JUDGMENT OF THE COURT
OF 24 MAY 1978 [1]

Hans-Otto Wagner GmbH, Agrarhandel KG v Hauptzollamt Hamburg-Jonas (Preliminary ruling requested by the Finanzgericht Hamburg)

"Monetary compensatory amounts"

Case 108/77

Agriculture — Common organization of the markets — Sugar — Trade with non-member countries — Monetary compensatory amounts — Export refund fixed in national currency — Application of a weighting — Not permissible
(Regulation No 1380/75 of the Commission, Article 4 (3); Regulation No 2101/75 of the Commission)

Article 4 (3) of Regulation No 1380/75, read in conjunction with Regulation No 2101/75, must be interpreted as meaning that the export refund in the sugar sector, fixed in national currency for each exporter individually on the basis of a tender, is not to be multiplied by a monetary coefficient fixed by the Commission derived from the percentage used to calculate the monetary compensation.

In Case 108/77

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

HANS-OTTO WAGNER GMBH, AGRARHANDEL KG, Bad-Homburg,

and

HAUPTZOLLAMT (Principal Customs Office) HAMBURG-JONAS

on the interpretation and validity of Article 4 (3) of Regulation (EEC) No 1380/75 of the Commission of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts (Official Journal No L

1 — Language of the case: German.

139, p. 37) in conjunction with Regulation (EEC) No 2101/75 of the Commission of 11 August 1975 on a standing invitation to tender in order to determine a levy and/or refund on exports of white sugar (Official Journal No L 214, p. 5),

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the present

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

Between 1 and 25 March 1976 the Wagner company, the applicant in the main action, exported to Bulgaria 4 000 000 kilograms of undenatured white sugar coming under tariff sub-heading 17.01-B-I of the Common Customs Tariff. Some of the export licences were issued by the Fonds d'Intervention et de Régularisation du Marché du Sucre (Fund for intervention and stabilization of the sugar market) in Paris to Jean Lion et Compagnie (Paris) and assigned by the latter to Wagner and the remainder were issued directly to Wagner by the Einfuhr- und Vorratsstelle für Zucker und Rohtabak (Import and storage agency for sugar and raw tobacco).

In pursuance of several decisions taken between 15 March and 15 April 1976 on the basis of Regulations Nos 2719/75 and 572/76 of the Commission of 24 October 1975 and 15 March 1976 respectively fixing the monetary compensatory amounts and certain rates for their application (Official Journal Nos L 276, p. 7, and L 68, p. 5), the Hauptzollamt Hamburg-Jonas granted the plaintiff in the main action monetary compensation amounting to DM 10.90 per 100 kg. It also granted export refunds amounting to DM

657 470.33 applying to the amounts resulting from the rates indicated in the export licences the coefficient 0.9. It did so in reliance on the provisions of Article 4 (3) of Regulation No 1380/75 of the Commission, according to which:

"In trade with third countries the import charges and the export refunds and levies, fixed in units of account, ... shall be multiplied by a coefficient ...".

The refunds at issue in the main action were, according to the Hauptzollamt, also fixed in units of account, the maximum amount of the refund having been, within the context of the prescribed procedure for tendering, fixed in units of account. The application to the refund of the coefficient is explained by the fact that compensatory amounts are calculated on the basis of the intervention price which includes export refunds. That part of the compensatory amount which related to the export refunds therefore had to be deducted.

The Finanzgericht Hamburg, before which the matter came, decided by order of 19 August 1977 to stay the proceedings and in pursuance of Article 177 of the EEC Treaty to submit the following questions to the Court of Justice for a preliminary ruling:

"1. Is Article 4 (3) of Regulation (EEC) No 1380/75 of the Commission read in conjunction with Regulation (EEC) No 2101/75 of the Commission to be interpreted as meaning that the export refund, which in the sugar sector is determined separately for each exporter in national currency on the basis of an invitation to tender, is to be multiplied by the monetary coefficient fixed by the Commission, which is derived from the percentage used to calculate the monetary compensation?

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

   Is Article 4 (3) of Regulation (EEC) No 1380/75 of the Commission invalid in so far as in the cases mentioned in Question 1 it does not provide for the multiplication of the export refund determined in national currency by the monetary coefficient?

