**that it does not refer to trade forming part of German internal trade within the meaning of the Protocol on German Internal Trade and connected problems of 25 March 1957.**

Kutscher Mertens de Wilmars Mackenzie Stuart Pescatore Sørensen

O'Keeffe Bosco Touffait Koopmans

Delivered in open court in Luxembourg on 27 September 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of First Chamber, acting as President

## OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 13 SEPTEMBER 1979 [1]

*Mr President,*
*Members of the Court,*

Article 9 (1) of Regulation No 123/67/EEC of the Council of 13 June 1967 on the common organization of the market in poultry-meat (Official Journal, English Special Edition 1967, p. 63) provides that to the extent necessary to enable the products covered by the common organization of the market to be exported on the basis of prices for those products on the world market "the difference between those prices and prices within the Community may be covered by an export refund". Pursuant to paragraph (2) of that provision the refund "may be varied according to use or destination".

It is further provided by Article 6 (1) of Regulation No 178/67/EEC of the Council of 27 June 1967 laying down general rules for granting export refunds on poultry-meat and criteria for fixing the amount of such refunds (Official Journal, English Special Edition 1967, p. 144) that the refund shall be paid upon proof, *inter alia*, "that the products have been exported from the Community". Paragraph (2) provides that where Article 4 of the regulation applies, under which the refund may be varied according to the destination of the products "where the world market situation or the specific requirements of certain markets make this necessary", the refund shall be paid under the conditions laid down in paragraph (1), provided it is

1 — Translated from the German.

proved "that the product has reached the destination for which the refund was fixed".

These provisions are complemented, finally, by Regulation No 1041/67/EEC of the Commission of 21 December 1967 on detailed rules for the application of export refunds on products subject to a single price system (Official Journal, English Special Edition 1967, p. 323), Article 3 of which provides that the refund shall be paid only upon proof, *inter alia*, that the product "has left the geographical territory of the Community unaltered". Under Article 4 the Member States may, in certain cases, "by reason of difference between the rate of the refund and that of the levy, or by reason of the nature of the exported products or of export markets, ... require, as a condition for payment of the refund, proof not only that the product has left the geographical territory of the Community, but also that the product in question has been imported into a third country and, where appropriate, proof of the conditions under which it was imported". Article 8, as amended by Regulation (EEC) No 499/69 (Official Journal, English Special Edition 1969 (I), p. 114) provides that the proof that the products have entered a certain country is to be submitted by the applicant in the form of certain documents certifying arrival in the country of destination or for the use in question. In addition "the competent national authorities may recognize other documents as equivalent and may require additional forms of proof".

Lastly I should mention Regulation No 648/73 of the Commission of 1 March 1973 laying down detailed rules for the application of monetary compensatory amounts (Official Journal L 64 of 9 March 1973, p. 1), Article 7 of which provides that in trade with non-member countries "provisions concerning the granting of export refunds and the charging of customs duties and levies shall apply to monetary compensatory amounts".

The provisions are relevant to a case pending in the Bundesfinanzhof brought by Geflügelschlachterei Freystadt GmbH & Co. KG against the Hauptzollamt Hamburg-Jonas (hereinafter referred to as "the Hauptzollamt") concerning the repayment of export refunds and monetary compensatory amounts.

In the summer of 1973 the applicant sold approximately 1 000 tonnes of frozen broiling chickens to an Austrian company acting on behalf of a company registered in Liechtenstein, which the latter re-sold to a company established in East Berlin. The broiling chickens fell within the common organization of the market for poultry-meat under tariff subheading 02.02 A I b, originated in the Community and were in free circulation in the Federal Republic of Germany; they were cleared for export by the German customs office at the Austrian border and immediately afterwards forwarded in transit through Austria and Czechoslovakia under the accompanying document procedure, without being given customs clearance for release into free circulation, and delivered directly without being transhipped to customers in the German Democratic Republic. Under the Commission regulations in force at the time of export the rate of export refunds was the same for all countries of destination.

