OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 19 March 1987 *

Mr President,
Members of the Court,

A — Facts

1. The proceedings for a preliminary ruling on which I give my Opinion today are centred on the question how production refunds are to be deducted from export refunds if the export refunds were fixed in advance and the amount of the production refunds was changed in the period between advance fixing and actual export.

2. The plaintiffs in the main proceedings are engaged in the export and import of commodities that are subject to market organizations. As part of those activities they imported maize from the United States of America in order to process it into various products, in particular sorbitol, which are then exported to non-member countries.

3. In August and September of 1980 the plaintiffs exported sorbitol classified under heading 29.04 C and 38.19 T of the Common Customs Tariff to various non-member countries. For the basic product used — maize for the manufacture of starch classified under heading 10.05 B of the Common Customs Tariff — they had the rate of refund applicable on 30 July 1980 fixed in advance by the Bundesanstalt für landwirtschaftliche Marktordnung.

4. They subsequently applied to the Hauptzollamt (Principal Customs Office) Hamburg-Jonas, the defendant in the main proceedings, for the grant of export refunds at the rate of refund applicable on 30 July 1980. In calculating the export refunds the defendant deducted *inter alia* the production refund applying on 30 July 1980, namely 2.055 ECU per 100 kg.

5. The *plaintiffs challenge the amount of that deduction* since they take the view that the relevant rate of production refund is the rate applying in the months of export, August and September, namely only 1.723 ECU per 100 kg.

6. After lodging an objection which was unsuccessful, the plaintiffs appealed to the Finanzgericht (Finance Court) Hamburg, but their appeal was dismissed.

7. On an appeal on a point of law made against that judgment, the Bundesfinanzhof (Federal Finance Court) has submitted to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty the question whether the rate of export refund on sorbitol manufactured between *August and September* of 1980 and then exported to non-member countries was to be calculated according to the rate of production refund applicable in the month of exportation even if the rate of export refund applicable on 30 *July* 1980 had been fixed in advance.

8. The plaintiffs and the Commission have given their views on the question referred to the Court. In the result, they are agreed that the question must be answered in the affirmative. The plaintiffs' view is unqualified; in the Commission's view, the rate of production refund applicable in the month of exportation can be applied only if it is proved that only the lower rate of production refund was actually granted in respect of the commodities concerned.

* Translated from the German.

9. For the wording of the preliminary question, the reasons for the reference and the submissions of the parties I refer to the Report for the Hearing.

B — Opinion

(1) *The general rules on export refunds*

10. Article 16 of Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals [1] provides that under the regime governing trade with non-member countries, export refunds may be granted in order to enable the agricultural products concerned to be exported to non-member countries. As regards sorbitol classified under headings 29.04 C and 38.19 T of the Common Customs Tariff and mentioned in Annex B to Regulation No 2727/75, the export refunds were to be fixed in the period in question (1 August to 30 September 1980) in accordance with Regulation (EEC) No 2682/72 of the Council of 12 December 1972 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. [2] Article 4 (3) of that regulation provides that, in fixing the rate of the refund, account is to be taken, where appropriate, of production refunds, aids or other measures having equivalent effect applicable to the basic products or to assimilated products. Article 5 (1) of the regulation provides that the rate of refund applying on the day on which the goods are exported is to be applied; however, Article 5 (2) provides for a system of fixing the rate of the refund in advance and for the possibility of adjusting and correcting the refund.

11. By Regulations No 1681/80 of 27 June 1980, [3] No 2050/80 of 31 July 1980 [4] and No 2282/80 of 29 August 1980, [5] the Commission of the European Communities had fixed the rates of export refund applicable in the months of July, August and September 1980 to certain cereal and rice products exported in the form of goods not covered by Annex II to the Treaty at respectively 9.798 ECU, 8.575 ECU and 7.262 ECU per 100 kg for maize. According to the footnotes in the aforesaid regulations, the amounts stated were to be reduced by the production refund of respectively 2.055 ECU, 1.723 ECU and again 1.723 ECU per 100 kg. The actual refund still to be paid for the purposes of Article 4 (3) of Regulation No 2682/72 was therefore 7.743 ECU per 100 kg of maize in July, 6.852 ECU in August and 5.539 ECU in September.