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

   What are the effects of the partial invalidity of Article 4 (3) of Regulation (EEC) No 1380/75 of the Commission?"

The Finanzgericht takes the view that if the interpretation of the plaintiff in the main action were to be followed doubts would arise as to the validity of Article 4 (3) of Regulation No 1380/75. In fact, in the case of exports from Member States whose currencies have appreciated beyond the limit of fluctuation, exporters would receive, apart from the export refund, the whole of the monetary compensation whereas, in the case of exports from Member States whose currencies have depreciated beyond the limit of fluctuation, exporters would receive the export refund only subject to a deduction of the whole of the monetary compensation. The absence of a corrective factor for the monetary compensatory amounts might infringe the prohibition on discrimination contained in Article 7 of the Treaty and constitute a breach of the general principle of equality.

Apart from Regulation No 1380/75, the Community legislation applicable to the main action is as follows:

(a) In the sugar sector the refund is fixed by tender (Article 4 (1) of Regulation (EEC) No 766/68 of the Council of 18 June 1968 laying down general rules for granting export refunds on sugar (Official Journal, English Special Edition 1968 (I), p. 155). Export refunds are expressed in national currency in tenders (Article 5 (2) (d) of Regu-

lation No 2101/75). The statement of award of the tender also states in national currency the refund to be granted (Article 11 (2) (c) of Regulation No 2101/75). Only the maximum amount of refund — which serves to limit the group of tenderers to whom the contract is to be awarded — is fixed in units of account (Article 9 (1) of Regulation No 2101/75);

(b) According to the sixth recital in the preamble to the basic Regulation (EEC) No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257) the compensation should be limited to the amounts strictly necessary to compensate the incidence of the monetary measures on the prices of basic products covered by intervention arrangements.

The order referring the matter to the Court was lodged at the Court Registry on 8 September 1977.

The Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry.

II — Summary of written observations submitted to the Court in pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *Wagner* undertaking states, with regard to the facts, that because of the unexpected application of the monetary coefficient, the Jean Lion company was only able to carry out as to 90 % the financial obligations which it had undertaken by contract with regard to the plaintiff in the main action resulting from the export licences transferred.

The wording of Article 4 (3) of Regulation No 1380/75 is unequivocal. There is not to be found in that regulation or in Regulations Nos 766/68 and 2101/75 or in Notice of Invitation to Tender No 9/1975 any possibility of applying the monetary coefficient to the refunds to be granted in the case of the main action, which were not fixed in units of account.

The above interpretation corresponds also to the meaning and purpose of the said provisions. The principle of legal certainty already constitutes an argument in favour of this view. Since transfers of export licences are authorized, to reduce *a posteriori* the amount of refunds fixed in national currency in export licences by applying to them a monetary coefficient which is valid only for refunds fixed in units of account would be quite simply irreconcilable with that principle.

In the case of the main action, which relates to refunds granted in the context of invitations to tender, special rules and conditions apply which at first sight exclude the application of the general rules relating to refunds. This appears from the third recital in the preamble to Regulation No 2101/75. In the case of a tender, Article 4 of Regulation No 766/68 provides that the refund is not fixed in terms of the difference between prices on the world market and the representative Community price but on the basis of a tender ("the purpose of the tender shall be to determine the amount of the refund").

The tender is based solely on the tenderer's calculations or his assessment of the market. It is taken into consideration only when it is not higher than the maximum amount of the refund, determined by the Commission on the basis of all the tenders submitted.

A person asking for the refund which he needs ought therefore to obtain that same refund and not a refund reduced by the effect of the monetary coefficient.

To that is added the fact that sugar-exporting undertakings established in countries which have revalued their currency are at a considerable disadvantage, in spite of the monetary compensatory amounts, in comparison with their colleagues established in countries which have devalued their currency.

There is no doubt as to the validity of Article 4 (3) of Regulation No 1380/75 in the event of the interpretation put forward by the plaintiff in the main action being followed. It is only by the adoption, subsequently, of Regulation No 2101/75 that it was established that, in the context of invitations to tender, refunds to be granted must not have the monetary coefficient applied to them. Moreover, that would be contrary neither to the prohibition on discrimination nor — from the point of view of failure to comply with the system — to the general principle of equality. In terms of Article 4 of Regulation No 766/68 the Commission was bound to take into account the peculiarities of tenders with respect to which it was explicit that the object was the amount of the refund.