Pursuant to an application by the plaintiff the Hauptzollamt fixed the

amount of the export refund at a total of DM 33 127.72 and the monetary compensatory amounts at DM 10 259.11 and paid out those amounts.

By a decision of 24 July 1975 the Hauptzollamt reclaimed the export refund and the monetary compensatory amounts on the ground that the goods had entered the German Democratic Republic. In its view since the German Democratic Republic is a non-member country within the meaning of the regulations on the common agricultural policy, the export refunds should not have been paid. After an unsuccessful objection the applicant lodged an appeal to the Finanzgericht [Finance Court] Hamburg, which rejected the complaint in a decision delivered on 8 March 1977 on the following grounds: according to the relevant provisions of Community law a condition of the refund is that the goods have been given customs clearance for release into free circulation in a non-member country. This was done neither in Austria nor in Czechoslovakia however. According to the Protocol on German Internal Trade and connected problems which is annexed to the EEC Treaty, and the provisions of national law contained in the Grundgesetz [Basic Law] as interpreted by the Bundesverfassungsgericht [Federal Constitutional Court], an interpretation which is binding upon the courts of the Federal Republic of Germany (see judgment of 31 July 1973 concerning the Basic Treaty between the Federal Republic of Germany and the German Democratic Republic, Sammlung der Entscheidungen des Bundesverfassungsgericht [Federal Constitutional Court Decisions] vol. 36, p. 1 *et seq.*) export refunds and monetary compensatory amounts are not granted in respect of the movement of goods from free circulation within the territory of the Federal Republic of Germany to the territory of the German Democratic Republic, if the goods have not been put into free circulation in a non-member country prior to reaching the territory of the German Democratic Republic. The relevant provision of the above-mentioned Protocol runs as follows:

"Since trade between the German territories subject to the Basic Law for the Federal Republic of Germany and the German territories in which the Basic Law does not apply is part of German internal trade, the application of this Treaty in Germany requires no change in the treatment currently accorded this trade."

In the appeal on a point of law against this decision lodged by the plaintiff in the Bundesfinanzhof it puts forward the view that according to Articles 4 and 6 of Regulation No 176/67 of the Council and Articles 3, 4 and 8 of Regulation No 1041/67 of the Commission, in cases where, as in the present instance, uniform refunds and monetary amounts have been fixed for all non-member countries, proof of importation into a specific non-member country cannot be required. The refunds and monetary compensatory amounts must, on the contrary, be paid upon proof only that the products have left the geographical territory of the Community. However, even if, contrary to that view, proof of importation into a non-member country must be furnished, this does not in any case mean that the goods must be given customs clearance for release into free circulation at their destination. The further transport of the goods into the German Democratic Republic without being put into free circulation in Austria and Czechoslovakia does not, in the plaintiff's view, jeopardize its claims to payment of the refunds and the monetary compensatory amounts, as the Protocol on German Internal Trade does not apply to deliveries which are carried out via third countries and with the intervention of contracting parties resident in those countries.

The defendant, the Hauptzollamt, holds the opposite view, namely that the conditions for granting a refund were

not fulfilled. The Federal Minister of Finance, who intervened in the proceedings, is also of the opinion that as importation into a non-member country is a substantive condition for entitlement to an export refund, the Member States may, under Article 4 (1) of Regulation No 1041/67, require, in addition to proof that a product has left the territory of the Community, proof that the product has been put into free circulation in a non-member country. The consignments in question were not, however, imported into a non-member country after leaving the geographical territory of the Community, for the German Democratic Republic is not to be treated as such according to the Protocol on German Internal Trade.

By a decision of 9 January 1979 the Seventh Senate of the Bundesfinanzhof stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1. Does the concept of exportation within the meaning of Regulation No 123/67/EEC (especially Article 9), Regulation No 176/67/EEC (especially Articles 4 and 6) and Regulation No 1041/67/EEC (especially Articles 3 (1), 4 (1) and 8) presuppose that the goods were or would be put into free circulation at their destination even if the rates of refund for the goods are not varied according to the destinations?