(2) *The application of Regulation No 1681/80*

12. The peculiarity of this case is that the date of the advance fixing of the export refund (30 July 1980) and the date of exportation (August and September 1980) are different and that in the interval the production refund and the export refund were reduced. This case is unquestionably not covered by Commission Regulation No 1681/80.

13. Regulation No 1681/80 only lays down the rates of refund which applied in July 1980. It is silent about which rates of refund

1 — Official Journal 1975, L 281, p. 1.

2 — Official Journal, English Special Edition 1972 (9-28 December), p. 42.

3 — Official Journal 1980, L 166, p. 41.

4 — Official Journal 1980, L 200, p. 37.

5 — Official Journal 1980, L 228, p. 38.

must be applied where the circumstances qualifying for the grant of export refunds on the one hand and production refunds on the other occur in different months.

14. It may not be assumed that Regulation No 1681/80 covered, at least tacitly, the case of advance fixing of the export refund since the Commission itself has admitted that this case was not envisaged when the regulation was enacted.

15. Regulation No 1681/80 is not therefore applicable to cases in which export refunds are fixed in advance. It remains to consider whether a solution can be found with the aid of the general rules on the granting of export refunds.

(3) *The applicability of general rules on the granting of export refunds*

16. Regulation No 2682/72 of the Council provides in Article 4 (3) that in fixing the rate of the refund, account is to be taken of *inter alia* production refunds. It provides in Article 5 (1) that the rate of refund applying on the day on which the goods are exported is to be applied; however, in Article 5 (2) it allows the rate of refund to be fixed in advance.

17. All in all it might be deduced from those provisions that in the case of the advance fixing of the refund it is not only the general rate of export refund within the meaning of Article 4 (2) which is fixed at the stated time but also the rate of production refund applying on the same date, that is to say the refund provided for in Article 4 (3). Thus the application of Articles 4 and 5 of Regulation No 2682/72 would produce a result which would be identical to that of Commission Regulation No 1681/80 (which is not directly applicable in this case).

18. (a) The plaintiffs oppose that interpretation of Regulation No 2682/72. In their view, the advance fixing of the refund consists of the fixing of the export refund only and not of the rate of production refund.

19. The Commission, on the other hand, appears to assume that in the case of advance fixing there is a single fixing of the rate of both the export refund and the production refund when it merely refers to the possibility of taking into account changes in the amount of the production refund on the basis of the fifth subparagraph of Article 5 (2) of Regulation No 2682/72.

20. (b) The proposition that when the rate of refund is fixed in advance all those elements of the refund for which no express possibility of correction or adjustment is provided are fixed cannot in principle be rejected. Such an interpretation would accord with the aim of advance fixing, which is to enable traders some time before exportation to include the export refund in their price calculation as a non-variable component. Traders are thus offered the possibility — of which they may or may not avail themselves — of establishing their prices under stable conditions, which, however, are not necessarily the most favourable conditions.

21. However, some doubt is cast on that possible interpretation by the wording of Regulation No 2682/72 which does not

make clear how the term 'rate of refund' is to be understood.

22. Whilst Article 4 (2) of the regulation assumes an unreduced rate of export refund, Article 4 (3) refers to the rate of refund reduced by the production refund or other aid. However, it is not clear from the regulation which of those two rates of refund is dealt with in Article 5 (2), which regulates the advance fixing of the rate of refund.

23. Since such ambiguities in the wording of legal provisions should not penalize traders relying on them, the inclination is to assume that the term 'rate of refund' used in Article 5 (2) of Regulation No 2682/72 means the unreduced rate of export refund within the meaning of Article 4 (2) for which any production refund has not yet been taken into account.

24. That conclusion is supported primarily by the fact that by Article 6 of Council Regulation (EEC) No 1009/86 of 25 March 1986 establishing general rules applying to *production refunds* in the cereals and rice sector[6] the Commission was empowered for the first time to adopt, following the management committee procedure laid down in Article 26 of Regulation No 2727/75, detailed rules on the possibility of production refunds being fixed in advance. Since that possibility became available in addition to the possibility provided for in Article 5 (2) of Council Regulation No 3035/80 of 11 November 1980,[7] which succeeded Regulation No 2682/72, there are grounds for subscribing to the plaintiffs' argument that in 1980 the Community system of advance fixing related exclusively to export refunds within the meaning of Article 4 (2) of Regulation No 2682/72 and not to production refunds or to the reduced refund under Article 4 (3) of Regulation No 2682/72.