The *Commission* points out that the objections of the plaintiff in the main action are based on a literal and formal interpretation of Community provisions which does not take into account either the spirit or the objective of those provisions.

To the extent to which monetary compensation, calculated on the basis of the intervention price, is equal to the amount representing the difference between the price on the world market and the Community price (in this case the refund) it is appropriate to proceed to a correction as the necessary compensation has already been granted.

The same is true in cases in which levies or refunds are fixed in a general way by regulation or by tender. Thus refunds granted in the context of a tender also constitute Community refunds and do not take account of the various monetary relationships existing between the respective currencies of the States of the Community. In comparison with the general system of fixing by way of regulation the procedure by way of tender has the sole objective and advantage that it determines the refunds which best correspond to market conditions.

Offers submitted by tenderers are expressed in national currency in accordance with Article 5 (2) of Regulation No 2101/75, but, at the Commission level, the whole of the calculation must necessarily be carried out on the basis of units of account. Offers submitted have to be converted into units of account by means of the "green" rates so that they may be comparable. Contracts cannot be awarded except by taking into account the maximum amount fixed in units of account and by comparison with it; in other words, they are deducted from that amount.

A failure to apply the monetary coefficient to refunds fixed by way of tender would make it impossible to establish complete equality of treatment between all the tenderers. This equality can only be attained by the application of the two monetary correctives: the basic compensatory amount and the coefficient. Otherwise participants from countries whose currency has strongly appreciated would be at an advantage since they would obtain an over-valued compensatory amount whilst participants in the invitation to tender from countries whose currency was depreciating would be at a disadvantage since they would obtain a compensatory amount which would be too small.

It would be possible to give an *interpretatio intra legem* of Article 4 (3) of

Regulation No 1380/75. The declaration of award of the contract does not constitute a fixing within the meaning of Community law but simply an executory act adopted by the national authorities. It should be noted that in that declaration there is an express reference to the maximum amount expressed in units of account so that the recipient could equally discover that the refund which has been awarded to him has also been determined in the form of an amount expressed in units of account.

Reference should also be made to the provisions of Article 4 of Regulation (EEC) No 1134/68 of the Council of 30 July 1968 laying down rules for the implementation of Regulation (EEC) No 653/68 on conditions for alterations to the value of the unit of account used for the common agricultural policy (Official Journal, English Special Edition 1968 (II), p. 396). According to that provision, which shows a striking parallelism with that of Article 4 (3) of Regulation No 1380/75, all amounts expressed in national currency in documents, but "given in units of account" — that is to say, fixed on a Community basis — are subject to the reservation of an alteration of the parity in question. Such an alteration, for its part, would involve an alteration in the amount expressed in national currency precisely in those cases in which refunds are fixed by way of tender. There is a special interaction between these two provisions. Regulation No 1134/68 constitutes a special rule whereas in Regulation No 1380/75 the application to refunds of the coefficient represents only one of the many special problems dealt with. It may be understood therefore that in Article 4 (3) the legislature used a simplified formula and did not take into account the case of a refund fixed by way of tender in having recourse to a formula specially conceived for that case.

Finally the interpretation contended for by the Commission also corresponds to a consistent administrative practice and one which has not hitherto been contested. There is no general problem of legal certainty as the provision in question was not formulated in such a confusing manner that the parties concerned could not at least make out the real intention of the legislature.

The Commission adopts the observations of the Finanzgericht with regard to the consequences which might follow the adoption of an interpretation similar to that of the plaintiff in the main action. That is an additional reason for seeking an "interpretation in conformity with Community law". Such an interpretation is possible when it is not opposed to the clear and unequivocal text of the legislation in question. There can be no question of that in the main action.

The Commission therefore suggests the following reply:

"Article 4 (3) of Regulation No 1380/75, in conjunction with Regulation No 2101/75, must be interpreted as meaning that the export refund in the sugar sector, expressed in national currency for each exporter individually on the basis of a tender, is to be multiplied by the monetary coefficient fixed by the Commission".