2. If the answer to Question 1 is in the affirmative:

   must Article 9 of Regulation No 123/67/EEC, Article 6 of Regulation No 176/67/EEC and Articles 4 and 8 of Regulation No 1041/67/EEC in conjunction with the Protocol on German Internal Trade and connected problems be interpreted as meaning that goods coming within Article 1 of Regulation No 123/67/EEC which, after being sold to a contracting party outside the Community, having been in free circulation in the Community, left the geographical territory of the Community on 28 and 30 August 1973, were delivered to the German Democratic Republic via the territory of non-member countries without being transhipped and remaining under customs control and were declared for home use in that country, benefit from refunds on exports to non-member countries?

My opinion on these questions is as follows:

I — Before considering the questions in detail I should like to make a few remarks on the formulation of the questions. I think this is necessary because the ambit and the content of both questions, but especially the first, have been interpreted differently by those taking part in the proceedings.

Thus the plaintiff is of the opinion that the first question put by the Bundesfinanzhof concerns only the interpretation of the concept of exportation, within the meaning of the regulations in question, pointing out that there was no direct contractual relationship between undertakings in the Federal Republic of Germany and in the German Democratic Republic. This is a general problem of Community law which applies to all exports from all Member States and has nothing to do with the status of the German Democratic Republic. What the Bundesfinanzhof wants to know, in fact, is whether the concept of exportation covers not merely leaving the territory of the Community but also the process of

importation into the country of destination. If this question is answered in the negative the second question is no longer pertinent.

The Commission, on the other hand, points out that the first question, which is formulated in very general terms and touches on a fundamental problem in the general body of law governing refunds, goes far beyond what is required for a decision in the case in question. For in view of the Protocol on German Internal Trade the legal status of exports of agricultural products from the Federal Republic of Germany into the German Democratic Republic is to be regarded as if refunds have been fixed only in relation to non-member countries with the exception of the German Democratic Republic. Consequently only the reply to the second question will be decisive in the main action, and that reply can be given independently of the first question.

Lastly, the Federal Government is of the opinion that quite apart from German internal trade, the first question concerns whether and under what conditions there is entitlement to a refund as such, with regard to the fact of exportation within the meaning of the rules of Community law. In that case the specific problem of German internal trade in relation to transactions via intermediaries ("Streckengeschäften") need be examined only in the second question.

I share the view of the plaintiff and the Federal Government that the Court of Justice must tackle the first question. In that question the Bundesfinanzhof is not merely seeking an interpretation of the concept of exportation, as the plaintiff thinks, but is asking in fact — as the Federal Government rightly remarks — what the *prerequisites for entitlement* to an export refund are. This is evident from the question itself, in which it is asked whether exportation within the meaning of the regulations in question presupposes, even if the rates of refund are uniform, "that the goods were or would be put into free circulation at their destination". In addition the Bundesfinanzhof expressly emphasizes in its order that a ruling on the legality of the decision ordering repayment of the refunds depends primarily on the interpretation of Community law as to "whether the conditions for the grant of the export refund and monetary compensatory amounts were fulfilled".

It is not disputed, however, that a condition for every claim to export refunds is that the goods have been exported out of the Community. Accordingly the only question is whether the factual requirements of "exportation" within the meaning of the provisions governing refunds are satisfied solely by the goods in question being moved out of the geographical territory of the Community, or if exportation within the meaning of the provisions governing refunds does not rather presuppose that the goods in question have been put into free circulation in the country of destination.