25. An independent possibility of advance fixing of production refunds would in fact have been unnecessary if that kind of advance fixing had already been included in the general rules on the advance fixing of export refunds.

(4) *Relevant date for the fixing of the production refund*

26. Since the advance fixing of the export refund still does not therefore include advance fixing of the production refund, the question to be considered is which rate of production refund is to be used for the reduction of the export refund.

27. (a) Relying on Article 3 (1) (b) 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[8] the plaintiffs take the view that the rate of production refund to be applied is the rate applicable on the day of exportation. They claim that this view is confirmed by Article 4 (3) of Regulation No 2682/72, according to which, in the fixing of the rate of the refund, account is to be taken of the production refunds *applicable* in all Member States to the products

6 — Official Journal 1986, L 94, p. 6.

7 — Official Journal 1980, L 323, p. 27.

8 — Official Journal 1979, L 317, p. 1.

concerned. The plaintiffs see further support for their view in the rules laid down in the first and second sentences of the fifth subparagraph of Article 5 (2) of Regulation No 2682/72 since the reduction of the rate of the production refund represents a measure which has altered relevant existing provisions so that the rate of refund must be adjusted.

28. Nor does the Commission exclude the possibility of applying the rules in the fifth subparagraph of Article 5 (2) of Regulation No 2682/72 in order to take account of the difference between the rates of production refund applicable at the time. An adjustment pursuant to the second sentence of the aforesaid provision would enter into consideration if the plaintiffs in the main proceedings could prove that they actually had to pay a higher price for the quantities which they exported because they were not granted the production refund in force in July 1980.

29. (b) It must be pointed out first of all that, according to the view put forward here, the previous fixing of the rate of refund under Article 5 (2) of Regulation No 2682/72 covers only the unreduced rate of refund within the meaning of Article 4 (2) of the aforesaid regulation.

30. As regards the rate of production refund, the general rules in Article 4 (3) of the regulation continue to apply, that is to say the production refunds *applicable* in all Member States to basic products are taken into account. That provision therefore requires the 'applicable'refunds to be taken into account, that is to say refunds which the processor has actually received. Since according to Article 5 (2) of Commission Regulation No 1570/78 of 4 July 1978,[9] the rate of refund on the day of processing is to be paid, only the rate of production refund actually paid can be relevant in taking account of the production refund in order to calculate the rate of export refund.

31. For the purposes of the reduction of the rate of export refund, the amount of the production refund actually paid is therefore the relevant amount; that rate is not determined by the date of advance fixing or the date of exportation of the processed goods but by the day of processing.

32. The fact that that conclusion is economically logical is also in its favour. From the total amount of the export refund within the meaning of Article 4 (2) of Regulation No 2682/72 only the production refund already granted is deducted, no more, no less. This takes account of the aim of Article 4 (3) of the aforesaid regulation, which is to avoid the overlapping of aid.

33. Recourse to the rules in the fifth subparagraph of Article 5 (2) of Regulation No 2682/72, which concern the adjustment of the rate of refund fixed in advance, is not, however, possible. Since the advance fixing does not include the amount of the rate of production refund, a change in that rate of refund cannot warrant an adjustment. Besides, it seems very doubtful whether the rules in that subparagraph

9 — Commission Regulation (EEC) No 1570/78 of 4 July 1978 laying down detailed rules for the application of Regulation (EEC) No 2742/75 as regards production refunds on starches and repealing Regulation (EEC) No 2026/75, Official Journal 1978, L 185, p. 22.

could be at all relevant since they relate to measures for altering the prices of the basic products. If the production refund, which is a processing aid, is a cost component, this component does not relate to the price of the basic product but to the processed product. A change in the rate of production refund cannot therefore justify the application of the fifth subparagraph of Article 5 (2) of Regulation No 2682/72.

C — Conclusion

34. For those reasons I suggest that the Court should answer the question submitted to it by the Bundesfinanzhof as follows.

35. 'The rate of export refund on sorbitol classified under headings 29.04 C and 38.19 T of the Common Customs Tariff and manufactured in the customs area between August and September of 1980 from maize classified under tariff heading 10.05 B and then exported to non-member countries was to be calculated according to the rate of production refund applicable at the time of processing even if the rate of export refund applicable on 30 July 1980 had been fixed in advance'.