The plaintiff in the main action, represented by K. Landry, Rechtsanwalt, Hamburg, and the Commission of the European Communities, represented by its Legal Adviser, P. Gilsdorf, acting as Agent, presented oral argument at the hearing on 1 March 1978.

The Advocate General delivered his opinion at the hearing on 18 April 1978.

Decision

1 By order of 19 August 1977, lodged at the Court on 8 September 1977, the Finanzgericht Hamburg submitted to the Court in pursuance of Article 177 of the EEC Treaty several questions relating to the interpretation and validity of Article 4 (3) of Regulation (EEC) No 1380/75 of the Commission of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts (Official Journal No L 139, p. 37), in conjunction with Regulation (EEC) No 2101/75 of the Commission of 11 August 1975 on a standing invitation to tender in order to determine a levy and/or refund on exports of white sugar (Official Journal No L 214, p. 5).

2 These questions were raised in the context of an action relating to the calculation of export refunds granted to the German company Wagner, the plaintiff in the main action, on the occasion of the export to Bulgaria of 4 000 000 kilograms of undenatured white sugar.

The Hauptzollamt Hamburg-Jonas, the defendant in the main action, granted Wagner monetary compensation amounting to DM 10.90 per 100 kg.

It also granted export refunds amounting to DM 657 470.33, multiplying the amounts resulting from the refund rates indicated in the export licences by the coefficient 0.9.

It did so in reliance on the provisions of Article 4 (3) of Regulation No 1380/75, application of which, according to the defendant, means that, as compensatory amounts are calculated on the basis of the intervention price, which includes export refunds, the part of the compensatory amount relating to the export refunds must be deducted.

3 The question is whether Article 4 (3) of Regulation No 1380/75, read in conjunction with Regulation No 2101/75, must be interpreted as meaning that the export refund in the sugar sector, which is fixed in national currency for each exporter individually, on the basis of a tender, is to be multiplied by the monetary coefficient fixed by the Commission, which is derived from the percentage used to calculate the monetary compensation.

In the event of a negative reply to the foregoing question the further question is asked whether Article 4 (3) of Regulation No 1380/75 is void in so far as, in the cases quoted in the above question, it does not provide for the export refund fixed in national currency to be multiplied by the monetary coefficient.

In the event of an affirmative reply to the last question the Court is further asked what are the effects of the partial invalidity of Article 4 (3) of Regulation No 1380/75.

First question

4 For the calculation of monetary compensatory amounts in intra-Community trade the Commission takes as a reference value the guarantee prices, in particular the intervention prices.

On the other hand, during the first stage of application of the system, in trade with non-member countries levies and refunds expressed in units of account and translated into the national currencies of the various Member States by the application of the so-called "green" conversion rates, offset the difference between world prices and the price in the Member State concerned, which involved a partial monetary compensation and made necessary the fixing of different monetary compensatory amounts for such trade.

As from 1 March 1973 the Commission, with a view to simplifying administration, decided to fix, both for intra-Community trade and for trade with non-member countries, uniform basic monetary compensatory amounts calculated with reference to the Community guarantee prices.

The seventh recital in the preamble to Regulation No 1380/75 refers to the situation created by that decision in the following terms:

"Accession compensatory amounts, fixed components as referred to in Article 61 of the Act of Accession (Journal Officiel No L 73 of 27 March 1972, p. 14), import charges, export refunds and all other amounts charged or granted in units of account in respect of trade with third countries are, like the prices in the Member States concerned, converted into the currencies of those Member States by applying the exchange rates provided for under the common agricultural policy; ... therefore, in calculating the

monetary compensatory amount only the difference between the price level and the amount in question expressed in units of account need be taken into consideration; ... in order to simplify the system so that the same compensatory amount may be applied in respect of the trade of a given Member State with every other Member State and with third countries, accession compensatory amounts, fixed components, import charges, export refunds and all other amounts charged or granted in respect of trade with third countries should be corrected by a coefficient expressing the position of the currency of the Member State which is to apply the monetary compensatory amount".

Therefore Article 4 (3) of that regulation provides that:

"(3) However,

(a) ...

(b) in trade with third countries the import charges and the export refunds and levies, fixed in units of account, ... shall be multiplied by a coefficient. This coefficient shall be derived from the percentage used to calculate the monetary compensatory amount and shall be fixed by the Commission at the same time as that amount".