Contrary to the Commission's opinion it is on the answer to that question that the decision in the main action turns. It is not disputed that the Protocol on German Internal Trade excludes the movement of goods between the Federal Republic of Germany and the German Democratic Republic from the scope of the provisions of Community law (see also the decision of the Court of Justice of 1 October 1974, Case 14/74 *Norddeutsches Vieh- und Fleischkontor GmbH* v *Hauptzollamt Hamburg-Jonas* [1974] 2 ECR 899). For the Protocol to apply, however, the disputed events must fall within the ambit of German internal trade. Since, pursuant to Article 239 of

the EEC Treaty, the Protocol forms an integral part of the Treaty, it is, like the Treaty itself, subject to interpretation by the Court of Justice which has the power in particular to determine the limits of its application under Community law. Transactions no longer constitute trade between the Federal Republic of Germany and the German Democratic Republic within the meaning of the Protocol — so much is already clear — if the factual requirements for "exportation" within the meaning of the provisions of Community law on refunds are satisfied and the goods have been forwarded to the German Democratic Republic *after the entitlement to a refund has arisen.* The knowledge of the exporter and the contractual relationships are not relevant in this connexion, for exportation constitutes an *objective requirement* for entitlement to a refund. Accordingly I shall now consider the criterion for entitlement to the grant of export refunds within the meaning of Regulation No 123/67.

This should be distinguished from the second problem which also arises from the questions formulated, whether in certain cases even where there is a uniform refund system proof may be required that the goods in question have reached the destination for which the refund was fixed.

Finally, the second question put by the Bundesfinanzhof must also be considered.

II — As to the *first question* on the conditions for entitlement to a refund the plaintiff is of the opinion that the concept of exportation does *not* presuppose that the goods must have been put into free circulation at their destination, independently of whether varying rates of refund have been fixed or not. The relevant provisions of Community law show that the term export is used therein in its normal meaning and in accordance with general usage. Thus the concept of export within the meaning of Article 9 of Regulation No 123/67 and Article 1 of Regulation No 176/67 amounts to physically leaving the geographical territory of the Community. The relevant provisions also draw a clear distinction between events which touch on the territory of the Community and events which extend to the territory of non-member countries. The concept of "export" is, the plaintiff continues, used solely and exclusively in connexion with the territory of the Community, as may be seen in Article 6 (1) of Regulation No 176/67, in the third recital in the preamble to Regulation No 1041/67 and in Article 3 of that regulation. Those provisions that deal with the territory of non-member countries however, for example the ninth recital in the preamble to Regulation No 1041/67 and Article 4 (1) and Article 8 (1) of that regulation, refer not to exportation from the Community but to "arrival", "reaching" or "importation". Even if, contrary to the plaintiff's view entitlement to refunds is made dependent not on exportation from the Community but on importation into a non-member country, that still does not mean that in every case importation into the country of destination must be taken to imply release into free circulation. On the contrary, Article 4 (1) and Article 8 (1) of Regulation No 1401/67 show that the regulation envisaged different import procedures, of which release into free circulation represents only one possibility.

1. The attempt of the plaintiff in the main action to elicit criteria for the meaning of the term exportation from the provisions cited above does not satisfy me however. In fact, as the Federal Government and the Commission rightly observe, all the provisions referred to from which the plaintiff purports to deduce that entitlement to refunds arises as soon as the goods leave the geographical territory of the Community, concern merely detailed rules for payment, which presuppose, but do not found, the existence of substantive entitlement to refunds. The above-mentioned provisions state merely that *payment* of the refunds may only be applied for when the goods have left the territory of the Community. None of the regulations to which reference has been made affords a clear definition of the concept of exportation underlying the relevant provisions relating to refunds.

In order to determine the extent of the concept, therefore, we must return to the general purpose and aims of the rules governing refunds. In my opinion delivered on 19 May 1976 in Case 125/75 *(Milch-, Fett- und Eier-Kontor GmbH* v *Hauptzollamt Hamburg-Jonas,* [1976] 1 ECR 785) I have already made some general observations on the tenor and purpose of the rules governing refunds in the organization of the market in milk and milk products, which is comparable in this respect (Regulation (EEC) No 804/68 of the Council of 27 June 1968, Official Journal, English Special Edition 1968 (I), p. 176). The object of the system of Community refunds is to make Community agricultural products which are subject to the common price policy competitive on the markets in non-member countries and to protect their marketing potential there by making up the difference between prices on the world market and those on the Community's internal market. That is apparent as far as the present case is concerned from Article 9 of Regulation No 123/67 and the eighth recital in the preamble to the regulation, which states that the difference between prices on the world market and prices within the Community for products subject to an organization of the market shall be covered by means of a refund in order to enable those products to be exported. Community products will, however, only have equal competitive opportunities for participation in trade in the markets of non-member countries if, after being released into free circulation, they can be traded in on the *markets* of non-member countries in the same way as the products of those non-member countries themselves. Thus the objective of the export refunds can only be achieved if the Community products, after having been released into free circulation, do in fact form the subject of economic transactions in non-member countries.

