, in accordance with the wording of that provision, the export refund fixed in advance cannot be paid, particularly since the alteration of the goods entails their classification under another heading of the Common Customs Tariff. The same applies to the monetary compensatory amount fixed in advance. According to Article 2 of Commission Regulation (EEC) No 243/78 of 1 February 1978 providing for the advance fixing of monetary compensatory amounts (Official Journal 1978, L 37, p. 5), which was in force at the material time, those amounts may not be fixed in advance unless the levies or refunds applicable are also fixed in advance. Accordingly, forfeiture of the refund fixed in advance must clearly be taken to entail forfeiture of the monetary compensatory amount fixed in advance.

3. Question 2

In its second question the Finanzgericht seeks to ascertain whether Metelmann can still qualify for the export refund and the monetary compensatory amounts. The Commission maintains that, exceptionally, following the exportation of the goods, customs formalities can still be completed afresh. Article 3 of Regulation No 2730/79 does not rule out that possibility. The relevant date for calculating the rate at which the refund is to be paid must also be determined on the basis of the provision concerned. Unlike the Commission, however, I consider that it follows from Article 3 (2) of that regulation that the relevant date in the event of completion of the customs formalities anew in such a case is the 'date of export' as defined in that provision and not the date on which the goods have actually left the Community. For the sake of clarity I would add that neither that solution nor the solution advocated by the Commission precludes the possibility that the amount of the refund applicable may be higher than the original amount fixed in advance. In my view, therefore, Regulation No 2730/79 should be made more explicit with regard to the completion of customs formalities anew after the event. That solution must also be applied in relation to monetary compensatory amounts in view of the connection between those amounts and the export refund, as is clear from Article 5 (4) of Regulation (EEC) No 1372/81 (Official Journal 1981, L 138, p. 14) on conditions for the grant of monetary compensatory amounts.

Consequently, there is no need in my view to answer Question 3 separately since I have already considered it in connection with the first and second questions.

4. Conclusion

In conclusion, I suggest that the questions submitted by the Finanzgericht should be answered as follows:

(1) Article 9 (1) of Regulation No 2730/79 precludes the condition that goods must have left the geographical territory of the Community 'unaltered' from being interpreted as meaning that an alteration in the presentation (such as repackaging into smaller units) does not entail forfeiture of the export refund fixed in advance and, in connection therewith, of the monetary compensatory amount fixed in advance.

2) It is still possible, in exceptional cases, for customs formalities to be completed after the goods have left the territory of the Community. In that case, the export refunds and the monetary compensatory amounts applicable on the date of export must be applied.