In order that the coefficient may be applied it is therefore necessary to establish that, in the present case, the refunds were fixed in units of account.

5 Regulation No 766/68 of the Council of 18 June 1968 (Official Journal, English Special Edition 1968 (I), p. 155) provided for the fixing of export refunds for sugar by tender.

In Regulation No 2101/75 the Commission adopted the necessary provisions regarding a standing invitation to tender in order to determine a levy or refund on exports of white sugar.

Article 5 (2) (d) of that regulation provides that the tender must indicate "the amount of the export levy or, where applicable, of the export refund, per 100 kilograms of white sugar, expressed in the currency of the Member State where the tender is submitted".

Article 9 provides that the Commission is to fix either a minimum export levy or a maximum export refund, account being taken of the current state and foreseeable development of the Community sugar market and of the world sugar market and that, where a maximum export refund is fixed, a contract shall be awarded to every tenderer whose tender indicates a rate of refund equal to or less than such maximum refund and to every tenderer who has tendered for an export levy.

In its Notice of a Standing Invitation to Tender of 14 August 1975 (Official Journal No C 185, p. 23) the Commission provided in Article V (8) that:

"In order to achieve comparability between tenders and for the award of contracts by Member States, the amount proposed for the export levy or refund, expressed in a national currency, will be converted into units of account by applying the conversion rates applicable for the purposes of the common agricultural policy".

6 The exports in question were effected on the basis of nine licences, in eight of which the amount of the refund was expressed in French francs and in the remaining one of which it was expressed in German marks.

It follows from these considerations that the refunds in question were fixed in national currency and that their conversion into units of account constituted only an internal operation within the Commission in order to make tenders comparable.

Article 4 of Regulation No 1380/75 provides for the application of the coefficient only to refunds or levies fixed in units of account.

The answer to the first question must therefore be in the negative.

Second question

7 In the course of the oral procedure the Commission pointed out that, if the Court were to take the view that the provisions of Article 4 (3) of the regulation were to be interpreted in the sense contended for by the plaintiff in the main action, the provisions must be declared at least partially void for breach of the principle of non-discrimination set out in Article 40 (3) of the

Treaty inasmuch as Article 4 would then produce discrimination between exporters of sugar according to the country of export.

8 Regulation No 1380/75 is a regulation of general scope laying down detailed rules for the application of monetary compensatory amounts in the whole of the agricultural sector.

In providing that, in trade with third countries, levies and refunds "fixed in units of account" are to be multiplied by a coefficient, Article 4 (3) of Regulation No 1380/75 did not commit a breach of the rule of non-discrimination as all levies and refunds are in principle fixed in units of account.

Any derogation from this system by reason of the fact that in pursuance of Regulation No 2101/75 tenders for refunds in the matter of exports of sugar to third countries are fixed in national currency cannot affect the validity of Article 4 (3) of Regulation No 1380/75.

In fact, the system of fixing refunds by way of tender was established in order to allow the fixing of different refunds, according to the tenders submitted, so that the net price received by the exporter might vary from one trader to another.

The second question must therefore be answered in the negative.

9 Having regard to the reply to the second question the third question has lost its point.

Costs

10 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

As the procedure is, in so far as the parties to the main action are concerned, a step in the action pending before the Finanzgericht Hamburg, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Finanzgericht Hamburg by order of 19 August 1977, hereby rules:

1. **Article 4 (3) of Regulation No 1380/75, read in conjunction with Regulation No 2101/75, must be interpreted as meaning that the export refund in the sugar sector, fixed in national currency for each exporter individually on the basis of a tender, is not to be multiplied by a monetary coefficient, fixed by the Commission, derived from the percentage used to calculate the monetary compensation.**

2. **Consideration of the second question has disclosed no factor of such a kind as to affect the validity of Article 4 (3) of Regulation No 1380/75.**

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 24 May 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 18 APRIL 1978

My Lords,

In this case the Court has to plunge, once again, into the complexities of the Community legislation on the organization of the sugar market and into those of the legislation on monetary compensatory amounts (or "mca's").

The case comes to the Court by way of a reference for a preliminary ruling made by the Finanzgericht of Hamburg.