2. Further proof that substantive entitlement to a refund arises only once the exported goods have been released into free circulation in a non-member country may be found in the way in which the refunds are calculated. It is obvious that the amount of the refund cannot, of course, depend on any abstract price, but only on prices actually obtaining on the markets, on the one hand on the Community market and on the other in international trade. That the amount at which the export refunds are fixed depends on the actual conditions prevailing on the markets of the non-member countries is clear in our case in Article 3 (2) of Regulation No 176/67, which mentions prices ruling on the markets of non-member countries, the

most favourable import prices in the importing non-member countries, producer prices recorded in exporting non-member countries and free-at-Community-frontier offer prices as the relevant criteria for determining the prices on the world market.

It is clear from those provisions that entitlement to a refund does not arise definitively on completion of the export formalities, but that the goods must have reached the market in a non-member country. Any other interpretation of the law would — as the Federal Government and the Commission also observe — render inconceivable a provision such as Article 4 of Regulation No 1041/67, which states that in certain cases, by reason of, *inter alia*, the export markets, Member States may require, as a condition for payment of the refund, proof not only that the product has left the geographical territory of the Community, but also "that the product in question has been *imported* into a third country and, where appropriate, proof of the conditions under which it was imported". If the entitlement to a refund arose as soon as the customs export requirements were fulfilled, the Member States would be neither entitled nor able to require the above-mentioned additional proof for granting the refund. In many cases however additional proof of this kind can be required only when the goods have already been exported, because only then does some doubt as to the actual destination of the goods arise.

In the light of what has been said about the tenor and purpose of the refund rules, "imported" can only refer to marketing. Therefore there must be a requirement that the goods in question have been in circulation on the relevant market and have been subject to the rules of the market, on the basis of which the rate of refund was fixed, irrespective of whether the system consists of varied or uniform refunds.

3. The plaintiff's attempt to counter that result by reference to Article 8 of Regulation No 1041/67 is unsuccessful. As we have seen, under Article 6 (1) of Regulation No 176/67 and the first of Article 3 (1) of Regulation No 1041/67 *proof* that the goods have left the territory of the Community is sufficient as a rule where there is a uniform refund system. In this respect no special proof of importation is necessary because in normal trading practice it may be assumed that after leaving the territory of the Community the goods have at least arrived in one non-member country or other and consequently proof of importation would amount to an unnecessary burden on trade. Where the refund rates vary according to destination, however, the position is different, for in this case there is a risk of abuse. For that reason the above-mentioned Article 8 provides that where the varied refunds are provided "arrival in the country of destination" must be certified by presentation of certain documents. It is obvious that the Community legislature was motivated principally by practical considerations, in order to burden trade as little as possible, in requiring only the presentation of documents which certify arrival in a country of destination. This is confirmed by the ninth recital in the preamble to Regulation No 1041/67, which says:

"since uniform methods of proof cannot at present be laid down because of the different rules applied by importing third

countries, documents should be accepted which establish beyond doubt, while interfering as little as possible with trade, that the exported goods have reached their destination".

At the same time, however, under Article 8 the competent national authorities are empowered to require "additional forms of proof". The use of that term must, as I have already explained in my opinion on Case 125/75, refer to marketing. It may thus also be inferred from Article 8 that where the authorities responsible for refunds in the Member States have doubts as to whether the goods were marketed in the territory of destination they may instigate special inquiries and require additional proof that the goods have been put into free circulation.

4. It is likewise quite clear that the arrival or importation of goods in a non-member country is to be considered as equivalent to release into free circulation from Commission Regulation No 192/75 of 17 January 1975 (Official Journal L 25 of 31 January 1975, p. 1), which has replaced Regulation No 1041/67. Article 11 of that regulation, which corresponds to Article 8 of Regulation No 1041/67, states that a product shall be considered to have been imported "when the customs formalities for entry into free circulation in the third country concerned have been completed".

5. Lastly, the Court has also ruled on the meaning of the concept of exportation in my opinion in Cases 6/71 *(Rheinmühlen Düsseldorf* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* judgment of 27 October 1971, [1971] 2 ECR 823) and 125/75 *(Milch-, Fett- und Eier-Kontor GmbH* v *Hauptzollamt Hamburg-Jonas,* judgment of 2 June 1976, [1976] 1 ECR 771). With reference to Article 20 (2) of Regulation No 19 of the Council of 4 April 1962 (Journal Officiel No 30 of 20 April 1962, p. 933), which contains rules corresponding to Article 9 of Regulation No 123/67, with which we are here concerned, and taking account of the purpose of the export refunds, the Court decided in Case 6/71 that the term "exports to third countries" presupposes release into free circulation in that country. In accordance with my observations on the tenor and purpose of the refund rules the statements made in that case must also be relevant in this case, irrespective of the fact that the earlier case concerned a system of varied refunds and the definition of the expression "exports to third countries". In Case 125/75 the Court went on to declare that Article 4 (1) of Regulation No 1041/67 is a provision of general application and "applies in all cases where there is a refund, *even if* the refund has been varied according to the destination". The said provision must be interpreted as meaning that where the refund is varied entitlement to a refund presupposes that the goods have been given customs clearance and put into free circulation at the destination. As we have seen this statement must, in view of the objectives of export refunds, apply equally to a system of uniform refunds. In both cases goods were forwarded through the sovereign territory of States to be put into free circulation only in another State. In both cases, the Court's decision on the question whether actual exportation had occurred within the meaning of the Community refund rules

was based not on departure from the geographical territory of the Community, but on the place of origin of the goods delivered and the country in which they were finally put into free circulation.

It is the same in the present case, where the goods were simply forwarded in transit through Austria and Czechoslovakia without being transhipped, prior to being put into free circulation in the German Democratic Republic.

6. The view that the criteria are importation and marketing cannot, moreover, be undermined by the plaintiff's contention that by passing on the export subsidies in the form of corresponding price reductions to the undertakings in Austria or Liechtenstein it had fulfilled the purpose of the refund rules, that is to say, to guarantee the disposal of products by means of measures favouring exports. To accept that argument would mean indeed that there would be a strong inducement to obtain refunds for goods originating in the Federal Republic of Germany and put into free circulation in the German Democratic Republic by shipping them via a non-member country. That is precisely what should be avoided, however, pursuant to the Protocol on German Internal Trade, which, as we know, expressly excludes the application of Community law to trade between the two parts of Germany. It would mean that Community law would provide refunds for exports of agricultural products from the Federal Republic of Germany into the German Democratic Republic, whereas no levy would be applied to exports from the German Democratic Republic into the Federal Republic of Germany. This would prejudice not only the equilibrium of German internal trade in the agricultural sector but also the balance of trade between the Community and the German Democratic Republic.

III — I can now turn to the other question, whether *proof* that the goods have been put into free circulation in the non-member country may also be required where there is a system of uniform refunds.

As we have seen the fact of simply transporting the goods to Austria, independently of whether the refunds at that time were uniform or varied, cannot found entitlement to a refund. Consequently even these general considerations are sufficient to show that Member States may make payment of the refund subject to proof that the goods have been put into free circulation in a non-member country even where a system of uniform refunds applies.

To counter that argument the plaintiff relies principally on Article 6 (1) of Regulation No 176/67 and Article 3 (1) of Regulation No 1041/67 according to which only proof of exportation can be required if the refunds are uniform. Only in the case of a system of varied refunds can proof be required, in its opinion, that the goods have reached the country of destination, and this is shown, in particular, by Article 6 (2) of Regulation No 176/67 and Articles 4 (1) and 8 (1) of Regulation No 1041/67.

On the other hand, I should like to remind the Court in the first place that the provisions invoked by the plaintiff in this connexion, which are set out above

at II (1), relate solely to the question of detailed rules for payment. At the same time, however, under Article 4 of Regulation No 1041/67 Member States may "in certain cases ... by reason of the nature of the exported products or of export markets, ... require, as a condition for payment of the refund, proof not only that the product has left the geographical territory of the Community, but also that the product in question has been imported into a third country and, where appropriate, proof of the conditions under which it was imported". As the Court of Justice expressly ruled in its judgment in Case 125/75, cited above, that provision is "a *provision of general application* and applies in *all* cases where there is a refund, *even if* the refund has been varied according to the destination". It that case, which concerned a system of varied refunds, the Court of Justice went on to confirm that according to that provision proof may be required that the goods "have been cleared through customs and put into free circulation at the destination".

I think that this statement must also apply where a system of uniform refunds applies. For the tenor and purpose of the provision, as is evident from the preamble to the regulation, are to prevent abuses which cannot be excluded under the provisions governing refunds especially where the refunds vary. This is quite obvious from the reference in Article 4 to "export markets". The risk of abuse "by reason of the nature ... of export markets" is equally present however where goods from the Federal Republic of Germany destined for the German Democratic Republic are delivered in the German Democratic Republic after having been transported via a non-member country without having been put into free circulation there. The special feature of that "export market" as regards goods from the Federal Republic of Germany according to the Protocol on German Internal Trade, is that no refunds are payable under Community law, whereas if the kind of transaction through intermediaries with which we are concerned in this case were permitted, the goods would nevertheless benefit from a refund, thereby circumventing the Protocol. Contrary to the plaintiff's view the position would be quite different if the goods had been forwarded to the German Democratic Republic after being put on the market in the normal way in the non-member country, for then customs duties or other charges on exports would have been encountered.

So even if the refunds are uniform, legitimate doubts may arise as to the correct way to apply the rules governing refunds. Nevertheless, in view of the wording and the logic of the refund system and the terms of the judgment in Case 125/75 Article 4 should be interpreted, as we have seen, as meaning that in general, where doubts are present, and are supported by appropriate indications, concerning the correct application of the rules governing refunds, *proof of importation* into another country, meaning in this case proof of release into free circulation, may be required. It also means that further investigations into the circumstances of the importation may be undertaken and the relevant proof may be required if, contrary to the normal circumstances, it is thought that an importation is not undertaken for the purpose of marketing the goods, irrespective of whether the refunds are uniform or not. That being

so, I do not think that we need consider further the solution suggested by the Commission, that the Protocol on German Internal Trade justifies analogous application of the system of non-uniform refunds, a solution which — let it be said — is, in my opinion, quite feasible.

Interpreted in this way, Article 4 of Regulation No 1041/67 is also not in conflict, as the plaintiff thinks, with Regulation No 176/67 of the Council. Article 6 (3) of that regulation provides expressly that additional provisions may be adopted by the Commission in accordance with the Management Committee procedure. In fact, however, paragraph (3) does not concern the varied refunds governed by paragraph (2) of that article, but uniform refunds, so that apart from the normal conditions for the payment of refunds as laid down in paragraph (1), other conditions may be imposed, a power which was exercised by the Commission when it adopted Article 4 of Regulation No 1041/67.

IV — As to the *second question* which has been put by the Bundesfinanzhof, the plaintiff is of the opinion that this no longer needs to be examined because the Protocol on German Internal Trade is not applicable to transactions of this type. In principle the German Democratic Republic is to be treated by the Community as a non-member country, for under the Protocol a different system is to apply only in respect of the treatment currently accorded to German internal trade. As it creates an exception, however, the Protocol must be interpreted strictly. If clearance into free circulation is required to found a claim for refunds, corresponding importation into the German Democratic Republic must be held to be sufficient.

The Commission has pointed out, on the other hand, that the plaintiff could only have become entitled to an export refund if the Community provisions on refunds were applicable and the plaintiff had fulfilled all the conditions of entitlement laid down therein. Whether Community law is applicable in fact depends, pursuant to the Protocol on German Internal Trade, on whether the events in question are to be counted as being part of German internal trade. However, it is not necessary to examine this question in detail because the plaintiff has not in any case fulfilled the conditions imposed by Community law for entitlement to refunds. The Commission further submits that it may be inferred from the Protocol on German Internal Trade, which is an integral part of the EEC Treaty, that exports of agricultural products from the Federal Republic of Germany are always to be treated as if a varied refund had been fixed, the refunds for the German Democratic Republic being set at nil, and the refund for all other non-member countries being set at the amount fixed by the Community regulations. As the poultry-meat in question was imported, marketed and consumed exclusively in the German Democratic Republic, that is, objectively, the only country of destination within the meaning of the refund rules. For that country of destination, however, no refunds should have been paid.

Although, as I have already said, I think the hypothesis of a system of non-uniform refunds is tenable I should like to suggest a different solution on the basis of what has been said above, and which has also been put forward by the

Federal Government. We have seen that the factual requirements for exportation within the meaning of the provisions of Community law on export refunds are satisfied only if the goods have arrived on the open market in the country of destination. As the Court of Justice confirmed in Case 125/75, the question whether the goods have reached the market in the country of destination can only be answered on the basis of objective criteria. It must be assumed therefore that the factual requirements for exportation can be satisfied only by taking the goods in question out of the territory of the Federal Republic of Germany into the German Democratic Republic; thus for the purposes of the provisions governing refunds the circumstances must be treated as if the goods arrived in the German Democratic Republic directly from the Federal Republic of Germany.

Under paragraph 1 of the Protocol on German Internal Trade, which according to Article 239 of the EEC Treaty is an integral part of that Treaty, this kind of consignment counts as trade between the German territories subject to the Basic Law and those in which it does not apply, which remains subject to national law and is not affected by Community law (see judgment of the Court of 1 October 1974, Case 14/74 *Norddeutsches Vieh- und Fleischkontor GmbH* v *Hauptzollamt Hamburg-Jonas* [1974] 2 899).

To hold that to establish entitlement to a refund it is sufficient that the goods have entered free circulation in the German Democratic Republic after passing through a non-member country would, as the Commission has pointed out, conflict with the letter and purpose of the Protocol on German Internal Trade. In every case for which Community law provides refunds, an incentive would exist for exporters to claim such refunds in the German Democratic Republic whilst avoiding direct exportation in order to circumvent the Protocol. That would not only threaten the equilibrium of German internal trade in the agricultural sector, but, as we have seen, would jeopardize the balance of trade between the Community and the German Democratic Republic, as the Court pointed out in Case 14/74.

V — In the light of the foregoing observations, the questions asked by the Bundesfinanzhof may be answered as follows:

1. Entitlement to the export refund payable under Article 9 of Regulation No 123/67/EEC of the Council of 13 June 1967, Article 6 of Regulation No 176/67/EEC of the Council of 27 June 1967 and Article 3 of Regulation No 1041/67/EEC of the Commission of 21 December 1967 presupposes that the goods must have been put into free circulation in the country of destination, irrespective of whether or not the refund varies according to the use or destination.

2. Where there are serious doubts as to whether the products have actually reached their use or destination, Member States may require, pursuant to Article 4 of Regulation No 1041/67/EEC, which applies in relation to all the refunds, proof that the product has been put into free circulation in the country of destination.

3. Pursuant to Article 9 of Regulation No 123/67/EEC and Article 6 of Regulation No 176/67/EEC in conjunction with the Protocol on German Internal Trade and connected problems the factual requirements for exportation giving rise to entitlement to the export refund are not satisfied in the case of goods within the meaning of Article 1 of Regulation No 123/67/EEC which leave the Federal Republic of Germany, pass through the territory of non-member countries subject to customs control and are delivered to the German Democratic Republic and there put into free circulation.